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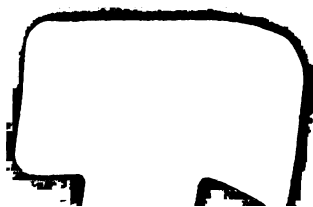
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# REPORTS

OF

All the Cases decided by all the Superior Courts

RELATING TO

MAGISTRATES, MUNICIPAL,

AND

PAROCHIAL LAW.

(REPRINTED FROM THE "LAW TIMES" REPORTS.)

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VOL. XIII.

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# REPORTS OF ALL THE CASES

DECIDED BY THE

## Supreme Court of Judicature

RELATING TO THE

## LAW ADMINISTERED BY MAGISTRATES

AND TO

## PAROCHIAL AND MUNICIPAL LAW.

[CT. OF APP.]

ATTORNEY-GENERAL v. GUARDIANS OF DORKING UNION.

[CT. OF APP.]

### Supreme Court of Judicature.

#### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

March 22 and 24, 1882.

(Before JESSEL, M.R., COTTON and LINDLEY, L.JJ.)

ATTORNEY-GENERAL v. GUARDIANS OF DORKING UNION. (a)

*Nuisance—Pollution of stream by sewage—Prescriptive right to use sewer—Rural sanitary authority—Riparian proprietor—Public Health Act 1875 (38 & 39 Vict. c. 55, ss. 13, 26.*

*Plaintiff, the owner of land bounded by a stream, into which was discharged a sewer within the district of a rural sanitary authority, alleged that the sewer was vested in the sanitary authority, that the sewer was being used not only by persons who had a prescriptive right to discharge their drains into it, but by persons who had no such right, and that such user had become a public and private nuisance, which was constantly increasing. He prayed an injunction to restrain the defendants from causing or permitting the sewage of the district to be conveyed through the sewer into the stream, other than sewage so conveyed by prescriptive right before the commencement of the action.*

*It was in evidence that the defendants had been endeavouring, ever since the passing of the Public Health Act 1872, to provide a system of drainage for the district, but hitherto without success.*

*Held, assuming the above allegations (which the defendants denied) to be true, that the plaintiff had no right to an injunction, and decision of Hall, V.C. affirmed.*

*Inasmuch as the defendants could not prevent owners with prescriptive rights from using the sewer, and consequently could not stop up the sewer as against them, the court would not order the defendants to put an end to a nuisance which*

*they could only put an end to, if at all, by bringing an injunction action.*

*Glossop v. The Heston and Isleworth Board of Health (40 L. T. Rep. 736; 12 Ch. Div. 102) followed.*

THIS was an appeal from a decision of Hall, V.C.

The plaintiff and relator, John Croft Deverill, was the owner and occupier of a dwelling house, stables, gardens, meadow, and appurtenances in the parish of Dorking (the population of which in 1851 exceeded 5000), bounded on the north by a stream flowing from west to east called the Pipp Brook; on the east by the river Mole, into which the Pipp Brook flows; on the south by the grounds of another house; and on the west by a public thoroughfare called Pixham-lane. The plaintiff and his family had lived in this house for upwards of ten years. The town of Dorking lies to the south-west of the plaintiff's house.

On the 17th Jan. 1879 the action was commenced by the Attorney-General at the relation of the plaintiff, against the Guardians of the Poor of the Union of Dorking, who are the sanitary authority for the district; and the statement of claim, which, as amended, was delivered on the 12th Dec. 1879, alleged that the sewage of the entire town of Dorking and of a large portion of the parish was discharged by sewers and drains into the Pipp Brook, injuriously affecting the purity of the water to such an extent that the houses on the northern outskirts of the town were rendered unwholesome, and that the air was impregnated with an odour injurious to the public health; that the house of a miller was rendered almost uninhabitable by the state of the water; and that the plaintiff and his family were most injuriously affected by the state of a pond called the Pixham Mill Pond, which was fed by the Pipp Brook, it being the practice to dam up the water at night after the mill had ceased working, and to let the water flow down in the morning at which time particularly, it was stated, the sewage down the stream was intolerable. The statement then alleged that the defendants had used since the passing of the Health Act 1875, and "now used" the said sewers for the purpose of carrying sewage into the Pipp Brook;

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ATTORNEY-GENERAL v. GUARDIANS OF DORKING UNION.

[CT. OF APP.]

that since 1875 new houses had been erected within the district in constantly increasing numbers, from which the sewage was being discharged through newly-constructed drains into the old sewers vested in the defendants; that the persons by whom such connections were made had not acquired any prescriptive right to throw into the sewers any sewage or filthy water; and that the public nuisance and private injury would increase unless restrained by the court.

The claim was for an injunction to restrain the defendants from causing or permitting the sewage or filthy water of the town or parish of Dorking, or any part thereof, to be conveyed through the sewers or drains within the sanitary district of Dorking (other than sewage or filthy water so conveyed by prescriptive right before the commencement of the action) into the Pipp Brook or into the said ponds or lakes (fed by the same brook) unless and until such sewage and filthy water was sufficiently purified and deodorised so as not to create a nuisance.

By an amended statement of defence, delivered on the 25th May 1880, the defendants denied that the whole, and said that only a portion of the sewage of Dorking was discharged into the Pipp Brook, inasmuch as a great number of houses in Dorking were drained by means of cesspools. They denied that they had used, or were using, any sewers or drains for the purpose of carrying sewage into the brook, and said that the sewers and drains now in existence had been used for a great number of years, and before the house occupied by the plaintiff was built; that the lessee of Pipp Brook Mill had recently taken a fresh lease of the premises, and continued to reside with his family in the house attached to the mill without inconvenience, and denied the fact of there being any nuisance.

They further said that in 1876 they had promoted a scheme for conveying the sewage of the town on to land in the adjoining parish of Mickleham, but the scheme met with so much opposition that it had to be abandoned after costing the defendants nearly 1000*l.*; that they were now, in conjunction with the adjoining parish of Leatherhead, applying to the Local Government Board to constitute a district known as the Dorking Special Drainage District, and the parish of Leatherhead into a united district for the purpose of carrying out a system of sewerage under the provisions of sect. 279 of the Public Health Act 1875; that such application was made on the 27th Nov. 1878, and was still before the local board for consideration.

They further said that there were no sewers whatever vested in the defendants. The sewer referred to in the statement of claim, and all other sewers and drains in the district were either private sewers made by private persons under private roads, or drains vested in or under the control of authorities having the management of roads not being local authorities under the Public Health Act 1875, and over which the defendants had no control.

The defendants had made no connection with any public sewer, and they had no power to prevent owners or occupiers from making connections with or using the sewers. If any nuisance was created, which the defendants did not admit, the plaintiff ought to proceed against the persons who made connections with and used the sewers. Defendants

did not admit that the houses had no prescriptive right to send their sewage into the brook, and said that such question could only be tried by proceedings against the owners or occupiers.

Issue was joined by a reply delivered on the 10th June 1880.

It was in evidence that, amongst the bye-laws "made and adopted by" the guardians of the Dorking Union, was one which required every person erecting a new building to construct every drain of suitable material, "and shall cause such drain to be properly connected with the sewers."

On the 12th Jan. 1881 the action came on to be heard before Hall, V.C.

*Kay, Q.C., Robinson, Q.C., and Latham*, for the relator and plaintiff.—This sewer is vested in the defendants. By the 43rd section of the Public Health Act 1848 (11 & 12 Vict. c. 63) all sewers were vested in the Local Board of Health. By the 3rd section of Nuisances Acts Consolidation Act 1855 (18 & 19 Vict. c. 121), the local authority, in places where there is no local board of health, council, body of trustees, or commissioners, was to be the highway board; and by sect. 22 of the same Act, the local authority had authority to make sewers, and keep them in repair. By sect. 2 of the Nuisances Removal Act 1860 (23 & 24 Vict. c. 77) the board of guardians of the poor were made the local authority to execute the Act; and by sect. 3 of the same Act the Highway Board was continued so long as it employed, or joined with other local authorities in employing, a sanitary inspector. The 17th section of the Public Health Act 1866 (29 & 30 Vict. c. 90) repealed the last mentioned section, and transferred the powers of the highway board to the nuisance authority, which by sect. 15 was defined to mean any authority empowered to execute the Nuisances Removal Act. Then, by the Public Health Act 1875 (38 & 39 Vict. c. 55), all sewers are (sect. 13) vested in the local authority, to whom are given (sects. 15, 16) powers of maintaining and making sewers; and by sect. 17, nothing in the Act authorises any local authority to "use" any sewer or drain for the purpose of conveying sewage into any natural stream or watercourse, until it be purified. So that in 1879, when this action was commenced, the sewers were vested in the defendants. A highway board, under the Acts of 1855 and 1860, though they could not prevent persons who had once drained into a sewer from continuing to drain into it, yet could be ordered to prevent fresh communications being made with their sewers:

*Attorney-General v. Richmond*, 14 L. T. Rep. N. S. 398; L. Rep. 2 Eq. 306.

The defendants say they have made no sewer; but they are allowing an increase of nuisance, and even creating such increase, by compelling new houses to be drained into the sewer. Thus the case is brought within the definitions laid down in *Glossop v. Heston and Isleworth Local Board* (40 L. T. Rep. N. S. 736; 12 Ch. Div. 102).

*William Pearson, Q.C. and V. Hawkins* for the defendants.—This sewer is not vested in the defendants. The plaintiffs have mixed up the Acts. There are three classes of statutes—the Highway Acts, the Public Health Acts, and the Nuisances Removal Acts—entirely separate. By

the Highways Act 1835 (5 & 6 Will. 4, c. 50) the duty was thrown upon parishes of appointing a surveyor, who was to have power (sect. 67) to make and cleanse gutters, drains, and water courses, except (sect. 18) in parishes of a population of over 5000, where a highway board might be nominated and elected by the vestry. In this instance a highway board was elected by the Vestry of Dorking. By the Highways Act 1862 (25 & 26 Vict. c. 61), the justices were empowered to form highway districts, but such districts were not (sect. 7) to include any place under the superintendence of any highway board, and the property, powers, and duties already vested in the surveyor were (sect. 11) to remain vested in him. Sect. 7 of the Act of 1862 was repealed by the Highways Act 1878 (41 & 42 Vict. c. 77), the old highway board under the Act of 1835 ceased, highway districts were made (sect. 3) as far as possible coincident with rural sanitary districts, and the rural sanitary authority became (sect. 4) the highway board. The result of the Acts is that the rights of the old highway board of Dorking were transferred to the Dorking District Board, but no property vested in any of these boards. It has been argued that by the Public Health Act 1848 all sewers were vested (sect. 43) in the local board of health. But that section only applies where a petition has been presented (sect. 8) and a local board formed. By the Sewage Utilisation Act 1865 (28 & 29 Vict. c. 75) the vestry was made the sewer authority, and might (sect. 4) construct sewers. This was the first creation of a sewer authority, except under the Nuisances Act 1855. By that Act nothing was vested in the sewer authority, and the sewer authority had nothing to do with the poor law guardians. The Public Health Act 1866 embodied the provisions of former Acts relating to public health and nuisances removal, but separated them into two parts. The sewer authority remained (sect. 3) the vestry; and any owner or occupier was empowered (sect. 8) to empty his drains into the sewer of the sewer authority; and then, by the Sewage Utilisation Act 1867 (30 & 31 Vict. c. 113), the sewer authority was (sect. 2) to mean the same as in the Act of 1865. Thus far the guardians of the poor had nothing to do with sewerage. Then came the Nuisances Removal Acts. By the Nuisances Act 1848 (11 & 12 Vict. c. 123), the guardians of the poor may (sect. 3) summon for nuisances; and, by the Consolidation Act 1855 the highway board (in this case) were made (sect. 3) the local authority, but this had nothing to do with the vesting of sewers, only with the removal of nuisances. The local authority had power (sect. 22) to construct sewers, but only under certain circumstances. There being the Nuisances Removal Act 1860 (23 & 24 Vict. c. 77), the guardians of the poor were for the first time in districts like the present made (sect. 2) the local authority; but nothing was vested in them. The Public Health Act 1866 only vests (sect. 17) in the guardians the powers of the Nuisance Removal Acts. The case of *Attorney-General v. Richmond* was decided in March 1866, before the passing of the Public Health Act 1866, and merely decided this—that the Hornsey Highway Board having constructed the sewer, were liable to an injunction. By the Sanitary Act 1868 (31 & 32 Vict. c. 115), the term “sewer authority” was defined (sect. 2) to be the same as in the Sewage Utilisation Act 1865; that is to say,

the vestry; and the powers of the “nuisance authority” were (sect. 4) made to cease, so that the guardians of the poor ceased to be the nuisance authority. Then came the Public Health Act 1872 (35 & 36 Vict. c. 79), whereby the guardians of the poor are made (sect. 5) the rural sanitary authority, and certain powers and duties are (sect. 8) transferred to the guardians for the first time. [HALL, V.C. — Then, at all events, the powers over sewers were transferred to the guardian.] As to sewers, only the powers under the Sewage Utilisation Acts. [HALL, V.C.—Is not that everything?] No; for all other powers of the “sewer authority,” the vestry remain. Nothing has ever been done by the guardians, and no property was vested in them. By the Public Health Act 1875, sewers are (sect. 13) vested in the local authority (here, no doubt, the guardians of the poor), but with certain exceptions, and the effect of sects. 4 and 13 is to except sewers made by the old Highway Boards. It was to meet the difficulties occasioned by *Attorney-General v. Richmond* that the proviso was inserted; so that sects. 15 to 21, relating to the repair of sewers, and the powers of owners or occupiers to drain into sewers, do not apply to this case. The defendants have nothing to do with the increase during the last twenty years. The principle of *Glossop's* case is in our favour. This is the first attempt to bring a rural authority into court in respect of sewage. Until rural sanitary authorities were created, there were highway authorities, and it was not intended that their powers should be vested in the rural authorities. It is otherwise in urban districts when there are local boards of health. Limited powers were given to the highway surveyors, because the highway drains had got to be used as sewers; but they were ancillary only. This is the first attempt to obtain an injunction without showing any specific wrongful act by the body assailed. The mere enactment of bye-laws is not enough, unless damage is actually proved. The sewers are not vested in us; but if they are, it is not proved that we ever made a sewer or used a sewer, or made a communication with a sewer.

*Robinson* in reply.

HALL, V.C. — Assuming the sewers to be vested in the defendants, my judgment is in their favour. The case of the informant and plaintiff is founded upon the defendants having, as the informant and plaintiff say, acted under the Public Health Act by user of the sewer without the sewage being freed from noxious matter. The defendants deny any user by them of the sewers. The statement of claim sets out a bye-law made by the defendants, which is as follows: I need not stop to read it. The bye-law, it is said, shows user of the sewers by the defendants, or such acting in reference to the drain and sewers, as renders them liable to be restrained as asked; and as to this being an alternative case put forward by the statement of claim, I give no opinion; but I shall treat it as being so. The bye-law makes provision as to the mode of constructing drains, and connecting them with the sewers, but does not authorise any unlawful user of a sewer. Further, it is one of many bye-laws, and does not, I think, establish that the defendants have used the sewers, or so acted in reference to them as to

render them liable to be restrained, as asked in the statement of claim, or to the limited extent asked at the bar, namely, from allowing any further connections to be made without the sewage being freed from noxious matter. The judgment of Cotton, L.J. in the case of *Glossop v. The Heston and Isleworth Local Board* shows what is meant by user in the 17th section of the Act; and I think it would be at variance with the judgment in that case to hold that the making of the bye-laws was user actual, or if that would suffice, constructive, of the sewers. Upon the whole I think the present case is governed by the case of *Glossop v. The Heston and Isleworth Local Board*, in which case it is to be observed that the sewers were vested in the defendants. In the case of *The Attorney-General v. Richmond*, the predecessors of the defendants had made a sewer, and the defendants were actually using it. The information and action therefore are dismissed with costs.

The relator and plaintiff appealed.

**March 22.**—*H. Davey, Q.C. and Latham* for the appellants.—If the defendants allow their sewers to be used so as to create a nuisance they can be restrained. The defendants are private owners of the sewer, and they cannot be permitted to use it so as to create a nuisance. In addition to the authorities above mentioned were cited

*Goldsmid v. The Tunbridge Wells Improvement Commissioners*, 14 L. T. Rep. N. S. 154; 1 Ch. Div. 349;

*Attorney-General v. Leeds Corporation*, 22 L. T. Rep. N. S. 330; L. Rep. 5 Ch. App. 583;

*Attorney-General v. Colney Hatch Lunatic Asylum*, 19 L. T. Rep. N. S. 44; L. Rep. 4 Ch. App. 147;

*Attorney-General v. Cockermouth Local Board*, 30 L. T. Rep. N. S. 590; L. Rep. 18 Eq. 172.

*W. Pearson, Q.C. and Vaughan Hawkins*, for the respondents, were not called upon.

**March 24.**—*JESSEL, M.R.*—This court is bound, as the court below was bound, by the decision in the case of *Glossop v. The Heston and Isleworth Local Board*, and even if I differed in opinion, which I do not, from the conclusions arrived at by the Court of Appeal in that case, I should be bound to decide this case in accordance with it unless I saw some substantial difference. As it appears to me there is no substantial difference whatever; indeed, I will go further, and say that there is no tangible difference, if I may use such an expression. As I understand the case of *Glossop v. The Heston and Isleworth Local Board*, there were sewers vested in the defendants, the local board, and I will assume for this purpose (and we have not heard the respondents) that the sewers in this case are vested in the guardians, or that they were vested in them at the time when this action was brought. There is a good deal to be said no doubt about the construction of the Acts; but, speaking for myself, if there is nothing else to be relied upon than that which was pointed out during the argument, I should think that it was so, but I give no definite opinion, as it is not necessary. I will assume it. Now it was undoubtedly so in the case of the local board in the case of *Glossop v. The Heston and Isleworth Local Board*. In that respect therefore the two cases are alike. In the next place it is admitted here and was proved there that, as regards a large portion of the sewers, there are prescriptive rights, that is, that there are a vast number of

persons who have the right, having used the sewer for more than twenty years, to send their drainage down the sewer. In this case the main sewer was made more than twenty-four years ago, and it has been used ever since, and largely used. In the case of *Glossop v. The Heston and Isleworth Local Board*, it appears that one of the sewers had been used certainly from the time of Oliver Cromwell, if not before, and therefore it was a very old sewer indeed—subject to a question whether another sewer had not been substituted for it under the power of the Act, which was passed expressly with reference to the persons having a prescriptive right—that is, a right to use the substituted sewer as they had used the old sewer. In that respect the two cases are alike. In the next place, it is the same as *Glossop's* case in that it is a case of gradual increase of nuisance. That is, in addition to the persons who have prescriptive rights, there are a great many people who have no prescriptive rights, who drain their houses into this sewer, and by reason of that additional sewage the nuisance to the plaintiff's stream is very much increased. Here again I have not gone through the evidence with much care. I have looked at it slightly only, but that is the impression produced upon my mind; and that, so far, is in favour of the appellant. It appears to me that it is a similar case to *Glossop's* case, although it does not appear distinctly from the report. The time that elapsed has not been so great in this case; but the same point has occurred. The defendants say that in order to construct a new system of drainage, which is what they ought to do, and what they intend to do when they can, they must acquire land; and they have endeavoured to acquire land, but unfortunately they have not been successful. They are still making further endeavours which they hope will be successful. Now, upon that point, I think it is as well to show what they have done. The action in the present case was commenced on the 17th Jan. 1879. That being the position of matters, what happened was this: The Public Health Act came into operation on the 10th Aug. 1872, and as early as in October of that year the defendants employed Sir Joseph Bazalgette to report, and he did report in December of that year. They found a difficulty in dealing with his report because they thought that the sewer did not comprise the whole, and consequently, after a great deal of deliberation, they applied in Dec. 1874 to the Local Government Board to make them a new drainage district. The Local Government Board do not seem to have hurried themselves, for it was not until Feb. 1877 that the request was complied with. During the interval they employed another engineer, Mr. Birch, and he told them to get twelve acres of land to make the sewage works. They gave notices accordingly, whereupon the Local Government Board directed one of their inspectors to hold an inquiry under the Local Government Act. This inquiry took place, but they were so strongly opposed that their counsel, Mr. Michael, advised them not to contest it further, but to give it up, and try to get some other power. We are told by the affidavit that these abortive proceedings cost the defendants upwards of 1000*l.* Therefore they were in earnest. Then they started again, and after they got the new power, the Local Govern-

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ment Board, in June 1878, appointed a committee to confer with the representatives of the parish of Leatherhead as to a joint scheme, and they made another application on the 27th Nov. 1878 to constitute the Dorking Special Drainage District and the parish of Leatherhead a united district. In the month of Nov. 1879, this action having been brought in Jan. 1879, the Local Government Board directed an inquiry to be held before Mr. Arnold Taylor upon the application, and he made an adverse report, and thereupon the board declined to proceed with the matter further until a portion of the parish of Leatherhead was constituted a special drainage district, and now such last-mentioned special drainage district having recently been formed, the application of the defendants is still before the Local Government Board for consideration. Then they go on to say in their affidavit that they have by every means in their power sought to obtain suitable land for the reception of the sewage, but without success, and they are now, in addition to the above-named application to the Local Government Board, seeking the advice of their engineer, Mr. Birch, as to an alternative scheme to be proceeded with, should such application be refused. They are not neglecting to put their general powers into execution any more than the defendants were in the case of *Glossop v. The Heston and Isleworth Local Board*. I especially mention this because I do not wish it to be inferred that, if these public bodies do neglect to exercise their power, that is a reason for not compelling them to exercise it. However, that is not the present case. This being the position of matters, what does the plaintiff complain of? He says this—the sewers being vested in you, the defendants, you allow or permit persons having no prescriptive right of drainage to drain through your sewers into my stream, and thereby cause additional and serious additional pollution. Now there are two points to be considered here. Would the plaintiff have any right of action at common law quite irrespective of these Acts of Parliament, by reason of this ownership of the sewers which I assume for this purpose is vested in the defendants; and, secondly, if he would not, does the Rivers Pollution Act or any other Act give him a right of action? As to the first point which does not seem to have been very much discussed in the previous case, we must remember that the vesting of the sewers in the local authority gives them a very limited right of ownership. I am not prepared to say that they are in the same position as a land owner through whose land a sewer, an artificial work, runs. It by no means follows that they have the same rights as he has. He can stop it up without asking anybody. But as I read this Act of Parliament I am by no means prepared to say that this Local Sanitary Board can stop the sewer up, and thereby cause a most frightful nuisance to the inhabitants of the district whose drainage it is their business to protect and perfect. That is the first difficulty in the way—that the vesting is not an absolute right of ownership, but a modified and limited right of ownership, and it does not in my opinion give them a right to stop up the sewer. But independently of that, let us consider the matter. Even assuming they had an absolute right of ownership, could they bring an action at law? I think they could not. It is the case of a landowner with a sewer and drain running through his

land, through which persons above have a prescriptive right of drainage and of sending sewage down. He cannot stop up the sewer against them. But other persons also above who have no such prescriptive right send sewage down the sewer. As he cannot stop up the sewer, how is he to prevent it? I know of no means except by bringing an action, and indeed Mr. Latham very fairly argued it upon that ground that you cannot stop up a sewer. He said you must bring an action and get an injunction to prevent them throwing sewage in. Whether the plaintiff could get such an injunction or not must depend upon circumstances. In the case I put, it by no means follows that he sustains any damage. It may be utterly immaterial to him, as it is in this case, whether there is more or less sewage thrown down. It does not matter to him in the least. Could he maintain an injunction? My present impression is that he could not upon that particular ground. Inasmuch as he could not maintain an injunction then, these people, by going on for twenty years, would get a prescriptive right, and he would be entitled to an injunction upon the ground of permanent injury to his property by prescription being acquired over it. Therefore, for this purpose, he could get an injunction. Then the person whose land is situated below, which is polluted, says, "You can obtain an injunction to restrain these people sending the sewage down your sewer, and therefore I will bring an action against you." What for? "Because you do not bring an action for an injunction against the people who are sending the sewage through your land." Suppose he says, "I do not care about prescription; so many people already have prescriptive rights of sending down this sewage into the sewer that I do not care about other people getting them too." Is he compelled to bring an action for the purpose of asserting his title to prevent a prescription as to which he is perfectly indifferent? It is a most singular thing to say so. Independently of that, did one ever hear of an action against a man because he did not bring an action against his neighbour. It is impossible to suppose that any such action could be maintained. It comes to this, if you could maintain it you would get an injunction against a man for not bringing an injunction action against his neighbour. That is the result of it. As it is the only means of preventing it, it comes to an order that he shall bring an action for an injunction against all his neighbours who are sending sewage down without a prescriptive right into the sewer. That is, he would have to fight in every case the question of prescription, acquiescence, and fifty other questions which might arise. How can we tell in the absence of the people what the defence might be? He may have lost his right by acquiescence or in various other ways. No such action has ever been heard of at common law, and I am sure no such action has ever been heard of in equity, where a person cannot physically put an end to the nuisance, when he can only put an end to it, if he can put an end to it at all, by bringing an action for an injunction. If there is no action at common law where do you get the right under the statute? The only rights under the statute are, you shall not do anything to commit a nuisance. They say, "We have done nothing at all, we found the sewers in this state, and we left them there." Besides that, they have a general scheme of

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drainage which they are endeavouring to put in force, and as to which I say, without negligence or without the imputation of negligence upon them, they are doing the best they can. Is that a case which gives the plaintiff any right to an injunction? I think it does not. Then I come to the last ground. I must say it appears to me that there is one sentence in the judgment of Cotton, L.J. in the case of *Glossop v. The Heston and Isleworth Local Board*, which puts an end to the case altogether. He says this, "But it would be contrary to the course of the court to make a decree of that nature against the defendants, unless the court is satisfied that there is some particular mode by which they can carry into effect this scheme of drainage, and in that way exercise the powers of this Act of Parliament." In other words, it comes to this, you are to enjoin a man or corporation under the penalty of sequestration of his property—there are other penalties as regards an individual—to prevent a certain state of things being allowed to continue, without being aware of any means by which he can stop it. Surely that cannot be right. You are not to send a man to prison for not preventing what he cannot prevent. In the *Colney Hatch* case Lord Hatherley said, if it is impossible, and if you cannot do it—and I go further and I entirely agree with the statement of Cotton, L.J.—that before you can make an order directing a man to do something—for that is the effect of the injunction; it is negative in form, but it is positive in fact—you must be satisfied that he can do it. As I said before, I am not only not so satisfied, but, upon the present evidence, I think the defendants cannot do it, and that is a sufficient ground. There is one other ground that was not mentioned in the case of *Glossop v. The Heston and Isleworth Local Board*, but which appears to me to be a very important ground, and that is that, in granting an injunction which is a very delicate injunction, the court always looks at the balance of convenience. I agree that where it is an injury to the plaintiff's property, it is no answer to say, "We have invaded your property because it is more convenient to us." But where it is a continuance of a state of things which you find existing, and which it is only by the intervention of parliamentary powers you can stop, would it be right to grant an injunction when you cannot compel the exercise of the parliamentary power, the effect of which would be to cause a most frightful injury to the town of Dorking? I am now assuming that they would physically stop up the sewer. Would it be right to order them to stop it up, leaving the town of Dorking to go undrained, and so cause disease probably, which would be utter destruction to the town, because there is a temporary injury to the plaintiff? That is a consideration which the court must not lose sight of when it is asked to grant a mandatory injunction. I am by no means prepared to say what the rights of the plaintiff would be if the defendants neglected to put in force their parliamentary powers, but I am prepared to say that the court would find some remedy for him in that case. It appears to me that this case is not fairly distinguishable from the case of *Glossop v. The Heston and Isleworth Local Board*, and that the learned judge in the court below rightly considered himself bound by that case in coming to the conclusion that he did, and I think

that we are equally bound, and therefore this appeal ought to be dismissed.

COTTON, L.J.—In this case I assume that the sewers are vested in the defendants. It is not necessary in the view which I take to give any opinion upon that in this case; but I assume, for the purpose of the argument, what I have no doubt is the case, that the stream in which the plaintiff is interested is in a very bad state, and is becoming daily worse. But does that entitle the plaintiff to a decree and injunction against the defendants? Now the defendants are doing nothing. They are not making any new sewer or making themselves active in exercising any power which they have under the Act, of turning sewage, if they had the power, into any new course from that in which it previously went. In that state of things, in my opinion, the case is exactly the same in principle, although there are minute differences, as the case of *Glossop v. The Heston and Isleworth Local Board*. I adhere, although Mr. Davey presumed to question the reasons for deciding that case as it was decided, to the opinion that was there expressed by me. Just see how it is. True, all that has happened is that under the Act of Parliament these sewers have become vested in the defendants. Under a section in the Act they are in this position, that they cannot close up those sewers without providing that which is necessary for the purpose of carrying away the sewage, nor can they close up any sewer which would create a nuisance. Could it be for a moment said that closing up this sewer without providing another system of sewage would not cause a great nuisance to every householder who had previously drained into these sewers? It is not only so as regards those already drained into the brook, but, under the Act of Parliament, every householder has a right, if his house is within a certain distance of this sewer, of conducting his drain into it, and that being so, no permission is required from the defendants to enable any householder having a new or old house to connect his drain with this sewer. Therefore they are not using their sewer for the purpose of carrying this drainage in the same way as a body or a person would be doing, who permitted or allowed persons to turn their sewage into a sewer when that person could not make any connection with the sewer except by the permission or with the authority of the person in whom the sewer was vested. In my opinion, therefore, it cannot be said that they are using this sewer for the purpose of conveying this sewage, which I assume, causes a nuisance to the plaintiff. It is said that that would not be in accordance with the 17th section of the Act of Parliament, which says: "Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall, for the purpose of conveying sewage or filthy water into any natural stream or watercourse." Now I pointed out how, in my opinion, they are not really to be considered as themselves using, either by themselves conveying, or by granting permission for sewage to be conveyed, into the stream by means of this sewer. The construction of the section is this, as I understand it, that the Act does not give authority to use or do anything so as to commit a nuisance, and, as was pointed out by James, L.J., and I think also by myself, in our judgment in the



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*Glossop* case, that is simply this: if you want, for the purpose of doing anything, to rely upon authority given by the Act, you must do that thing so as not to commit a nuisance. Here they are doing nothing, subject to what I shall say as to the plaintiff. They are not constructing a new system of sewers. It was said that they are in fact using this sewer by allowing it rather to be used as part of the existing system of drainage, which is vested in them. That is, they are not substituting a new system of sewage; and, in my opinion, the mere fact that they have not substituted a new system of sewage cannot make this the using of the sewer by them, when it is used without any leave granted by them, under the rights which are granted by the Act to householders. That being so, in my opinion, they are doing no act; and the injunction ought not to be granted. But it is said that they can prevent this being done, and, therefore, that an injunction ought to be granted for the purpose, as I understand the argument, of compelling them to exercise for the benefit of the plaintiff those rights which they have of preventing this nuisance. I have dealt with the question of closing up the sewer. It is said that they may do it in two ways, one by bringing an action, or taking proceedings under the powers of the Act against the persons who are in fact causing the nuisance by sending their sewage into it. Now, the Master of the Rolls has dealt with this part of the case, and, I must say, except where a person has bound himself by contract to bring an action, which of course is a different question, I never heard of anyone bringing an action against another person because that other person did not bring an action which the plaintiff could as well bring himself; and if here there is a nuisance committed by the persons who are sending their sewage either *de novo* or continuing to send it into the sewer, and thence into the stream, the plaintiff can bring an action just as well as the defendants, except that it is said he has not the same knowledge. But does the fact that the defendants know of evidence which the plaintiff does not know entitle the plaintiff to bring an action against the defendants for not bringing an action which the plaintiff himself at law may bring, although he may have some difficulty in proving his case? I never heard of any such principle and, in my opinion, there is none. Then it was said—and that was, I think, really the principal argument—although the defendants here are not actively doing anything which causes the nuisance, although they are doing nothing the doing of which can be stopped by granting an injunction, they may indirectly be compelled to exercise the powers of an Act of Parliament which would be a benefit to the plaintiff by preventing the sewage coming into the stream. I repeat here what I said in *Glossop's* case, that, in my opinion, if that is the object to be attained, it ought to be done by an order directing the defendants to exercise their powers, and not by way of injunction, which is to have that indirect effect. But, independently of that, there has been no default, as the Master of the Rolls has pointed out, on the part of the defendants to exercise their powers. They have been trying, but they cannot do it. There is this fatal objection to what is asked by the plaintiff as the ground for the injunction: In my opinion it would not be right

to grant an injunction to restrain the defendants from allowing this sewage to come into the stream, where it does not appear that there is any means under the authority given by the Act of Parliament by which they can divert the sewage from the stream. It is said that it is contrary to all the cases decided with reference to it. In my opinion it is contrary to not one of them. In those cases which have been referred to, the *Birmingham* case, the *Tunbridge Wells* case, and the various other cases which are too numerous to go through, in all those cases the defendants who were restrained had done something actively to turn the sewage into the stream, or on to the land of the parties complaining of it. In this case it is not material to consider whether they could get rid of their sewage by any other means. The Act of Parliament has given them power to get rid of their sewage, provided they could do so without committing a nuisance, and if they could not do it without committing a nuisance the Act of Parliament did not authorise them to do it, and they were in the same position as individuals who were doing a wrong to their neighbour without any parliamentary authority. It is immaterial to consider whether it could be done under any of the powers given to them by the Act without committing a nuisance. Here the defendants are doing nothing, and they are sought to be compelled to exercise the powers of the Act, when it does not appear that the exercise of the powers would prevent the injury or loss to the plaintiff of which he complains. The cases are entirely different, and, in my opinion, if there were no other, that would be a fatal objection to the granting of the injunction for the indirect purpose which the plaintiff here tries to obtain by his application for an injunction. In my opinion, the decree dismissing the information and bill was right, and, therefore, the decree appealed from ought to be affirmed.

LINDLEY, L.J.—I am of the same opinion. I will only add, having looked carefully at the case of *Glossop v. The Heston and Isleworth Local Board*, I do not see how to distinguish this case from that in substance.

Solicitors: *Walters, Deverell, and Walters; Duncan, Warren, and Gardner*, for *Hart, Hart, and Marten*, Dorking.

#### SITTINGS AT WESTMINSTER.

Wednesday, Feb. 22, 1882.

(Before BRETT and COTTON, L.JJ.)

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF PORTSMOUTH (acting as the Urban Sanitary Authority of the said borough) v. SMITH AND OTHERS; SAME v. MOODY. (a)

*Towns Improvement Clauses Act—Right of action for paying expenses—20 & 21 Vict. c. 37 (local and personal), s. 20—27 & 28 Vict. c. 83.*

*By sect. 53 of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), "If any street, although a public highway at the passing of the special Act, have not theretofore been well and sufficiently paved and flagged, or otherwise made good, the commissioners may cause such street, or the parts thereof, not so paved and flagged, or otherwise made good, to be paved and flagged or*

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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*otherwise made good in such manner as they think fit, and the expenses incurred by the commissioners in respect thereof shall be repaid to them by the occupiers of the lands abutting on such street, or such parts thereof as have not been theretofore well and sufficiently paved and flagged, or otherwise made good, and such expenses shall be recoverable from such occupiers respectively as hereinafter provided with respect to private improvement expenses."*

*By sect. 156, "Where by this or the special Act the occupiers of any lands or buildings are made liable to the payment of any expenses which are directed to be recoverable as private improvement expenses, the commissioners may charge the occupiers of such lands and buildings respectively with special rates over and above any such rates."*

*By sect. 149, "If the owner of any buildings or lands made liable by this or the special Act for the repayment to the commissioners of any expenses incurred by them do not as soon as the same become due and payable from him repay all such expenses to the commissioners, the commissioners may recover the same from such owner in the same manner as damages, or in an action of debt in any of the Superior Courts, or in any other court having jurisdiction."*

*In 1857 a local Act for the borough of Portsmouth incorporated the above sections, with the proviso that sect. 53 "shall be construed as if the word 'owners' were substituted for the word 'occupiers'."*

*By the Local Government Supplemental Act 1864, sect. 156 of the Act of 1847, and the succeeding sections dealing with private improvement expenses were struck out of the local Act.*

*The urban sanitary authority of the borough of Portsmouth (who represented the commissioners mentioned in the above sections) having incurred certain expenses within the above sect. 53, sought to recover the same by action from the owners of the abutting lands. The defendants alleged that the expenses in question could not be recovered directly by action, but that a rate must be made in respect of them, as in the case of private improvement expenses.*

*Held, on demurrer to the defence, that, by the repeal of sect. 156 and the succeeding sections relating to private improvement expenses, the last words of sect. 53 were in effect repealed; and, consequently, no special remedy being provided for the recovery of expenses under sect. 53 an action would lie to recover them, independently of sect. 149.*

*Judgment of Field, J. affirmed.*

THIS was a demurrer to paragraphs 2, 3, 5, and 6, of the re-amended statement of defence in an action by the urban sanitary authority for the borough of Portsmouth to recover the sum of 268*l.* 2*s.* in respect of paving, flagging, and making good part of Asylum-road, within the district of such authority.

The plaintiffs alleged in their statement of claim that after the passing of the Local Government Act 1858, and the Local Government Supplemental Act 1864 (No. 2), the defendants were and still are the owners of certain lands abutting on the north side of Asylum-road, within the urban sanitary district of Portsmouth, the footway of which adjoining the defendant's land had not

theretofore been well and sufficiently paved, flagged, or otherwise made good. And that the plaintiffs in exercise of the power conferred on them by sect. 53 of the Towns Improvement Clauses Act 1847, caused the footway to be paved, flagged, and made good, and incurred expenses amounting to 268*l.* 2*s.*

The re-amended statement of defence was as follows:

1. The defendants say that prior to the time of the execution by the plaintiffs of the work in the statement of claim mentioned, the footway had been well and sufficiently paved, flagged, and otherwise made good by the plaintiffs.

2. By reason of the above premises the footway had become repairable by the inhabitants of the borough of Portsmouth at large.

3. That the plaintiffs are not entitled to recover the sum of 268*l.* 2*s.*, or to maintain this action by reason of their not having taken the necessary steps provided under sects. 156, 171, 191, and intermediate sections of the Towns Improvement Clauses Act 1844.

4. The defendants deny that the plaintiffs caused the footpath to be paved, flagged, or otherwise made good as alleged.

5. If the plaintiffs did cause the footpath to be paved, flagged, and otherwise made good, as alleged, and incurred the alleged expenses, the defendants deny that the plaintiffs did so in the exercise of the powers conferred upon them by the 53rd section of the Towns Improvement Clauses Act 1847; but, on the contrary, if they did the said work and incurred the said expenses they professed to do so by virtue of the powers conferred upon them by the Public Health Act 1875.

6. If the plaintiffs actually did the work and incurred the expenses under and by virtue of the Public Health Act 1875, the defendants say that the plaintiffs are debarred from recovering the same from the defendants by reason of sects. 251, 252, and 257 of the said Act.

The plaintiffs demurred to the 2nd paragraph of the defence, on the ground that the matters therein stated did not relieve the defendants from liability; to the 3rd paragraph, on the ground that the sections mentioned in that paragraph are not in force so far as relates to the said urban sanitary district; to the 5th and 6th paragraphs, on the ground that it was immaterial how the plaintiffs professed to do the work, and that the sections referred to in those paragraphs do not preclude them from recovering for the same.

Nov. 26.—FIELD, J.—The case stands, in my judgment, thus: The plaintiffs were, before 1875, the Local Board of Health within some districts comprising Portsmouth. After 1875 they became the Urban Sanitary Authority, and as such, I presume, they became in some way the representatives of the commissioners under the Portsmouth Local Act of 1857. They were therefore entitled to exercise whatever powers and remedies those commissioners had. In the present case they seek to recover by means of an action the amount of certain expenses which they allege they have incurred in paving, &c., a certain street. And they seek to recover such expenses from the defendant because he is the owner of the lands abutting upon the street. There have been very serious alterations in the different statutes affecting the question, and in order to understand them we must consider what was the general course of the Legislature. Before the Act of 1857 was passed, questions of a similar kind to the present were decided with reference to the Public Health Act 1848, the 69th section of that Act gave certain powers, almost as great as those given in the present instance, but not exactly similar. There were two differences between the Act of 1848 and

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the local Act of 1857, the first of which was that the Act of 1848, as well as all the subsequent legislation, relates to streets not being highways, and a highway was afterwards defined as "a highway repairable by the inhabitants at large," whereas the local Act of 1857, in express terms, includes a street, whether a highway or not. The mayor, aldermen, and burgesses, now called the "town commissioners," have therefore a larger power under that Act than they would have had under the Act of 1848. The other material difference is this: That by the Public Health Act of 1848, before the proper authority can charge the owner with any expense, the owner must be given an opportunity of doing the works himself; and it is only in the case of the default of the owner in doing the work that any charge can be made upon him. The Act provides that the expenses may be recovered from the last-mentioned owners in the manner thereafter provided. Sect. 90 provides that manner as follows: That whenever the local board have incurred or become liable to any expenses through doing these works, they may, if they think fit, levy upon the occupiers of the premises, although sect. 69 said owners, and if they decide upon making them private improvement expenses, the occupier is then the person who is to pay. The reason seems to be this: That if the expenses are to be made private improvement expenses, the effect of which will be to throw the whole charge over a series of years, they may be put upon the occupier, who then, by the statute, has his remedy against his landlord by way of deduction from his rent. That was the scheme of the Act of 1848. Besides that Act, however, a skeleton Act had been passed the year before relative to towns, which was not a law binding anybody, unless the Legislature afterwards thought fit to bind persons thereby in particular districts. And, in order to do this, the clauses of the skeleton Act were passed, only to become law binding anyone when incorporated in any particular Act of Parliament. Now, the skeleton Act of 1847 was a well-devised scheme, and consistent with itself from beginning to end, if adopted as a whole, unaltered; but, if in adopting it you alter part, and the other part which is in conflict with the part as adopted is left unaltered, a considerable difficulty arises. Under sect. 53 of the general Act the commissioners are to do the work and then charge the occupiers with the expenses thereof, which are to be recoverable from the occupiers in the manner thereafter provided in regard to private improvement expenses. There are a series of rating clauses, beginning with sect. 156 and going as far as sect. 199, the most important among which is sect. 156, which is as follows: "Where, by this or the special Act, the occupiers of any lands or buildings are made liable to the payment of any expenses which are directed to be recoverable as private improvement expenses, the commissioners may charge the occupiers of such lands and buildings respectively with special rates over and above any other rates." In sect. 164 it is provided that "every occupier of any such house or building at a rent not less than a rack rent, who has paid any such drainage rate, shall be entitled to deduct three-fourths of the rate so paid by him from the rent payable by him to his landlord;" and we then come to the mode of levying the rates, which, amongst other things,

requires notice to be given of the rate, which notice, it is to be observed, is an occupier's notice rather than an owner's notice, as in the case of a poor rate. And in sect. 181 it is said, with reference to owners, "the owners of all rateable property of which the full net annual value does not exceed the prescribed sum, or (where no sum is prescribed) the sum of 10*l.*, or which are let to weekly or monthly tenants or in separate apartments, shall be rated to and pay the rates by this or the special Act directed to be made instead of the occupiers thereof." That being the scheme of the general legislation, the local Act says: First of all we will incorporate the general Act with ours, but we will not incorporate it as it stands. We will take sect. 53, but we will alter the incidence of liability, and, instead of the occupier being the person who shall be liable to these expenses, we will make the owners liable. That was done by sect. 20, which says that in construing the Act of 1847, sects. 53, 54, and 73, shall be construed as if the word "owners" were substituted for the word "occupiers." Sect. 54 has been repealed; looking, however, at sect. 57 it seems very distinct and clear that sect. 53 is to be read as saying, first of all, that the expenses incurred shall be repaid by the owners of the lands; and, secondly, that such expenses shall be recoverable from such owners in such manner as is thereafter provided with respect to private improvement expenses. Besides sect. 53, however, and the sections to which I have referred as originally incorporated in the local Act, there is sect. 149, upon which, and sect. 53, the plaintiffs found their title to sue. They say they are the urban authority and incurred the expenses in doing works mentioned in sect. 53, that the defendants are the owners who, under the enactment, are to repay them, whether the works were necessary or not; and that the mode provided for the recovery of their expenses is by an action in the same manner as to recover damages or a debt. Before we consider the defendant's contention let us look how the law was altered. As the Act of 1847 stood the "manner thereafter provided for the recovery of the expenses" was to make a rate upon the occupiers, but, as the plaintiffs say, that provision was repealed. But for such repeal it would, no doubt, have been possible to have made the owners the rateable persons, and the Act would have read in this way, You, the owners, shall pay the moneys, and such moneys shall be recoverable in manner thereafter provided, which manner is not pointed out with reference to owners, but is pointed out with reference to occupiers. In 1858 there was fresh legislation, the Local Government Act 1858, afterwards amended by the Act of 1861, by which Act a very important change was made. Up to that time there had existed all over England, commissioners with all sorts of varying rules as to by whom the work was to be done, and how it was to be paid for. The Act of 1858, therefore, by sect. 77, gave local boards the power to petition the Secretary of State for the repeal or alteration of any local Act. Great doubt arose upon the construction of that section, which was only set at rest by the Act of 1875; it was with reference to sect. 77, however, that the legislation of 1864 took place with regard to Portsmouth. The authorities of Portsmouth proceeded to present the necessary petition, and obtained a modifi-

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cation or repeal of certain clauses in their local Act, the effect of which was, shortly, that the rating clauses in the Act of 1847—I cannot say were repealed—ceased to be incorporated. The only clauses retained were, first of all, sect. 16, limited, however, to retaining (*inter alia*) sects. 53, 147 to 151, 196, and 197, and it further specifically retained sect. 20 of the local Act, so as to continue to import the word owners instead of occupiers. Therefore, as the law stood at the time when these works were executed, sect. 20 was in force and sect. 16 as to certain clauses, and then sect. 53, expenses incurred under which are to be recoverable in the same manner as private improvement expenses; but there has now ceased to be any provision for the recovery of private improvement expenses; the sections relating thereto, which are 167 to 184, are gone. Then there were retained clauses 147 to 151, the two first of which refer rather to the scheme in the general Act than to sect. 53, for in them the owner is given the opportunity of doing the work himself, which is not the case in sect. 53; and I am of opinion that these clauses, sects. 147 and 148, upon which the defendant relies as modifying the language of sect. 149, do not relate to sect. 53. Sect. 149 applies to the owner, and by sect. 150 a cumulative remedy is given, because, whether any action is brought against the owner or not, the commissioners may, if they like, “require the payment of all or any part of the expenses payable by the owner for the time being from the person who then or at any time thereafter occupies any such buildings or lands under such owner; and in default of payment thereof by such occupier, on demand, the same may be levied by distress and sale of the goods and chattels of such occupier,” when he shall be entitled to deduct so much as he has paid from his rent, and he could not have paid more than his rent. It is a species of equitable mortgage upon the rent. The next sections necessary to refer to are sects. 196 and 197, which, in my opinion, though I may be wrong, refer rather to the power of rating the owner contained in sects. 44 and 45 of the special Act. The question I am to decide is, whether this action is maintainable. It is an undoubted rule of law, that where a statute directs the payment of money, an action will lie; so, also, where, notwithstanding there being no contract and no previous liability, a new obligation to pay is created by the statute, unless you see from the statute that a specific remedy is provided. And, therefore, it is that the defendant contends that although it may be that the owner, under sect. 53, is the person who has to pay, yet that section, creating a new obligation, points also to a specific remedy, and that that remedy alone can be pursued, and, therefore, no action will lie, but the expenses must be recovered as private improvement expenses. The plaintiffs do not dispute that rule of law, but say that in sect. 149 there is an express power of suing given, that where any expenses become due and payable by the owner, the commissioners may recover the same from such owner, and that sect. 53 is to be read “the expenses are to be repaid to them by the owner,” and, therefore, looking at the fact that sect. 149 has been retained by the same blow which struck out all the rating sections, that that was the remedy which it was intended to provide. The defendant does not absolutely dispute that

construction, but says that sect. 149 is meant to apply only to the cases in sects. 147 and 148. I am not able to come to that conclusion, for this reason, that the language of sect. 149 seems to be general, and, in my opinion, is a specific power given to the commissioners to sue. I think that the expenses in question are recoverable by the commissioners in the present action, and I, therefore, give judgment for them.

From this judgment the defendants now appealed.

*A. Charles*, Q.C. (with him *E. U. Bullen*), for the defendant in first action.—It is true that, under sect. 53, as altered by the Local Act, the owner has to pay; but it is a special enactment and provides a special remedy, namely, that these expenses should be recoverable as private improvement expenses; and that is the remedy which must be pursued. Sect. 149 does not apply where there is a special remedy provided. [Brett, L.J.—It may be that sect. 149 would only apply to a case where the landlord has been called upon to do the work, but has not done it, and it has been done by the urban authority at his charge. So that it all comes back to the construction of sect. 53.]

*F. O. Crump* for the defendant Moody.—If the contention of the other side is correct, a liability has been put upon the owner which was never on the occupier. Sect. 53 never meant that these expenses should be recoverable immediately.

*Bompas*, Q.C. and *Pitt Lewis*, for plaintiffs, were not called upon.

BRETT, L.J.—If I thought that we could get any more light on this case by hearing Mr. Bompas I would do so; but I think that it has been thoroughly exhausted by Mr. Charles. We have, too, a wonderfully careful judgment of Field, J. The ground of that judgment, however, is a short one, and must be appreciated at once; those sections 156 to 199 are not by reference incorporated into sect. 53. If those sections are not incorporated into sect. 53, as regards Portsmouth, they do not exist at all. Therefore, the last words of sect. 53—“such expenses shall be recoverable from such owners respectively as hereinafter provided with respect to private improvement expenses”—must be read as if, as regards Portsmouth, there were no subsequent provisions with respect to private improvement expenses at all. Then those words of sect. 53 become useless, and the section must be read as if they were not there. It must be read as if there were no provision as to the expenses except “the expenses incurred by the commissioners in respect thereof shall be repaid to them by the occupiers of the lands abutting on such street.” If that stands alone, the expenses in question must be recoverable by action. The sole question really is whether the last words of sect. 53 are in such a form as to read into that section the series of sections beginning with 156 that relate to private improvement expenses; or whether those words are to be taken merely as meaning in the same manner as private improvement expenses in other cases. Now private improvement expenses might be recovered in cases to which sect. 53 did not apply at all; therefore, the provisions with respect to private improvement expenses were not all applicable to that section, and cannot, I think, be

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read into it. The words mean in the same manner as private improvement expenses in other cases. Then, those sections as to private improvement expenses being repealed, sect. 53 must be read as if no such sections ever existed. There is then no special provision as to the recovery of these expenses, and they are, therefore, recoverable by action. I will only add that I do not think that sect. 149 assists the case of either party.

COTTON, L.J.—The question that we have to consider here is, what effect upon a section in a general Act of Parliament the private legislation of Portsmouth has had. That legislation incorporated certain sections of the Towns Improvement Clauses Act 1847, and it is upon this that the present difficulty arises. Except so far as special legislation makes them part of the special Act, the provisions of the Towns Improvement Clauses Act 1847 have no effect at all. Then in 1857 a local Act for the borough of Portsmouth incorporated, amongst other sections, sect. 53 of the Act of 1847, but it did not do so *simpliciter*, because it said that sect. 53 "shall be construed as if the word 'owners' were substituted for the word 'occupiers.'" Sect. 53 enables the local authority to pave streets and to recover the expenses "as hereinafter provided with respect to private improvement expenses," the effect of which would be that the owners would have had time given them to repay the expenses. Then comes the legislation of 1864, by which the legislation of 1857, which incorporated sect. 53 and the private improvement expenses clauses, was altered by only incorporating sect. 53 without the private improvement expenses clauses. The question is, how is the owner liable now to pay the expenses incurred under sect. 53? Can he say, notwithstanding that sects. 156 to 199 are not part of the private legislation of Portsmouth, I am not liable to have an action brought against me for these expenses until you have proceeded in the way pointed out by those sections? I am of opinion that he is liable to pay these expenses at once. The private improvement expenses clauses are no longer applicable to Portsmouth. Sect. 53 must be read as if the words "such expenses shall be recoverable from such owners respectively as hereinafter provided with respect to private improvement expenses" were not there. The owner cannot, therefore, in my opinion, say that he is not liable to pay at once. I think that he is liable to pay these expenses at once, and that they can be recovered by action. It is not, in my opinion, necessary for the plaintiffs to have recourse to sect. 149 as giving them a right of action in respect of these expenses. Under sect. 53 they are to be repaid to the plaintiffs by the owners of the adjoining lands, and that is sufficient, in the absence of any special provision, to give the plaintiffs a right of action.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Bischoff, Bompas, and Co.*

Solicitors for the defendants, *Ford and Ford.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Monday, May 15, 1882.*

(Before GROVE, J.)

WOLSTANTON AND BURSLEM UNION (apps.) v. NORTHWICH UNION (resps.). (a)

*Removal of pauper—Settlement by residence under sixteen years of age—Derived settlement—39 & 40 Vict. c. 61, ss. 34 and 35.*

*A pauper, whose settlement both by birth and parentage was in the appellants' union, had, before he was sixteen years old, resided in another union for the term, in the manner, and under the circumstances required by sect. 34 of the Divided Parishes and Poor Law Amendment Act 1876 to acquire a settlement by residence.*

*Held, upon an appeal from an order of removal to the appellants' union, that the first paragraph of sect. 35 of that Act refers only to derived settlements; that there was nothing in that section to prevent the pauper from acquiring a settlement under sect. 34; and that therefore the order of removal was bad.*

THIS was an appeal against an order of two justices for the county of Chester, dated the 28th day of June 1881, for the removal of one Egerton Wedgwood, a pauper lunatic, from the respondents' union to the appellants' union, by which order it was adjudged that the place of the last legal settlement of the said Egerton Wedgwood was in the parish of Wolstanton, in the appellants' union. The appeal was tried at Michaelmas Quarter Sessions for the county of Chester, holden at Knutsford, when that court affirmed the said order, subject to the opinion of the Queen's Bench Division of the High Court of Justice, on the following case:

1. The said pauper Egerton Wedgwood was born in the said parish of Wolstanton, in the appellants' union, on the 3rd Oct. 1860, and was the legitimate son of Abner Philimore Wedgwood, who resided in the said parish from the year 1843 till Jan. 15, 1871, when he died; he resided there during the said period under such circumstances as to gain a settlement in the said parish.

2. The mother of the said pauper continued to reside in the said parish of Wolstanton, in the appellants' union, from the time of her said husband's death until her second marriage in the month of June 1877, and was legally settled in the said parish during such period.

3. The said pauper resided with his father and mother until the death of the former, but he subsequently resided in the parish of Maer, in the Newcastle-under-Lyme Union, in the county of Stafford, from about the year 1872 till the month of May 1877, under such circumstances as to gain a settlement of his own in the said parish of Maer, by complying with the provisions of 39 & 40 Vict. c. 61, s. 34, unless by the provisions of the 35th section of the said Act he was incapable, under the aforesaid circumstances, of acquiring such settlement.

4. It was contended on behalf of the appellants that the 34th section applies to any person, and that its provisions are not restricted by the 35th

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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section, and therefore that the said pauper lunatic acquired a settlement in the said parish of Maer. It was contended on behalf of the respondents that the 34th section should be read together with the 35th section, and that when so read it enacted that a legitimate child under the age of sixteen would not, under the above circumstances, acquire a settlement for itself, and therefore that the said pauper lunatic took the settlement of his widowed mother.

5. Being of opinion that the above contention of the respondents was right in law, the said Court of Quarter Sessions dismissed the appeal with costs.

6. If the court should be of opinion that the above contention of the respondents is right in law, then the aforesaid order shall stand; but, if the court shall be of opinion that the contention of the appellants is right in law, then the aforesaid order, and the order of sessions confirming the same with costs, shall be quashed, and the aforesaid appeal to the quarter sessions shall be allowed with costs.

By 11 & 12 Vict. c. 111, after reciting the Irremovability Act 1845 (9 & 10 Vict. c. 66):

Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable notwithstanding any provisions of the said recited Act, and should not be removable by reason of any provision in the said recited Act.

By the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 34:

Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise."

By sect. 35:

No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish to which he or she was born.

The argument of this case was by consent heard by a single judge.

*Marshall*, for the respondents, showed cause against the rule to quash the order of quarter sessions.—The question to be decided is, whether this pauper, who was under the age of sixteen, acquired a settlement by residence in the parish of Maer, apart from his widowed mother, and in a different place from her settlement. There seems to be nothing in the Statutes of Irremovability before the Act of 1876 which touches the question; and although it may have been possible in some few instances for a child under sixteen to have acquired an independent settlement, the Legislature may well have intended by sect. 35 to

impose the derived settlement upon all legitimate children under that age. Indeed, it can only be by applying the first paragraph of sect. 35 to acquired as well as derived settlements that the word "estate" can have any meaning or effect. A settlement can only be derived from a parent or a husband; there never can be a derived settlement by estate. If, however, the word "derived," in the first line of the 35th section, be read in its most commonly received sense, so as to include settlements technically both derived and acquired, the words "estate and otherwise" would be intelligible, and would include the settlement which, but for this section, has been acquired by the pauper in this case.

*Higgins, contra.*—The word "derived" is used more than once in this 35th section; and in the last paragraph its meaning is clearly to be distinguished from that of the word "acquired." It cannot be intended that the same word should have a general meaning in one part and a technical meaning in another part of the same section. The first paragraph, therefore, can only refer to settlements derived in the case of children under sixteen from their parents, and has no application to a child who, like the pauper here, has acquired an independent settlement by residence. We must then fall back upon the 34th section, which, in words general enough to include children under sixteen, enables any person to acquire a settlement by residence. Here the pauper has acquired such a settlement, and the order of removal to the appellants' union, which is the place of his derived settlement, is not justified by the last paragraph of the 35th section. No doubt this construction of sect. 35 involves a difficulty with respect to the word "estate;" but the words "whether by parentage, estate, or otherwise" may be held to be altogether superfluous; or possibly they were intended to refer to the previous substantive "settlement," and not the verb "to have derived," in order to point out that the settlement so derived from the other person might have been obtained by that other person either by parentage, estate, or otherwise, it being well known that a settlement can be technically derived only by parentage or marriage.

*Grove, J.*—I cannot say that I have much doubt as to the construction of this section; but I admit that, in the only sense I can adopt, there is no effect given to the word "estate." I am not at all satisfied with the suggestion that the words "whether by parentage, estate, or otherwise" should be applied to the settlement of the other person from whom the settlement, which is the subject of the enactment, is derived. It seems to me that the section was intended to deal with the settlement of a man or an unmarried woman above the age of sixteen, which was derived by parentage or marriage. I can only think that the words "estate and otherwise" were used in a vague sense, or as surplusage, and I greatly prefer so to decide than to extend the sense of the word "derived," as suggested for the respondents, in order to include both derived and acquired settlements. The words "derive" and "acquire" are used several times in the 35th section, and in the instances other than this their meanings are distinct, and their use is technically accurate. I feel it impossible to hold, in the face of this careful distinction, that when the word "derived" first appears in the section it



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means both "derived and acquired." It may be, as contended, that the object of the Legislature was to abolish all settlements acquired by children under sixteen; but, if it was, the necessary words have not been employed, and I cannot make the law. My opinion is that the first paragraph of the 35th section applies to derived settlements only, and not to acquired settlements of children or other persons. There was, therefore, in this case no necessity to resort to the pauper's derived settlement, and the orders of removal and quarter sessions were wrong. I think this is a case in which no costs should be allowed.

*Judgment for appellants.*

Solicitors for appellants, *Llewellyn and Ackrell*.  
Solicitors for respondents, *O. R. and H. Cuff*,  
for *A. and J. E. Fletcher*, Northwich.

Thursday, March 30, 1882.

(Before POLLOCK, B. and MANISTY, J.)

REG. v. GANZ. (a)

*Extradition—Fugitive criminal subject of a state other than the state requiring his surrender—Foreign warrant—Duly authenticated copy of a decree of competent foreign tribunal ordering arrest—Sufficiency of warrant—Habeas Corpus Extradition Act 1870—33 & 34 Vict. c. 52, ss. 10, 15—Extradition treaty between Great Britain and the Netherlands, 1874.*

*G., the fugitive, was alleged to have committed an offence in N. for which he might be extradited. The Government of N. applied for his surrender. On his apprehension in England he produced letters of naturalisation granted to him by the U.S., and claimed to be a subject of the U.S. and not of N., which could not lawfully demand his surrender. The warrant for G.'s arrest was a duly signed and authenticated copy of a decree entered in the official book of a competent tribunal in N. ordering his arrest. G. was taken into custody, and an application for a writ of habeas corpus was made on his behalf. On the argument it was contended that, being a naturalised citizen of the U.S., he was not within the terms of the treaty between Great Britain and N., and could not be delivered up at the request of the Government of N. Also that the warrant of his arrest was not in form or substance within the meaning of the English term "warrant," and was besides bad and insufficient by reason of its being a mere copy, and not an original document.*

*Held, that a person who commits a crime within the jurisdiction of a particular country is pro tanto a subject of that country which can rightly demand his extradition on escape, unless there are treaty arrangements to the contrary.*

*Held, further, that a foreign warrant need not be of the same kind or description as an English warrant, and that any foreign judicial document purporting to be duly signed and authenticated which orders the arrest of a person, is a sufficient warrant upon which the committing magistrate in England can order the surrender of that person as a fugitive criminal.*

THIS was an application for a rule nisi calling upon the Governor of Holloway Gaol to show cause why a writ of habeas corpus should not

issue calling upon him to bring up for release the body of Edward Nathan Ganz, who had been committed to his custody under an extradition warrant granted by the Chief Magistrate at Bow-street on the application of the Government of the Netherlands.

The following were the material facts of the case:—

1. Edward Nathan Ganz, the fugitive criminal, whose *alias* was alleged to be Bernhardt Wyprecht, was charged, at the instance of the Government of the Netherlands, with an extraditable offence amounting to the obtaining of money under false pretences during the year 1881.

2. Ganz, whose offices were a small room in a street in Rotterdam, inserted during the year 1881 an advertisement in various newspapers on the Continent to the effect that customers dealing with his firm would save a considerable amount per annum by purchasing their grocery supplies direct from the prisoner's "warehouses" in Rotterdam. The prisoner's firm was styled "Bernhardt Wyprecht and Co."

3. In the advertisement appeared the notice, "All our goods are picked out at the place of growing by our own factories, and the most conscientious warranty for utmost purity and best weight."

4. On receipt of an order the prisoner sent to the customer a circular requiring payment in advance, and in terms repeating the statements put forward in the advertisement.

5. A large number of persons sent the prisoner orders from Berlin and other parts of the German empire, and, on receipt of the circular, remitted the amount of their orders as directed.

6. The prisoner, as "Bernhardt Wyprecht and Co.," did not send any goods in return for the money, nor had he "warehouses" in Rotterdam nor "factories" elsewhere.

7. Ganz came over to England towards the latter part of the year 1881.

8. In consequence of the representations made through the Governments of those persons who alleged that they had been swindled by the prisoner, criminal proceedings were taken in the Arrondissement Court (or the Criminal Court of first instance) in Rotterdam, which held that the offence had not been made out. But the Court of Criminal Appeal at the Hague reversed the decision of the court below, and issued the following copy document [translation] authorising the prisoner's arrest. This document was relied on as a proper and valid warrant of arrest.

In the name of the King.

The Court of Justice at the Hague in Council assembled.

Seen the report of the Arrondissement Court of Justice of Rotterdam assembled in council of the 15th Nov. 1881 in the case of Bernhardt Wyprecht (as he calls himself), from which report it appears that the papers in this case showed no crime, the demanded prosecution was refused, and it is declared there is no ground for further proceedings.

Seen the act of protest, dated the 16th Nov., following against the reports submitted by the officer of justice of the mentioned court of justice.

Seen the papers and requisition of the public prosecutor showing that he does not approve of the report of the court against which he protests.

Seen the further papers.

Considering that there exists sufficient reason for complaint—the accused being said to have resided in the course of the year 1881 at Rotterdam, to have advertised

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from there in different German newspapers wherein he, stating to trade as Bernhardt Wyprecht and Co., in Rotterdam, offered different wares, some of which he named at *en gros* prices, guaranteeing his buyers that they were picked out through his own factories, and could be delivered at such low prices that through buying from him may hundred marks per annum could be saved, all entirely fraudulent and without any intention of keeping to his offer.

Furthermore he is said to have induced different persons by these advertisements to send him moneys as prepayment in ordering some of the advertised goods, and also from the persons mentioned, the amounts standing against their names, without sending them the ordered goods, to have received the same and fraudulently become possessed of them to their damage. [Here follow the names of twenty-eight persons in different parts of Germany who remitted him money.]

Taking into consideration that these acts are punishable by article 405 of the Penal Code.

Seen the articles 88 and 89 of the Law Book of Demands for punishment.

That the before-mentioned report of the Court of Arrondissement at Rotterdam will not be accepted.

Authorised proceedings with order for arrest against Bernhardt Wyprecht (calling himself so) last living at Rotterdam, thence absconded.

Done at the Hague on the 21st Nov. 1881 by the following gentlemen :

[Here follow the signatures of the vice-president and others of the council.]

For copy delivered on demand of the O. M.,

The actuary of the courts of justice.

(Signed) W. BISDOM and M. VAN DEN BERGH.

Seen for certifying the handwriting of the above-named Bisdom and Van den Bergh.

The Hague, Dec. 2, 1881.

For the Minister of Justice, the Secretary-General.

(Signed) CLAMM.

9. A formal requisition for the extradition of the prisoner was made.

10. On being arrested in London Ganz produced two documents which purported to be two letters of naturalisation as a citizen of the United States of America; one described him by the name of Ernest Ganz, the other as Ernest Nathan Ganz.

11. The above charge was preferred against him at Bow-street, and Sir James Ingram committed him to custody for extradition.

12. An application for a rule *nisi* for a writ of *habeas corpus* was accordingly made on behalf of the prisoner.

By 33 & 34 Vict. c. 52, sect. 1 :

Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may by Order in Council, direct that this Act apply in the case of such foreign state. Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient. Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement.

By sect. 6 :

Where this Act applies in the case of any foreign state, every fugitive criminal of that state who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime.

By sect. 7 :

A requisition for the surrender of a fugitive criminal

of any foreign state who is in, or suspected of being in, the United Kingdom shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

By sect. 8 :

A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in, or suspected of being in, the United Kingdom may be issued by a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England.

By sect. 10 :

In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the commitment for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

If he commits such criminal to prison he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the commitment, and such report upon the case as he may think fit.

By sect. 14 :

Depositions or statements on oath taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act.

By sect. 15 :

Foreign warrants and depositions or statements on oath, and copies thereof and certificates of or judicial documents stating the fact of a conviction shall be deemed duly authenticated for the purposes of this Act, if authenticated in manner provided for the time being by law or authenticated as follows :

- (1.) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued;
- (2.) If the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken to be the original depositions or statements, or to be true copies thereof as the case may require; and
- (3.) If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and

if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the Minister of Justice, or some other minister of state. And all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

By the treaty made between Her Majesty and the King of the Netherlands for the mutual surrender of fugitive criminals, signed the 19th June 1874, art. 1 :

It is agreed that Her Britannic Majesty and His Majesty the King of the Netherlands shall, on requisition



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made in their names by their respective diplomatic agents, deliver up to each other reciprocally any person who, being accused or convicted of any of the crimes hereinafter specified, committed within the jurisdiction of the requiring party, shall be found within the territories of the other party.

By art. 3:

No subject of the Netherlands shall be delivered by the Government of the Netherlands to the Government of the United Kingdom; and no subject of the United Kingdom shall be delivered by the Government thereof to the Government of the Netherlands. With reference to the application of the present treaty, are comprised in the denomination of "subjects," not only naturalised citizens of the country, but also such foreigners as, according to the laws of either of the contracting parties, are assimilated to subjects, as well as such foreigners who, being domiciled in the country, and having married a citizen thereof, have one or more children by that marriage born there.

By art. 8:

The requisition for extradition shall be made through the diplomatic agents of the high contracting parties respectively. The requisition for the extradition of an accused person must be accompanied by a warrant of arrest issued by the competent authority of the state requiring the extradition, and by such evidence as, according to the laws of the place where the accused is found, would justify his arrest if the crime had been committed there.

*Bealey* (*Tickell* with him) moved on behalf of the prisoner for the writ of *habeas corpus*.—The prisoner is entitled to his discharge from custody on several grounds. The first is, the prisoner is not a subject of the King of the Netherlands, but of the United States of America, and so cannot be claimed by the Government of the Netherlands, for he is not a subject within the meaning of articles 1 and 3 of the Treaty of Extradition of 1874 between this country and Holland. When Ganz was arrested over here, two letters of naturalisation as a citizen of the United States were found on him dated respectively the 25th and 28th July 1880, and also a passport dated the 29th July 1880. Now, there is no evidence on the depositions made against him that he was born in the Netherlands, which ought to be forthcoming to displace the presumption that he is a subject of the United States. So far as the evidence goes, he may be a natural-born Englishman, or one who was born in any country other than the Netherlands. [POLLOCK, B.—A man may be a vagrant, that is, of no country, and the law seeks to give him a domicile. Here you start with the proposition that Ganz was at a certain date in the Netherlands, and that there he did certain acts—I will not say more; therefore the presumption is, he is a subject of that country. That he has come to this country again is patent, but that does not help you unless you show a general proposition that every man, whether he be on the Continent, or in England, or anywhere else, if he can produce letters of naturalisation making him, *quoad* those letters, the subject of another country, that therefore he has lost his original domicile.] I say that it changes the burden of proof, and it is for the demanding country to show that they are entitled to have him surrendered. My next point is, that there has been no warrant of arrest proper to enable the demanding country to have him arrested: The only document on which the prisoner has been arrested is a mere copy of a letter ordering the arrest of one Wyprecht, who is said to be the same person as Ganz. [The learned counsel here read the document set forth above,

beginning "In the name of the King."] This is not an original foreign warrant authorising the arrest of the criminal within 33 & 34 Vict. c. 52, ss. 10, 15: (Clarke on Extradition, p. 178.) There has been no proper authentication in this matter, and, even assuming this to be an order for arrest, it is a copy and not an original; and there is no provision which enables the requisitioning state to send over a mere copy of the actual foreign warrant. [MANISTY, J.—Is your point that no properly authenticated warrant of arrest was produced?] No original warrant at all; that which has been produced is simply a minute. Copies of depositions and statements may be sent over, but not a copy of the warrant of arrest. First, I say this document is not a warrant at all; next, if it were, it is a mere certified copy of that document which has not been sent over. This warrant must be of equal validity with an English warrant by which a person may lawfully be taken into custody: (Extradition Treaty of 1874, art. 8.) [The learned counsel urged several other points for the consideration of the court; but they are not set out fully in argument, because the court requested the Attorney-General to confine his remarks to the two points which are set out above. There were, however, two points urged by him, both of which were covered by the unreported case of *Reg. v. Jacobi and Hiller* (a) cited in the

(a) Thursday, March 3, 1881.

(Before POLLOCK, B. and STEPHEN, J.)

REG. v. JACOBI AND HILLER.

*Extradition—Foreign warrant—Crime sufficiently stated—Goods obtained by false pretences sent from one country to another—English law of local venue—Extradition Act 1870 (33 & 34 Vict. c. 52).*

G. and H. were charged with conspiring together in A. in the jurisdiction of the Government of H. to obtain goods by false pretences from H. and Co. in M., in the jurisdiction of the Government of G. They wrote letters from A. (containing the false pretences) to H. and Co., in G., ordering goods to be sent to them in A.; they also orally (with like false pretences) ordered the same goods from the agent of H. and Co., who called on them in A. The goods were sent from M. as ordered. On the receipt of the goods, G. and H. sent them to E., whither soon after they themselves absconded; and were there arrested at the request of the Government of G. The warrant of arrest described the fugitive criminals as "suspected of fraud." On the application for their discharge, it was contended that the warrant of arrest was bad for insufficiency; and that the offence, if any, had been committed in H. and not in G., so that they ought not to be delivered up to the Government of G.

Held, that the foreign warrant of arrest was sufficient, and did not require the offence to be so set out as to strictly satisfy the English definition of the crime committed abroad; but it was enough if it purported to be a judicial document issued by a court of competent authority ordering the arrest of a fugitive criminal.

Held, further, that where the offence is one continuous transaction committed partly in one country and partly in another, the English law of local venue in criminal matters ought not to be applied to the extradition of fugitive criminals.

THIS was an application for two rules *nisi* calling upon the Governor of Holloway Prison to show cause why two writs of *habeas corpus* should not issue, calling upon him to bring up for release the bodies of two persons named Jacobi and Hiller, who had been committed to his custody under an extradition warrant granted by the Chief Magistrate at Bow-street, on the application of the Government of the Emperor of Germany.

The following were the material facts of the case:—

1. Jacobi and Hiller were charged with conspiring

argument: (1) That the document ordering the arrest should not be in general words, but must set out a specific crime committed by the fugitive,

together in Amsterdam to obtain goods by means of false pretences from a firm named Heininger and Co., carrying on business in Mayence, in the province of Hesse.

2. On the 23rd Sept. 1880 the prisoners sent a letter in the name of "O. Jacobi and Co." to the prosecuting firm at Mayence, giving orders for the supply of a suite of furniture for four rooms in a house in Amsterdam, which furniture was to be sent by the prosecutors to Amsterdam.

3. Some time after the receipt of the above letter the agent of Heininger and Co. called at the supposed place of business of Jacobi and Co. in Amsterdam, and there saw both prisoners. Jacobi, in the presence of Hiller, told the agent that he had a large woollen manufactory; that he was shortly going to be married, and wanted the goods for the furnishing of the house where he and his wife were going to reside.

4. The above statements were alleged to be false and fraudulent.

5. The furniture so ordered was sent by Heininger and Co. by the ordinary carrying agents to the address in Amsterdam given by Jacobi.

6. Other furniture was subsequently ordered and supplied to Hiller separately on the guarantee of Jacobi.

7. The furniture so supplied was not paid for.

8. The prisoners, on the receipt of the goods, immediately sent them off to England, and the furniture ordered by Jacobi was found at Vine-street, Minorities, and that ordered by Hiller in a warehouse in Brixton.

9. In Dec. 1879 Jacobi and Hiller absconded to England, and a warrant for their arrest was issued by a court of criminal jurisdiction of the province of Hesse.

10. The said warrant of arrest was in the following terms: "Jacobi, the alleged proprietor of the firm of O. Jacobi and Co., at Amsterdam, who is suspected of fraud, by having with intent to procure for himself some illegal pecuniary profit, and by the pretence of doing business, that is to say, by a promise of payment given in writing falsely and in bad faith, induced the firm of J. Heininger, at Mayence, to forward him on the 11th Dec. 1880 a quantity of furniture of the value of 3838 francs 20 cents., thus causing a pecuniary prejudice to the said firm amounting to the above-stated sum, shall be taken into custody and detained during the investigation of the case. The arrest of the accused during the investigation of the case is ordered because, after having perpetrated the said crime, he has absconded with the goods thus obtained to a foreign country." The warrant for the arrest of Hiller was in the same terms with the exception of the substitution of his name for that of Jacobi.

11. A formal requisition for the extradition of the prisoners was made; and on apprehension the above charge was preferred against them at Bow-street, and on the oral evidence of the agent of the prosecutors a *prima facie* case of obtaining goods by false pretences was made out against them. Sir J. Ingham thereupon committed them to custody for extradition.

12. An application for two rules *nisi* for two writs of *habeas corpus* was accordingly made on behalf of the prisoners. The grounds of the application were: (1) that no offence had been committed in Germany; (2) that the warrant of arrest issued by the German authorities asking for the extradition of the prisoners did not contain a statement showing that the offence for which the prisoners were sought to be extradited was an offence within the extradition treaty between England and Germany.

The Attorney-General (Sir Henry James, Q.C., A. L. Smith with him) showed cause.

A. G. M. McIntyre, in support, contended, as on the argument for the rules, that if any offence had been committed by the prisoners it had been committed in Holland, and not within the jurisdiction of the German Empire, because the false pretence had been made (if at all) both by letters written from, and verbally in, Amsterdam; and the prosecutors had not parted with possession of the goods until they had reached Amsterdam, for up to that time they were under the control of the prosecutors and their agents, the carriers; and,

for which he could be apprehended on a warrant of arrest in England; and that it was not enough for the extradition crime to be proved by oral

secondly, that the warrant ordering the arrest of the prisoners was bad for insufficiency, as it did not state upon its face that the crime charged against the prisoners was the extradition offence of obtaining goods by false pretences, but set out a mere fraud which could be substantiated without proving a single false pretence for which he could be indicted in England, and that such mere fraud was not an extraditable offence within the extradition treaty between England and Germany.

POLLOCK, B.—This is a matter with reference to which, as it affects the liberty of the subject, this court, like any other court, no doubt should be extremely careful in seeing that they thoroughly appreciate the objections which are taken on behalf of the prisoner. Mr. McIntyre has taken those objections both upon his rule and his argument to-day very clearly, and I can myself have no doubt whatever that we are now really in possession of the whole facts and of the law which bears upon this case. Mr. McIntyre's objections are two. The first, although of a somewhat technical character, is still deserving of the greatest attention. That objection is, that the foreign warrant, whereby the police magistrate was put in motion, merely recited that Jacobi and Co., or rather Hiller, who is alleged to be a commercial clerk of Jacobi and Co., "who is suspected of fraud by having, with intent to procure for himself some illegal pecuniary profit, and by the pretence of doing business, that is to say, by a promise of payment given in writing, falsely and in bad faith induced the firm of J. Heininger and Co., at Mayence, to forward him on the 11th Dec. 1880 a quantity of furniture of the value of 3838 francs 20 cents." That is the charge, and the real substantial question is, whether that is, when we have referred to the Extradition Act of 1870, a sufficient statement of the warrant under which a prisoner may be arrested in this country and detained. The 10th section of that Act is as follows: [His Lordship here read the section, which will be found set out in the principal case above.] With regard to the mere actual language used in the warrant, this very question was most carefully considered by this court in the case of *Ex parte Terras* (39 L. T. Rep. N. S. 502; 4 Ex. Div. 63; 48 L. J. 214, Ex.), and in the course of that decision the court pointed out the general principle of law, and the wide distinction which exists between the case of a warrant for the arrest of a person for the purpose of putting him into safe custody in order that he may be brought to trial, and the case of a warrant which acts as a commitment in execution of the body of the prisoner. In that case two authorities were cited: *Rez v. Despard* (7 T. E. 736) and *Rez v. Gourlay* (7 B. & C. 669), in which the distinctions pointed out were referred to, and in part relied upon by this court. But in truth it does not require a reference to those authorities, because what we have to consider here is this: If these two persons had been in England and had been residing in England, that evidence would have to be produced to show that they were guilty, or that there was reason to suppose that they were guilty of the obtaining money or goods by false pretences; there could be, of course, no manner of doubt, that being the very language used in our statute relating to false pretences, whereby the offence is constituted, and that is now the language which is used in the schedule to the Extradition Act 1870. By the language of sect. 18, to the effect that "such evidence is to be produced as would, according to the law of England, justify the commitment for trial of the prisoner if the crime of which he is accused had been committed in England," you get what is the spirit and intention of the Act, which it is quite clear is not to be affected by mere variation of language, and by not merely saying that there was evidence to show that these prisoners were guilty of obtaining money by false pretences, but saying that they were guilty of "fraud," that "fraud" being "with intent to procure for themselves some illegal pecuniary profit, and by the pretence of doing business, that is to say, by a promise of payment given in writing falsely and in bad faith, induced the firm" to part with the goods which were to be forwarded. When you once get that statement, you get in substance what is the offence of obtaining goods under false pretences, because, as has already been said by my brother Stephen,

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evidence before the magistrate; (2) That, on the facts of the case, the offence, if any, was committed within the empire of Germany, and not

if you were to attempt to say that each warrant must absolutely contain the exact language to be used in the terminology of our criminal law abroad and at home, the statute would be almost a dead letter. That seems to me to dispose of the first objection taken by Mr. McIntyre. Then comes the second objection, which no doubt is one of much greater substance, because one must be very careful, in dealing with foreign criminals as well as with those of our own country, not to deal equivocally, or say that they were guilty of a criminal act generally, but to see that the offence is actually brought within the statute or law under which they were prosecuted. Now, what was the offence with which these two men were charged? The question whether the evidence establishes the offence is, I agree with the Attorney-General, for the magistrate before whom the case is brought. In this particular case it was for the magistrate at Bow-street on the hearing of the case to say whether in his opinion the evidence established the commission of the offence by the prisoners in question; provided, of course, that this court sees that he has not in any way exceeded his jurisdiction, or that he has not in any way misinterpreted any description of any crime in a statute under which he supposes he is acting. What is the evidence of the offence in this case? Two prisoners, who upon the evidence apparently reside at Amsterdam, sent letters to the firm of J. Heininger and Co., Mayence, a city in the empire of Germany, and those letters ask that furniture may be delivered at Mayence, not merely generally, but for the purpose of going to Amsterdam; and the goods come ultimately into the custody of the prisoners. I entirely agree with Mr. McIntyre that the evidence does not disclose anything which shows that there was an intention on the part of the prisoners in ordering these goods that they should be delivered to any particular carrier in Mayence, so as to make that agent the consignee of the prisoners. If this question had arisen under the Statute of Frauds, or otherwise, which made it necessary to decide whether, when the goods left the hands of the prosecutor at Mayence, they came into the hands of the prisoners in the empire of Germany, I think it would have been a different matter altogether. But, for the purposes of this case, I find that, in favour of the view presented by Mr. McIntyre, there is a clear intention on the part of the prisoners expressed in their letters that the goods should be placed in the hands of some person; and the only further observation I would make upon that is this: if it stopped there, I should myself look at the English statute which governs such cases, viz., 24 & 25 Vict. c. 96, s. 89, which provides that "whosoever shall by any false pretence cause or procure any chattel to be delivered to any other person for the use or benefit, or on account of the person making such false pretence with intent to defraud, shall be deemed to have obtained such chattel within the meaning of the last preceding section," viz., the obtaining of it under false pretences. If it stopped there I should have been inclined to think it would have been quite sufficient to show, although no evidence had been given of the prisoners' obtaining these chattels, that they had by their false pretences induced the prosecutors at Mayence to part with their possession; but it is unnecessary to decide that here, because we have this further fact, that the prosecutors were directed to deliver possession to some person on behalf of the prisoners; and that they did so, the correspondence and the subsequent acts of the prisoners clearly show. There was one continuous chain of transaction; the letters were written ordering the goods; the goods were delivered at Mayence to the carrier; the receipt by the carrier was adopted by the prisoners at Amsterdam; and they dealt with the goods and sent them to this country under peculiar circumstances to which I need not advert. It seems to me, therefore, that upon all the sound principles the course of dealing of the prisoners was an obtaining of the goods in Mayence under false pretences; and, without going into the question of what might have been the position under our old law of local venue, that seems to me to be sufficient for us to deal with this particular statute. The only one other remaining point which was taken was, that there was no evidence of false pretence. That is a matter which it

within the jurisdiction of the kingdom of the Netherlands.]

The Attorney-General (Sir Henry James, Q.C.)

was the particular office of the magistrate to decide. He did decide upon evidence contained in those letters which clearly show that there was false pretence, and that under those circumstances the offence was committed. It seems to me that this is enough to dispose of the present case which is before us, and to enable us to say that these prisoners ought to be remitted to custody from whence they came.

STEPHEN, J.—I am of the same opinion; and really for the same reasons, but I will state them in different words, simply because the case is one of considerable importance. It seems to me that there are two objections in this case, the one to the warrant, the other as to the place where the crime was committed. With regard to the warrant, it is said that it does not set forth such a crime as is contained in the schedule of extradition offences, and that it does set forth a crime of which a person might be convicted, although there might not be proof against him, or the evidence necessary to make up that crime, for having committed which, or for having been suspected of which, he was delivered up to the foreign country. That objection appears to me to be a fallacy. I think that the warrant and the evidence are two distinct things. I think that the warrant need show nothing more than the fact that it has been issued by some competent authority, and is, in fact, an official document for the arrest of the prisoner. Then I think that the provisions relating to evidence provide the real safeguard against improper extraditions. I think that it is essential to the delivery up of the prisoner that it should appear upon the evidence given before the magistrate that he might have been committed for trial for one or other of the crimes mentioned in the first schedule if he had done in England the act which he is alleged to have done in a foreign country. Every one of the extradition crimes, when you come to look at them, are taken from English law, and everybody who is at all familiar with such subjects must be well aware of the fact that the definitions of crimes given in the law of England are peculiar to English law, and to the law of those countries which like America have derived the greater part of their criminal law from our own. For instance, in some cases, the English definitions are wider, and in other cases the English definitions are narrower, than those which prevail upon the Continent. If it were necessary for the warrant to set forth precisely the crime for which the magistrate is bound to see that there is sufficient evidence to put a man upon his trial, every foreign magistrate who issued a warrant available for the purposes of this Act would have to be acquainted with the law of England. I take it both ways. For instance, the definition of manslaughter, which is one of the crimes for which extradition may be made, according to English law is exceedingly wide. Suppose it should be a fact, as I rather think it is, a foreign magistrate, acting according to the French or the German Penal Code, were to issue a warrant for a man's apprehension for having in some way assaulted or wounded another, which would have been followed by death; and suppose that assaulting and wounding was not an extradition crime, if it appeared in evidence before the magistrate that death had followed upon such assaulting or wounding, then, although the man might be tried, and probably would be tried for something very much less than causing death, viz., for causing the injury which led to death, I think that the magistrate, if he saw his way to commit him for manslaughter, or would have seen his way to committing him for manslaughter if the act had been done in England, would have to issue his warrant for his extradition. There are many other things, and I might give illustrations taken from nearly every offence mentioned in the schedule. Here the prisoner is accused of a fraud. Upon the face of the warrant the prisoner is accused of a fraud, and of obtaining money by written promises which were given without apparently the intention of being fulfilled; in fact, he is accused of an offence very like what we call obtaining credit by false pretences. That is what is said on the face of the warrant. When you bring him before the magistrate, it appears that he did acts for which the magistrate thinks he ought to be committed for trial for obtaining goods

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(*A. L. Smith* with him).—As to the first point of nationality, I will assume that the prisoner is a naturalised subject of the United States. Every person residing in a country is amenable to the laws of that country, whether he be a native or a stranger; there is no immunity from such liability, representatives of a foreign sovereign alone excepted. The criminal law of a country can be enforced equally against strangers residing in it as against native-born subjects; so, too, the power of extraditing equally applies whether the offender is or is not a native of the country where found. In the first article of the treaty between this country and the Netherlands, the wide and general words "any persons" are used, and cover a stranger subject to the criminal law of either country. Mr. Besley says article 3 of the same treaty has restrictive words qualifying the scope of the first article. Now the term "subject" is not used in the first article, though it is in the third. The prisoner, to avail himself of the benefit of the provisions of article 3, must show that he is either a subject of this country, or a person assimilated to a subject; there is not the slightest ground for saying that the Government of the Netherlands shall not ask for the extradition of an American subject. But more than that, *prima facie* this man must be treated as a Netherlander. He cannot say that he was free from the jurisdiction of the criminal law of that country because of his British or American nationality; the first he never possessed, and the latter cannot avail him. As to the second point, this is more technical, and possibly there is more to be said for it; but it is not at all a fatal objection. Mr. Besley relied upon article 8 of the treaty, and said these proceedings were bad under it. Even if the warrant were defective (which I do not admit), it would be immaterial if the proceedings before the magistrate were regular and in accordance with the terms of the Extradition Act 1870 (33 & 34 Vict.

by false pretences, which is an extradition crime. That being so, it seems to me that, although the warrant is for a different offence, his committal within the Act is proper. Then comes the further question as to the place where the act was committed. What the man actually did at Mayence was this: He wrote letters which we may, upon the evidence, very fairly consider was making a false pretence. The letters speak of the place where the goods are to be delivered, viz., Mayence; he writes letters asking the person with whom he is dealing there to send this property to Amsterdam, and the property is actually parted with by the people at Mayence; it is sent by the railway to Amsterdam, and there it is taken by the prisoner and sent to London. I do not think we ought to import the whole of the English law of venue into these Extradition Acts, or that we ought to consider every independent country as forming so many distinct counties, each with its own grand jury, which would be necessary in order to make the English law of venue intelligible. I think questions might arise upon which at present I express no opinion; I indicated some such, for instance, as a duel fought across a frontier. I will settle any question which may arise upon that when the case happens. For the present purpose I think it is enough to say that the crime of obtaining goods by false pretences appears to me, for the reasons given at length by my brother Pollock, to have been committed at Mayence on this occasion, and therefore I agree in the opinion that the prisoners ought to be remitted to custody.

*Rules discharged.*

Solicitor for the applicants, *D. E. Chandler.*

Solicitor for the Crown, *Solicitor to the Treasury.*

c. 52), for mere non-compliance with the treaty obligations would not invalidate them:

*Reg. v. Counhays*, 28 L. T. Rep. N. S. 761; L. Rep. 8 Q. B. 410.

It has been sought in this case to limit the meaning of the word "warrant," under the Extradition Act 1870, to what would satisfy the technical definition of an English warrant; that is to say, a foreign warrant must be identical in form with an English one. This, however, cannot be maintained when the interpretation of a "foreign warrant" in sect. 26 of the Act is considered. Now, this warrant is a decree of a court authorising the arrest of Ganz, and so within the statutory definition of a foreign warrant. It is no doubt the copy of a decree of a competent court ordering his arrest, but for all practical purposes it is an original document, and no copy. It has received the official seal, and has been sufficiently authenticated under sect. 10 of the Act of 1870, and also under sect. 15 by having been signed by the proper officers of the court issuing it. This document, then, is a foreign warrant within the definition of the term. The prisoner has shown no grounds for setting these proceedings aside and entitling him to be discharged.

*Besley in reply.*

POLLOCK, B.—In this case the prisoner Ganz has been brought before this court upon *habeas corpus*, and upon the argument before us Ganz's counsel has certainly most thoroughly gone into the question, and presented to us all the points that could be urged why he is entitled to his discharge. With regard to several points that were taken, which were answered from the bench in the course of the argument, and in respect of which we did not call upon the Attorney-General for any reply, we think it unnecessary to make any further observation. Two points, however, which were most prominent in the argument of Mr. Besley certainly deserve the consideration of this court, because they involve questions of general principles affecting the liberty of the subject. The first of these points is this: It is said that Nathan Ganz, the person who is now in custody, is not subject to the extradition law as existing between this country and the Netherlands, by reason of his being not a domiciled subject of that country. That was put before us in two ways. It was put before us in the first instance by evidence which had been already given before the magistrate of his having been a naturalised subject of the United States. That evidence is now before us. It has, however, also been supplemented by an affidavit which for this purpose we admit, evidently by Ganz himself, stating that not merely has he been naturalised in the United States, but that also there is no reason to believe he was born in the Netherlands. On the contrary, he says he has reason to believe he was born in a city in Hungary. Therefore it is said that this extradition treaty between this country and the Netherlands cannot be made to apply in such way as to give him up to the Government of the Netherlands. Now this is a matter which depends not merely upon the English statute, but it depends also on the treaty which exists between this country and the Government of the Netherlands respecting this matter. Before I allude to that treaty, I will merely say that the leading principle which

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underlies all questions of nationality as applied to crime committed within any particular country is this: Whatever rights, civil or otherwise, a man may have which may be affected by his status and his domicile, it is, and must be, perfectly clear by the law of every nation that each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction, otherwise the criminal law could not be administered according to any civilised method. That has been the law from all time; it is recognised by the earliest writers upon civil law; it has been adopted again and again, and alluded to both in treaties and in dealings between this country and other countries of Europe, and is to be found stated in all the law books in the cases in which this matter has been discussed. That being so, a treaty is made, and in some sense subject to that general rule, we must construe this statute. Now, our attention was called by the Attorney-General to the very general form in which the first and third articles of the treaty are framed. Article 1 is this [his Lordship here read the article]. Here it is according to all rules of law and diplomacy that you would expect to find any limitations which limited the status of the persons who are to be given up. Here not only are the most general words "any persons" used, but the article goes on and refers to their being persons who are accused or convicted of crime within the jurisdiction of the requiring party; clearly showing that the definition of a person to be delivered up is any person who commits a crime which is specified in the later article within the jurisdiction of the requiring party. Then, when we get to article 3, there is an express definition of what is meant by the word "subject," which is made to include not only "naturalised citizens of the country, but also such foreigners as, according to the laws of either of the contracting parties, are assimilated to subjects as well as such foreigners who, being domiciled in the country and having married a citizen thereof, have one or more children by that marriage born there." The first part tends to show that the person who is assimilated to a subject must be so in respect to the subject-matter with which it is dealing in the criminal law. It is clear that a person who commits a crime within a particular territory, and is for all purposes connected with that crime, is assimilated to a subject. The only other article to which it is necessary to refer, which was much dwelt on by Mr. Besley, viz., article 11, and the only single word which gives any assistance to his argument, is this: After providing as to how a person "shall be discharged as well in the United Kingdom as in the Netherlands, if within fourteen days a requisition shall not have been made," it says, "for his surrender by the diplomatic agent of his country." I do not think there is any great stretching the meaning of the word "his" to say that "his country" means that country which he is in for the purposes of the criminal law administered there, and also for the purposes of this treaty. The answer is this: If you ask the question, what is the country of this criminal? it is the country in which he committed the crime. I do not myself feel in any way pressed by that, nor should I have thought it necessary to call on the Attorney-General for any answer to this objection except, no doubt, it is a matter of general importance for us as well

as for other countries that this matter should be thoroughly understood. Now comes the next point, which is a more technical one, but still not less important when we are dealing with the liberty of the subject, and that depends, not upon the treaty, but upon the true construction of the domestic statute under which we are acting while the prisoner is here in England, and by which all our English procedure must be governed. The objection raised was this, and it was an objection certainly at first sight entitled to some weight. It was said by Mr. Besley in this case there was no proper warrant of arrest produced before the magistrate who was called upon to detain and imprison for the time Gauz. That is a matter of great importance, essential to a person upon all ordinary principles of justice. A person when arrested in a foreign country would be entitled to know in respect of what crime or offence he is so arrested; therefore it is a careful provision made in the statute for the protection of persons charged. I cannot, however, help thinking that there has been a little confusion of thought on this subject, in supposing that any effect was ever intended to be given by this statute to a warrant drawn up in a foreign country. I can only say for myself, and I think it will be echoed by everybody who has thought of how the laws are passed in this country, and the jealousy with which the interference of any foreign power in this country would be treated, it never could have been intended or contemplated that any of the Extradition Acts should give power or currency to any foreign warrant within this kingdom. But what was intended was this; to establish machinery at the cost of the liberty of the subject which we were interested in with reference to our own subjects in other countries, as well as the subjects of other countries, when they were here, whereby, if it could be shown to any properly constituted tribunal of this country that a person had committed an offence in another country, and then had come here to escape the ends of justice, evidence in such case should be given before a magistrate here, who upon that evidence should commit the prisoner until there was an opportunity of extraditing him; that is, handing him over to the proper authorities of his country. Looking at the statute in that light we need now only see what preliminary precautions the Legislature took to set in motion the jurisdiction of the magistrate in this country, because there are many cases in this country dealing with our own procedure in which there may be some irregularity in a warrant whereby a man is arrested; but if the man once appear, the magistrate has to deal with the matter upon the evidence that is given before him. It, however, seems to me that everything has been done in the most strict form, and that there is no point of time at which the prisoner was not being dealt with under the most rigid carrying out of the provisions of this statute. This point altogether depends upon the meaning of the word "warrant" in sect. 10 of the Act of 1870. That section says, "in the case of a fugitive criminally accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is obtained;" then it proceeds to say that the evidence is necessary for the magistrate to act. What then is this "foreign warrant?" If

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the interpretation clause is looked at, it is found that "the term warrant in the case of any state includes any judicial document authorising the arrest of a person accused or convicted of a crime." Therefore it is upon the production of, not a warrant of a foreign power according to the technical rules of English law, but of any judicial document authorising the arrest of a person accused of a crime. We have now before us this document itself in the shape of a copy of a decree of a foreign court. It begins by reciting what had been done by an inferior tribunal which had come to the conclusion that there had not been sufficient evidence to establish any charge against Ganz. Having reviewed the different allegations with great minuteness (even to the reviewing and putting down the names of the persons who are alleged to have been defrauded by Ganz, and the amounts of which they are said to have been defrauded) it goes on to say, "Taking into consideration that these acts are punishable by article 405 of the Penal Code, and having seen the articles 88 and 89 of the Law Book of Demands for punishment—that the before-mentioned report of the Court of Arrondissement, at Rotterdam, will not be accepted—authorised proceedings with order for arrest against Bernhardt Wyprecht (calling himself so), last living at Rotterdam, thence absconded. Done at the Hague on the 21st Nov. 1881, by the following gentlemen." Now come the signatures, including that of the president, and of others described as councillors of the court, and of the actuary. So much for the document itself. It is impossible to say that is not a judicial document authorising the arrest of this person. Then comes the further question. This being in existence at the Hague, what evidence have we got of it here in England? It is this: we have a copy of it indorsed as follows: "Delivered on demand of the O. M., the actuary of the courts of justice at the Hague;" this is signed again by certain authorities. Lastly, come the words, "The Hague, Dec. 2nd, 1881. For the Minister of Justice, the Secretary-General, (signed) Olamm." It is sealed with the seal of the Ministry of Justice. Is that copy so identified and attested that it can be received under this statute? That depends upon sect. 15. Now it is common knowledge in dealing with a matter of this kind that the prosecution would not produce before the police magistrate in London all the original documents of foreign countries where they were the judgments of courts, and of course some provision would be made for the production and use of copies, accordingly in sect. 15 the use of copies is provided for: [his Lordship here read the last clause of sect. 15.] In foreign warrants by the interpretation clause are included foreign judicial documents authorising the arrest of a person accused, authenticated in manner provided for the time being by law, or authenticated as follows: "If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state, where the same was issued." Then a little later on there is a more general provision. In every case the warrants—including the judicial documents—are authenticated by the oath of some witness, or by being sealed with the official seal of the Minister of Justice or some other minister of state. Now this particular document is sealed with the seal of the minister of state for the Department of Justice. It appears to me,

therefore, that in this case all the provisions of the statute have been clearly complied with. In coming to this conclusion I do not think we have in the least degree extended either technically or in spirit the provisions of this Act, which are most carefully set round all persons who are charged under it with every precaution which is requisite and necessary for the maintenance of the liberty of the subject.

MANISTY, J.—I am of the same opinion, but I shall add a few observations of my own. It seems to me, looking at the Extradition Act of 1870, and the treaty of 1874, that there are two essential requisites before the fugitive criminal can be extradited. The first essential requisite is a requisition for extradition by the diplomatic representative of the foreign state. That is necessary for giving effect to all the subsequent proceedings; but that requisition may follow instead of precede the steps taken to arrest the fugitive criminal. Another is, that the magistrate to whom the matter is intrusted, or before whom the matter is brought, should be satisfied by evidence that a crime has been committed, and that it is one specified in the treaty, and that the evidence is such as will convict the criminal in this country. Now, no doubt in the treaty it is stated that the requisition for the extradition must be accompanied by a warrant of arrest (that is, the requisition issued by the competent authority of the state requiring the extradition). But if an information is laid before any justice of the peace or a police magistrate that the accused is a fugitive criminal and has been convicted of a crime within the power of such magistrate, the latter may issue his warrant and arrest the criminal before any requisition is produced. That, I think, throws a good deal of light on the subject, and shows that, with reference to the decision which the court arrived at when they held as they did in a case to which I will advert presently, the Secretary of State may waive certain conditions, because, by the 6th section of the Act of 1870, "where this Act applies in the case of a foreign state" (say, in the Netherlands) "every fugitive criminal of that state who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act." What is the manner provided by this Act? The 7th section enacts that the requisition for the surrender of a fugitive criminal "shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of a fugitive criminal." That is a case where a requisition has been received and acted upon by the Secretary of State of this country. Now comes a most important section, viz., sect. 8: "A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom may be issued by a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in



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England." Then follows an important provision that a warrant may be issued "by a police magistrate or any justice of the peace in any part of the United Kingdom" not upon the receipt of an order from the Secretary of State, but "on such information and complaint and such evidence, or after such proceedings, as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction," without any intimation from the Secretary of State, or any requisition to the Secretary of State. It then provides certain guards to protect the criminal—"any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue together with the evidence and information or complaint," and so on, "to a Secretary of State, who may, if he think fit, order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged;" and further, "a fugitive criminal when apprehended on a warrant issued without the order of a Secretary of State shall be brought before some person having power to issue a warrant under this section, who shall by warrant order him to be brought before a police magistrate. A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as with reference to the circumstances of the case he may fix, receives from a Secretary of State an order signifying that a requisition has been made for the surrender of such criminal." It will be found that he is to be discharged unless within fourteen days a requisition is received. In my opinion, therefore, a requisition is an essential element in the proceedings under the Extradition Act of 1870. That Act does not say that the requisition must precede the issuing of a warrant by a magistrate, but it must ultimately come, otherwise there is no power to deliver him up. That, I think, may well account for the decision in the case of *Rey. v. Counhays* (28 L. T. Rep. N. S. 761; L. Rep. 8 Q. B. 410), because it was objected there that some of the conditions had not been complied with; but Blackburn, J. says: "As to the objection that the terms of the treaty have not been complied with, and the order of the Secretary of State ought, therefore, not to have been made, I do not think that affects the magistrate's jurisdiction; if the conditions of the treaty have not been complied with the Secretary of State might have refused to order a magistrate to proceed, but these conditions are not in the Act of Parliament; and the Secretary of State having made an order, and the magistrate having acted under it, all we have to do is to look at the Act to see whether he had jurisdiction under it. We are, I believe, also all agreed that sect. 14 makes depositions properly authenticated evidence that may be taken in the absence of the person accused, and for good reason, because, although the requisition must sooner or later come by the 11th article of the treaty, the fugitive criminal is to be discharged as well in the United Kingdom as in the Netherlands if within fourteen days a requisition shall not have been made for his surrender;" that is, after the arrest. So that both in the treaty and in the Act of

Parliament that is the course of procedure. But the fugitive, though he may be arrested without the interference of the Secretary of State, or by the interference of the Secretary of State after a requisition has been received, may be arrested before that, although he must be discharged if within fourteen days a requisition is not received by the Secretary of State. The Act of Parliament and the treaty are at one on the subject. If the crime which has been committed comes within the treaty, and the evidence satisfies the magistrate that it is a crime which would have been punishable in England, he may take these proceedings; but the delivering up of the criminal depends upon whether or not a requisition is made by the diplomatic representative of the foreign state. Though I think all the rest is form, yet I am clearly of opinion that the document here objected to comes within the terms of the meaning of a warrant in the 21st section of the Extradition Act. It was an order of the Court of Justice at the Hague, and bore the official seal of the court. It has been properly attested, and is an original document and no copy at all. We are of opinion that all proper forms have been complied with.

#### *Rule discharged.*

Solicitors for the applicant, *Greenfield and Abbott.*

Solicitor for the Crown, *Solicitor to the Treasury.*

*Wednesday, March 22, 1882.*

(Before GROVE, J. and HUDDLESTON, B.)

RUMBALL (app.) v. SCHMIDT (resp.). (a)

*Projecting building—Continuing offence—Limitation of summary remedy—38 & 39 Vict. c. 55 ss. 156, 252.*

*Within an urban district, the appellant had, without the consent of the sanitary authority, brought forward a building, forming part of a street, beyond the front wall of the house or building on either side thereof, and he was afterwards served with a written notice by the authority to the effect that he had committed a continuing offence under sect. 156 of the Public Health Act 1875. Upon an information laid more than six months after the date of the notice, the appellant was convicted of an offence under this section and fined.*

*Held, upon a case stated, that the conviction was right.*

*Marshall v. Smith* (28 L. T. Rep. N. S. 538; L. Rep. 8 O. P. 416) distinguished.

THIS was a case stated by justices under the Summary Jurisdiction Act 1879.

On the 21st Nov. 1881 an information was laid before justices by the respondent, as the building surveyor of the local board of Eastbourne (being the urban sanitary authority of the district), against the appellant for an offence against sect. 156 of the Public Health Act 1875 in building an addition to and bringing forward a house belonging to the appellant, and forming part of a street in Eastbourne, beyond the front of the houses on either side the same house, and in continuing the said offence after written notice to him in that behalf from the urban sanitary authority, for the space of thirty-seven days from the 14th Oct. to 19th

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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Nov. both inclusive. On the hearing of the information, the justices convicted the appellant, and imposed a penalty upon him of one shilling a day for the thirty-seven days with costs. The material facts stated in the case were as follows:—

The appellant in April 1881, being the owner of the house in question, erected an addition upon the forecourt in front thereof, and brought out such addition considerably beyond the fronts of the houses on either side. This was done without any consent on the part of the urban sanitary authority. On the 2nd May 1881 the appellant was duly served with notice from the urban authority that he had committed an offence against sect. 156 of the Public Health Act 1875, and that he would be liable to a penalty not exceeding forty shillings for every day during which the said offence was continued after receipt of the notice. Between the 2nd May and the 14th Oct 1881 the appellant was three times summoned by the urban authority before justices, and convicted for continuing the offence above mentioned. Upon two of those occasions a fine was imposed which he paid, and on the third he undertook to remove the addition complained of; but he had failed to do so up to the time when the present information was laid. At the hearing of the information on the 5th Dec. 1881, it was contended for the appellant (*inter alia*) that the information was not laid within the time limited by the statute, and that the alleged offence was completed upon the building of the addition complained of, and that the charge of continuing the offence was unsupported by evidence. If the court were of opinion that the conviction upon this information was right, the conviction was to stand; but if otherwise the information was to be dismissed.

By the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 156:

It shall not be lawful in any urban district, without the written consent of the urban authority, to bring forward any house or building, forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front of the house or building on either side of the same. Any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice in this behalf from the urban authority.

By sect. 252:

Any complaint or information, made or laid in pursuance of this Act, shall be made or laid within six months from the time when the matter of such complaint or information respectively arose.

*Lee Roberts* and *Pardoe* argued for the appellant, and relied upon the case of *Marshall v. Smith* (28 L. T. Rep. N.S. 538; L. Rep. 8 C. P. 416), in which *Keating* and *Honyman*, JJ. held that the appellant could not be convicted of a continuing offence under bye-laws in pursuance of the Public Health Act 1848, merely because he omitted to alter a party wall, which he had constructed half the width required by one of the bye-laws. There the 12th bye-law required that all party walls should be nine inches at least in thickness, and the 42nd bye-law was as follows: "In case any offence under any of the foregoing bye-laws shall continue, the persons offending shall be liable to a further penalty of not exceeding forty shillings for each day during which such offence shall continue after written notice of the offence has been given by the local board to the offender." There, too, the cir-

cumstances as to the first conviction, and the period before the date of the information, were similar to this case:

*Coggins v. Bennett*, 2 C. P. Div. 568.

*Gore* for the respondent.—The case of *Marshall v. Smith* is distinguishable from the present, not, perhaps, so much in the facts, as in the enactments under which the conviction was obtained. It was held there that the 42nd bye-law might have applied to some other preceding bye-law besides the 12th; but here, in the 156th section of the Public Health Act 1875, the penalty is imposed only upon the continuance of a building constructed in breach of the section, and if not to such facts as these here stated, the summary remedy could have no effect at all.

*Pardoe* in reply.

*Grove*, J.—I am very unwilling to differ from a court of high authority under any circumstances, even if I am not bound to follow its decision, and, in this case of *Marshall v. Smith* (28 L. T. Rep. N.S. 538; L. Rep. 8 C. P. 416) the judges who took part in the hearing merit the utmost consideration, and I should not venture to express a different opinion from that which they entertained, were it not that it seems to me doubtful from the reports how far their decision applies to the facts of the present case. Looking carefully at their judgments, and at the 156th section of the Public Health Act 1875, I cannot but think those two judges would have coincided with our view of this case. The language, no doubt, in the bye-law which was before them is somewhat similar to that of this section, but the very fact that it was a bye-law is an important difference; and, moreover, the circumstances of the case were entirely different. In the first place, it should be remembered that the bye-law, there alleged to have been infringed, applied to and followed several other bye-laws which created offences; the words were: "In case any offence under any of the foregoing bye-laws shall continue, the person offending shall be liable to a further penalty of not exceeding forty shillings for each day during which such offence shall continue, after written notice of the offence has been given by the local board to the offender." This bye-law might well have had an application to some of the offences created by the previous bye-laws, but *Keating* and *Honyman*, JJ. held that it was not a continuing offence within its enactment to allow a party wall, which had been completed, to remain standing. One of the previous offences was created by these words: "All party walls shall be nine inches at least in thickness. Any person offending against this bye-law shall be liable to a penalty not exceeding forty shillings." The appellant had been before convicted for building a party wall of only 4½ inches in thickness, and the appeal was brought against a second conviction for that the said offence still continued. Now full effect might have been and was given to this bye-law against continuing offences without applying it to the particular party wall; but here the penalty for a continuing offence is part of the section creating the offence of building beyond the front of adjoining houses, and if we do not apply it to the facts before us we shall render the enactment of no effect. The section says, "it shall not be lawful in any urban district, without the written consent of the urban authority, to bring forward any house or building on either side thereof beyond the front



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wall of the house or building on either side thereof;" but the subsequent part of the section which creates the offence imposes a penalty only "for every day during which the offence is continued, after written notice in this behalf from the urban authority." It follows, from a careful consideration of this section, that a penalty is imposed only for the continuance of this offence during a day after the authority has given written notice. If therefore the appellant's contention is right, and this is an offence which cannot be continued by the building being left standing, there can be no penalty at all; and if the forward building has been completed before the authority has discovered it and given the requisite notice, the builder would escape all responsibility to this summary remedy, provided that he made no further addition. In *Marshall v. Smith* there was a power under the bye-laws to pull down forbidden buildings, but no such power exists here, and, although there may be a cumbersome remedy by indictment for the misdemeanour of disobeying a statute, it seems to be clear that the Legislature entertained the object of imposing a summary remedy for some useful purpose. It can scarcely be said that there is no way of incurring that penalty but by actively proceeding with the building after notice. The fact that the penalty is imposed by the same section which declares the offence shows the meaning of the section to be that the urban authority may, in the exercise of its discretion, enforce the demolition of a building, constructed in defiance of the section, by a daily fine so long as the building is left standing. I cannot, of course, give the reason why the actual building of any wall beyond the neighbouring line has not been subjected to a penalty; it is enough that the more effectual mode of compelling the demolition of such a building exists in the penalty for its continuance. The words of the section are wide enough to cover this interpretation, and it is strongly supported by the absence of any other power in the sanitary authority to abate the consequences of a disobedience of the section. The judgments in *Marshall v. Smith* must be read *secundum subjectam materiam*; there was not only another mode of enforcing obedience to the enacting part of the bye-law by pulling down the building, but it was possible to give effect to the bye-law creating continuing offences without applying it to the offence there committed. Keating, J. is reported to have expressly referred to both these points, and with regard to the former he said: "I was at first struck by the argument that, unless no power were given to continue the penalty until the wall was pulled down, the Acts might be defeated; and if it had been impossible to carry out the intention of the Acts in any other way, I might perhaps have yielded to the force of that argument, and have held that continuing penalties might be enforced; but it appears, from the latter part of sect. 34 of the Act of 1848, that the board has power to pull down walls improperly built. I think that this, and not a continuing penalty, is the appropriate remedy to meet the evil." I think there are substantial distinctions, both in law and in fact, between the present case and that of *Marshall v. Smith*, and I think that some, if not all, the reasons given for that judgment do not apply here. The only other point is as to the statutory limit of time for commencing these proceedings. About that I am quite clear; there can be no limitation to a continuing offence. The

case of *Coggins v. Bennett* (2 C. P. Div. 568) has no application whatever. I think the respondent is entitled to judgment.

HUDDESTON, B.—I am of the same opinion. I think that, as this section imposes a penalty for a criminal offence, the appellant is entitled to the benefit of any doubt which may arise on the construction of it. It is said that by sect. 252 the information should be laid within six months from the time when the matter of the information arose, that the offence was the bringing forward of the appellant's house beyond the line of the street, that the offence was committed when the addition was completed, and that the matter of the information arose then. It may be that the offence, specified in the first clause of sect. 156, was committed as soon as it became apparent that the appellant was bringing forward his house beyond the line of the street. But in substance the offence for which he was liable to the penalty was the continuing the addition after written notice from the urban authority. It is possible that, for the offence specified in the first clause, the appellant would have been liable to an indictment; but the following clause provides that the penalty shall not be for building the addition, but for continuing it after notice. I think the meaning of the section is clear. It was thought necessary to secure uniformity with respect to the line of buildings in streets; it is therefore enacted that houses shall not be brought forward without that consent, and if the urban authority give him the written notice specified in the section, he is liable to a penalty not exceeding forty shillings for every day during which the offence against the uniformity of the street is continued. I do not feel myself fettered by the decision in *Marshall v. Smith*, which differs considerably from the present. The decision was upon a bye-law, not upon an Act of Parliament. It is obvious that the judgment of the court was influenced by the fact that there were a number of bye-laws, each of them specifying different offences, and a general subsequent bye-law covering those of the preceding ones to which it applied. Keating, J. thought that the offence under the bye-law, with respect to party walls, was not a continuing one, and, therefore, that the general bye-law did not apply to it. The corporation there had power to make bye-laws enabling them to pull down the party wall, so that there remained a remedy to them beyond the penalty. Here there is no such power; the penalty is imposed, not in respect of the offence, but in respect of the continuing it, and the penalty clause is part of the same section which declares the offence. I should feel but little difficulty in the decision of this case had it not been for *Marshall v. Smith*; but, for the reason I have given, I think that case distinguishable.

*Judgment for respondent.*

Solicitors for appellants, *Layton and Jaques*.

Solicitors for respondent, *Coles and Carr*, Eastbourne.

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REG. v. EATON AND OTHERS; Re JOHN SHARPE; Re MARY MARRIOTT.

[Q.B. Div.]

Dec. 9, 16, and 20, 1881.

(Before FIELD and CAVE, JJ.)

REG. v. EATON AND OTHERS (Justices, &amp;c.); Re JOHN SHARPE; Re MARY MARRIOTT. (a)

*Elementary education—Justices—Attendance order—Bye-laws—Enforcement of, where parent or employer resides in union extending into several counties—Jurisdiction of justices in such case—Elementary Education Act 1876 (39 & 40 Vict. c. 79), ss. 12, 34—Poor Law Amendment Act 1867 (30 & 31 Vict. c. 106), s. 27.*

*Proceedings before justices, under sect. 12 of the Elementary Education Act 1876 (39 & 40 Vict. c. 79), against parents or employers residing in a union extending into several counties, for non-compliance with a school attendance order or for any breach of the school bye-laws under the Elementary Education Acts, may by virtue of sect. 34 of the Elementary Education Act 1876, incorporating "all enactments relating to guardians and their officers," &c., and of sect. 27 of the Poor Law Amendment Act 1867 (30 & 31 Vict. c. 106) be taken against such parents or employers before the justices of either of such several counties.*

THIS was an application for a rule for a *mandamus* ordering the defendants, justices of the peace for the county of Northampton, to hear and adjudicate upon certain complaints on the part of a school attendance committee against certain persons for breaches of the bye-laws of the school board, &c.; and the facts of the case, as gathered from the affidavits of the clerk to the guardians and to the school attendance committee of the Stamford Union filed on the application for the rule on behalf of the said committee, appeared to be as follows:—

The Stamford Poor Law Union extends into four counties, viz., Lincolnshire, Rutland, Northamptonshire, and Huntingdonshire, and the work-house of the union is in the county of Northampton.

Under the Elementary Education Act 1876 (39 & 40 Vict. c. 79) a school attendance committee, selected from the guardians of the Stamford Union, was duly appointed at a meeting of the guardians on the 18th April 1881, and under sect. 74 of the Elementary Education Act 1870, as amended by the last-mentioned Act of 1876, and the Elementary Education Act 1880 (43 & 44 Vict. c. 23), the said committee made and passed certain bye-laws for the several parishes within their jurisdiction and the said union, which were duly sanctioned by Her Majesty's Privy Council.

At a meeting of the school attendance committee, on the 29th June 1881, William B. Arnold, a duly appointed school attendance officer, was directed to institute and carry on proceedings against one John Sharpe, of Belmistorpe, in the parish of Ryhall, in the county of Rutland, within the Stamford Union, for a breach of the said bye-laws in not causing his son George, under the age of thirteen years, and not being within either of the exemptions mentioned in No. 5 of the said bye-laws, to attend a school; and also against one Mary Marriott, of Borderville, in Stamford aforesaid, and occupying a farm in the said parish of Ryhall in the aforesaid union, for employing a child under the age of fourteen years at Ryhall

aforesaid, contrary to the provisions of the Elementary Education Act 1876.

The defendants, three of Her Majesty's justices of the peace for the county of Northampton, holding petty sessions at the Town Hall, in Stamford, were accordingly, on the 29th July 1881, applied to by the clerk to the guardians and the school attendance committee, on behalf of the said committee and the said W. B. Arnold, their officer, for summonses against the said John Sharpe and Mary Marriott respectively, for their respective offences as aforesaid, but the said justices refused to grant such summonses, or either of them, on the ground that they had no jurisdiction in cases arising under the Elementary Education Act 1876 elsewhere than in the county of Northampton, and that sect. 27 of the 30 & 31 Vict. c. 106, did not apply to such cases.

Thereupon a rule *nisi* was obtained in last Michaelmas Sittings calling upon the said justices (the defendants) to show cause why a writ of *mandamus* should not issue, directed to and commanding them to proceed to hear and determine the matter of the above-mentioned application on behalf of the said school attendance committee, for a summons against the said John Sharpe for a breach of the said bye-laws, but upon its subsequently coming on for argument, the court declined to grant the rule for a *mandamus* to the justices, but ordered that, in lieu of such rule, the defendants, the said three justices and the said John Sharpe, should show cause peremptorily on Wednesday, Dec. 14, why the said justices should not proceed to hear and determine the matter of the said application on behalf of the said school attendance committee for a summons against the said John Sharpe for a breach of the said bye-laws as above mentioned.

A similar application was made with the like result in the case of the charge against the said Mary Marriott.

The following are the material portions of the Acts of Parliament bearing upon the case, and referred to in the judgment of the court:

The Elementary Education Act 1876 (39 & 40 Vict. c. 79). By sect. 12 it is enacted that

Where an attendance order is not complied with, without any reasonable excuse within the meaning of this Act, a court of summary jurisdiction, on complaint made by the local authority may, if it think fit, order as follows: (1) In the first case of non-compliance, if the parent does not appear, or appears and fails to satisfy the court that he has used all reasonable efforts to enforce compliance with the order, the court may impose a penalty not exceeding with the costs the sum of 5s. . . .

Sect. 34:

In a union the clerk of the guardians shall be the clerk of the school attendance committee for the purposes of this Act. All enactments relating to guardians and their officers and expenses, and to relief given by guardians shall, subject to the express provisions of this Act, apply as if the guardians, including the school attendance committee appointed by them, and their officers acting under this Act, and expenses incurred and money paid for school fees and relief given under this Act, were expressly acting, incurred, and paid and given as relief under the Acts relating to the relief of the poor, and the Local Government Board may make rules, orders, and regulations accordingly. Any expenses incurred by officers of guardians in carrying into effect sect. 20 of the Elementary Education Act 1873, when paid by such guardians, may be charged by them to the parish in respect of which such expenses are incurred.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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The Poor Law Amendment Act 1867 (30 & 31 Vict. c. 106). Sect. 27:

Where a union extends into several distinct jurisdictions, every matter, act, charge, or complaint, by which the guardians thereof are affected, or in which they have any interest, shall, for the purpose of jurisdiction, be deemed to arise or exist equally throughout the union.

The rule *nisi*, as modified by the order of the court as above mentioned, under sect. 5 of Jervis's Act (11 & 12 Vict. c. 44)(a), now came on for argument.

The justices did not appear by counsel to show cause, but they filed an affidavit in which they stated that they refused to issue the summonses applied for on behalf of the school attendance committee, on the ground that they had no jurisdiction in cases under the Elementary Education Act 1876 except in cases arising in the county of Northampton, having been advised and believing that sect. 34 of the last-mentioned Act, being silent as to legal proceedings, did not apply to such cases; that there were certain clauses in the Elementary Education Act 1876 relating to legal proceedings, but there was no clause in the said Act, nor, as they had been advised and believed, in any other Act of Parliament, giving them jurisdiction in cases under the Elementary Education Act arising in any other county than the county of Northampton; that, having been advised and believing that every penalty imposed by them under the Elementary Education Act might be recovered in a summary manner under the Summary Jurisdiction Acts, and that the imposition of such penalty might, in case of default in payment, subject the person upon whom such penalty was imposed to imprisonment, and believing that they had no jurisdiction except in cases arising in the county of Northampton, they, the said justices, did not feel justified in granting the said summonses, seeing that the proceedings under the same might possibly be followed by imprisonment of the persons against whom the summonses were applied for.

W. Y. Clare now appeared for the applicants, the school attendance committee, and his arguments in support of the rule sufficiently appear in the judgment.

*Our. adv. vult.*

Dec. 20.—The following judgment of the court (Field and Cave, JJ.) was now delivered by

FIELD, J.—A rule *nisi* was granted by this court calling upon the defendants, three of the justices of the peace for the county of Northampton, to show cause why they should not hear and determine an application made to them on behalf of the school attendance committee of the Stamford

(a) Sect. 5 of Jervis's Act (11 & 12 Vict. c. 44) is as follows: "In all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench upon an affidavit of the facts for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and if after due service of such rule good cause shall not be shown against the said court, may make the same absolute with or without costs as to them shall seem meet, and the justice or justices upon being served with such rule absolute shall obey the same, and shall do the act required.

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Union, for a summons against one John Sharpe; and also, on the motion of the same applicants, for a like summons against Mary Marriott, for an offence, in each case, under the Elementary Education Act 1876, in having committed a breach of the bye-laws made and passed by the school attendance committee of the said union. Both of these persons, John Sharpe and Mary Marriott, against whom the proceedings were instituted, reside in the parish of Ryhall, in the county of Rutland, but within the poor law union of Stamford, which union also extends into and comprises within it a portion of the county of Northampton, within which county the said justices had jurisdiction in petty sessions holden at Stamford. The proceedings against John Sharpe were for a breach of the bye-laws made under sect. 74 of the Elementary Education Act of 1870 (33 & 34 Vict. c. 75), as amended by the Elementary Education Acts of 1876 and 1880, for, amongst other places, the parish of Ryhall; and the application against him was made under sect. 12 of the Act of 1876 (39 & 40 Vict. c. 79), by which, when an attendance order is not complied with without any reasonable excuse, a court of summary jurisdiction may, on complaint made by the local authority, make such order as they think fit within the limits imposed by the statute. The proceedings against Mary Marriott were made, so far as the question which we have to decide is concerned, under similar circumstances. It will have been observed that, although the persons proceeded against in both these cases committed the breaches complained of within the county of Rutland, the application in each case was made to the justices in petty sessions in the county of Northampton; and that the justices to whom the applications were made having been advised that they had no jurisdiction in cases under the Elementary Education Act of 1876, except in cases arising in their own county, declined to issue the summonses. There is, of course, no doubt that, primarily, the limits of the commission of justices of the peace are also those of their jurisdiction, and that it lies upon anyone, who asks them to act elsewhere, to show some statutory authority enabling them to do so. In the present case the school attendance committee of the union, whose duty it is to enforce the bye-laws and the provisions respecting the employment of children, relied upon sect. 34 of the Act of 1876 as giving that jurisdiction. By that section "all enactments relating to guardians and their officers and expenses, and to relief given by guardians, shall, subject to the provisions of this Act, apply as if the guardians, including the school attendance committee appointed by them, were acting under the Acts relating to the relief of the poor, and the Local Government Board may make rules, orders, and regulations accordingly." It is impossible to exaggerate the inconvenience of this mode of legislation. Instead of the Legislature referring specially to any previous Acts or sections of Acts of Parliament which it proposes to incorporate in this 34th section, the only incorporation is that of "all enactments relating to guardians," &c.; thus rendering it necessary for any tribunal that may be required to construe the incorporating Act to search through every Act of Parliament in which guardians are referred to, in order to see whether any particular enactment can be found bearing upon the

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matter in hand; and inasmuch as in this very Act there is a set of clauses (sects. 37, 38, 39) expressly referring to legal proceedings, I am not at all surprised to find that the justices in the present cases, finding no extension of the jurisdiction in those clauses, considered that it had not been given to them. In order, however, to make out that a jurisdiction to act within the county of Rutland had been conferred on the justices for the county of Northampton, we were referred by the learned counsel who appeared on behalf of the school attendance committee to sect. 27 of the Poor Law Amendment Act of 1867 (30 & 31 Vict. c. 106), by which it is enacted that "where any union extends into several distinct jurisdictions, every matter, act, charge, or complaint by which the guardians are affected, or in which they have any interest, shall for the purpose of jurisdiction be deemed to arise or exist equally throughout the union." Now, if that clause is to be read into sect. 34 of the Elementary Education Act 1876, and if, when it is so read in, sect. 27 of the Poor Law Act of 1867 applies to the present case, it must, we are of opinion, be taken that the justices of Northamptonshire would have jurisdiction in this matter, although the matter of the complaint in each case arose in the county of Rutland; the marginal note to sect. 27 pointing out, as it does, that the enactment is intended specifically to relate to "jurisdiction of justices in unions." Let us then see whether sect. 27 of the Poor Law Amendment Act of 1867 (30 & 31 Vict. c. 106) is made applicable to the enforcement of bye-laws made under the provisions of the Elementary Education Acts. The authority enforcing them is "the school attendance committee," who are expressly mentioned in sect. 34 of the Elementary Education Act 1876. They are "acting" under that Act, and the section says that "all enactments relating to guardians shall apply as if the school attendance committee were acting under the Acts relating to the relief of the poor." Now the statute 30 & 31 Vict. c. 106, is undoubtedly one of "the Acts relating to the relief of the poor," and, as the Stamford Union extends into the county of Northampton, we think that the matter complained of in these cases, although actually arising within the county of Rutland, must be taken to have arisen equally in the county of Northampton, into which county the union extends, and so to have arisen and to be within the jurisdiction of the justices for Northamptonshire. There are many instances of similar legislation. For an offence committed in a workhouse a justice of the peace may commit to the gaol of the county to a parish in which the pauper is chargeable (7 & 8 Vict. c. 101, s. 57), notwithstanding that the justices are not justices of that county (see 11 & 12 Vict. c. 110, s. 9). In like manner, under the various Public Works Consolidation Acts, if questions arise relating to lands not wholly in one jurisdiction, they may be decided by a justice of the peace in any county in which any part of such lands is situated; and an offence against the Salmon Fishery Acts, committed in a river running between and fixing the boundaries of two counties, is cognisable by any justice of either of such two counties. The result, therefore, in the present cases, is, that the justices of Northamptonshire have jurisdiction in both these cases, and must proceed to hear and determine them both accor-

dingly. Both rules, therefore, must be made absolute.

*Rules absolute accordingly.*

Solicitors for the prosecutors, *Joseph Mote and Son*, agents for *English*, Stamford.

March 11 and May 26, 1882.

(Before FIELD and BOWEN, JJ.)

WARRINGTON WATERWORKS COMPANY (apps.) v. LONGSHAW (resp.). (a)

*Water rate—Basis of assessment—Annual value—Gross value—Rateable value—General Assessment Act 1836—Waterworks Clauses Act 1847—18 & 19 Vict. c. cxciii. ss. 63, 65—6 & 7 Will. 4, c. 96, s. 1—10 & 11 Vict. c. 17, s. 68.*

*Sect. 63 of the appellant company's special Act (18 & 19 Vict. c. cxciii.), obliged the company to supply water at a rate not exceeding 6l. per cent. per annum upon the annual rack rent or value of the premises so supplied with water.*

*Sect. 65 of the same Act provided that such water rates should be payable according to the annual value at which the premises were assessed to the poor rate, if so assessed, or if not, according to the net annual value of the premises. The respondent was charged by the company on the basis of the gross estimated rental value of the premises so owned by him; he disputed his liability for more than the sum to be calculated upon the net rateable value of his premises. The appellants brought their action in the County Court for the full amount. The respondent paid into court the amount for which he admitted his liability. The County Court judge held that the respondent's contention was right, and gave judgment in his favour. The County Court judge, however, stated a case for the opinion of the court above.*

*Held, on appeal, that the County Court judge was right, and that under the provisions of 18 & 19 Vict. c. cxciii. s. 65, the basis of assessment was not the "gross estimated rental," but the "net annual value" of the premises sought to be assessed.*

THIS was a case stated by the learned judge of the County Court of Lancashire holden at Wigan.

The material facts were shortly as follows:

The appellants were a waterworks company supplying the town of Warrington with water.

The respondent was owner of a house, of which, according to the rate-book, the "gross estimated rental" was 10l. per annum, and the "rateable value," 8l. per annum.

The appellant company claimed to charge the respondent for the supply of water at a rate based upon the "gross estimated rental" of the house; the amount of the rate was 6s. The respondent on the contrary denied his liability to be charged on the higher basis of assessment, but claimed to be assessed on the lower basis of the "rateable value" of his premises, in which case the rate amounted to 4s. 10d.

The appellants, in order to raise the question, sued the respondent in the County Court held at Wigan, for the said sum of 6s. The respondent thereupon paid the sum of 4s. 10d. into court, as being sufficient to satisfy the claim of the appellants.

(a) Reported by W. P. EVESLEY, Esq. Barrister-at-Law.

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The appellants contended at the trial that they were entitled to charge the water rate on the "gross estimated rental" of the premises; and the respondent contended that he was only liable on the basis of the "rateable value."

The learned County Court judge held that the contention of the respondent was the correct one, and, as the sum of 4s. 10d. paid into court was sufficient, gave judgment for the respondent.

Leave to appeal was granted, and the opinion of the Superior Court was asked in the form of a special case stated by the learned County Court judge.

By 9 & 10 Vict. c. cxii. s. 61:

The owners of all dwelling-houses occupied as separate tenements, and receiving a supply of water from the company, the annual rateable value of which houses or tenements shall not exceed the sum of 10l., and which houses or tenements shall be let for periods not exceeding one month, shall be liable and subject to the payment of all rates, rents, and other charges made by the company; and the powers and provisions herein contained for the recovery of rates, rents, and other charges from occupiers shall be construed to extend and apply to the owners of such houses and tenements.

By 18 & 19 Vict. c. xciii. s. 63 (incorporating sect. 53 of 9 & 10 Vict. c. cxii.):

The company shall, at the request of the owner or occupier, furnish to every occupier of a private dwelling-house, or part of a dwelling-house, in any street within the limits of this Act in which any main or other water pipe of the company is from time to time laid, a sufficient supply of water for the domestic purposes of such occupier, including water-closets, at a rate not exceeding 6 per cent. per annum upon the annual rack rent or value of the premises so supplied with water: Provided always that the company shall not be entitled to receive for such supply from any one such owner or occupier more than the sum of 10l. in any one year, and shall not be obliged to furnish such supply to any owner or occupier for less than 5s. in any one year.

By sect. 65:

Such water-rates shall be paid by the owner or occupier requesting the supply of water, and shall be payable according to the annual value at which the premises are from time to time assessed to the poor rate, if the same be so assessed, or, if not, according to the net annual value of the premises.

By 6 & 7 Will. 4, c. 96, s. 1:

No rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.

By 10 & 11 Vict. c. 17, s. 68:

The water rates, except as hereinafter and in the special Act mentioned, shall be paid by and recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices.

*B. E. Webster, Q.C. (S. Taylor with him) appeared for the appellants.*

*Sir Hardinge Giffard, Q.C. (Aspland with him) appeared for the respondent.*

The arguments appear sufficiently in the judgment of the court.

*Our. adv. vult.*

*May 26.*—The judgment of the court was delivered by FIELD, J.:—This is an action brought

to recover a sum of 6s. for half a year's supply of water by the plaintiffs to the defendant in respect of a dwelling-house, of which he is the owner. The defendant admitted his liability to the extent of 4s. 10d., but disputed the rest. The plaintiffs claimed to recover the sum charged under their special Acts. By the first of them, the Warrington Waterworks Act of 1845, c. cxii., s. 53, the plaintiffs were obliged to furnish to every occupier of a dwelling-house water at a rate not exceeding 6l. per cent. per annum upon the annual rack rent or value of the premises; and such rate is by sect. 54 to be payable according to the annual value at which the premises shall be assessed to the poor rate, if the same shall be so assessed, or, if not, according to the net annual value of the premises. By sect. 61, owners of dwelling-houses, the annual rateable value of which shall not exceed 10l., and let upon periods not exceeding a month, are made liable to the water rent instead of the occupier. By and with a subsequent Act (1855) the Act of 1845 was repealed, and the Companies Clauses Act, save so far as the clauses or provisions thereof respectively are expressly varied or excepted, are incorporated. By sect. 63 of this Act of 1855 the plaintiffs are obliged, as in the former Act, to furnish a supply of water at a rate not exceeding 6l. per cent. per annum upon the "annual rack rent or value" of the premises supplied, such water rate being, by sect. 65, made payable according to "the annual value at which the premises are from time to time assessed to the poor rate, if the same be so assessed, or, if not, according to the net annual value of the premises," this proviso being in substance identical with that of the 54th section of the repealed Act. The words "annual value" thus used in these Acts are the same words that are used in the General Parochial Assessment Act (6 & 7 Will. 4, c. 96), by which, as is well known, the assessment of occupiers to the poor rate is governed, and by which no poor rate is of force which is not made upon "an estimate of the net annual value" of the hereditaments. In that Act the words "net annual value" are followed by an express definition of the sense in which they are used; that is to say, it is to be the rent at which the hereditaments may reasonably be expected to be let "free of all usual tenants' rates and taxes and tithe rentcharge, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." Under this Act, therefore, the sum at which the party chargeable to the poor rate is to be assessed is arrived at by two steps: firstly, by ascertaining the rent without taking into account the rates and taxes and tithe rentcharge usually borne by the tenant, or, in other words, the sum which is ordinarily paid as rent to the landlord; and, secondly, by deducting from that sum the expenses necessary to be incurred by the landlord in order to keep the rateable hereditaments in the condition to command that rent. The sum arrived at by the first stage of this calculation is in the words of the heading of the form of rate given by the Act, and of the definition given in the Union Assessment Act of 1862, described as "gross estimated rental," the ultimate result being "rateable value," and being the sum upon which the computation of the amount payable by the person chargeable is to be made.

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This being the state of the law applicable to the subject, the following are the facts to which it has to be applied: The defendant is the owner within the meaning of the 65th section of the Act of 1855 of the dwelling-house to which the water was supplied, and by the poor rate at the time in force this dwelling-house was stated to have a "gross estimated rental of 10*l.*, and to be of the "rateable value" of 8*l.*, and the defendant was "assessed" as owner upon the latter sum, and did not dispute his liability to that extent. The plaintiffs, however, claimed to compute his water rate upon the higher sum. At the hearing before the learned County Court judge, he held that the defendant's contention was correct, but stated the case for the opinion of the court upon which we are now called on to decide. Upon the arguments before us it was not disputed on the part of the plaintiffs that the sum upon which the computation had to be made was to be found in the poor rate, but it was said that the words decisive of the question as to the part of the poor rate in which that sum was to be found were the words "annual rack rent or value" in the earlier part of the 63rd section, and which "annual rack rent or value" they said was in truth the sum ordinarily going as rent into the pockets of the landlord, without making deduction for what may be shortly called landlords' charges, or, in other words, the "gross estimated rental" of the poor rate. In support of this contention, Mr. Webster prayed in aid the 68th section of the Waterworks Clauses Consolidation Act of 1847, by which the water rates are to be payable according to the "annual value" of the tenements, alleging that it could not be reasonably held to be the intention of the Legislature to point out one principle of assessment in the general Act, and sanction a different principle in a private Act. But the general Act is, as is well known, of no binding force until it has been applied by some special Act; and, inasmuch as in the present case the general Waterworks Act is only incorporated so far as its enactments are expressly varied and altered by the special Act, the latter and its true interpretation must be had recourse to for the purpose of deciding the question now before us. Thus the contention is narrowed to the simple question, whether by the special Act it is the "gross estimated rental" or "net annual value" of the hereditaments that is to be taken as the basis of the assessment; and upon that question we think that the language of the Act now before us clearly points to the latter and not to the former. The Legislature designedly intended to remove the question, from the uncertainty of the words "annual rack rent or value," as used in the 63rd section and in the Waterworks Clauses Act of 1847, by declaring their meaning by the 65th section; for that section says that the sum is to be calculated upon the amount at which the premises are "assessed" to the poor rate. It is true, as Mr. Webster pointed out, that the language is not technically accurate, for it is the occupier or owner, and not the hereditament upon which the assessment is made, but surely the sum upon which he or the premises are assessed is not the "gross estimated rental." Before the ultimate assessment can be arrived at that sum must be reduced by deducting therefrom the landlord's charges, which leaves the "net annual value" as the basis of the water rent.

That, therefore, is the sum at which the owner or occupier is assessed to the poor rate, and it seems to us to be the sum upon which his water rate is to be charged. Mr. Webster referred us to the case of *The Sheffield Waterworks Company v. Bennett* (27 L. T. Rep. N. S. 199, and 28 L. T. Rep. N. S. 509; L. Rep. 7 Ex. 409, and L. Rep. 8 Ex. 196; 41 L. J. Ex. 233), but whatever light that case might have thrown upon a case in which the language, Act, and question had been precisely similar, it does not assist us in the present case where all differ. We think therefore that the decision of the County Court judge was correct, and affirm it with costs.

*Appeal dismissed.*

Solicitor for the appellants, *Gregory, Rowcliffes, and Co.*, for *Nicholson, White, and Nicholson*, Warrington.

Solicitors for the respondent, *Field, Roscoe, and Co.*

March 18 and May 26, 1882.

(Before FIELD and BOWEN, JJ.)

DOBBS (app.) v. THE GRAND JUNCTION WATERWORKS COMPANY (resps.). (a)

*Water rate—Basis of assessment—Rent—Annual value—Gross value—Rateable value—The Valuation (Metropolis) Act 1869—7 Geo. 4, c. cxi. s. 27—15 & 16 Vict. c. clvii. s. 46—32 & 33 Vict. c. 67, s. 4.*

*Sect. 27 of the respondent company's special Act (7 Geo. 4, c. cxi.) obliged the company to supply water at a scale of rates graduated to the rent of the houses supplied. Such rate was to be payable according to the actual amount of the rent, where the same could be ascertained, and where the same could not be ascertained, according to the actual amount or annual value upon which the assessment to the poor rate was computed in the district where the houses were situated.*

*Sect. 46 of a later special Act of the said company (15 & 16 Vict. c. clvii.) obliged the company to furnish water at the following rates; "where the annual value of the dwelling-house . . . shall not exceed 200*l.* at a rate per centum per annum on such value not exceeding 4*l.*; and where such annual value shall exceed 200*l.*, at a rate per centum per annum on such value not exceeding 3*l.* The appellant occupied a house, the rent of which could not be ascertained, as he held it on a lease for a long term of years at a small ground rent. The appellant was rated by the respondent company at the gross annual value of his hereditament as appearing in the valuation list for the time being in force under the Valuation (Metropolis) Act 1869. The appellant contended that he was liable to be rated only on the rateable value of his hereditament, and refused to pay the larger sum demanded. The dispute was referred to a police magistrate, who decided in favour of the contention of the respondent company, but stated a case for the consideration of the Superior Court.*

*Held, on appeal, that the magistrate was wrong, and that the proper basis of chargeability under the statutes was not the "gross estimated rental" of the hereditament, but its net "rateable value."*

THIS was a case stated by one of the magistrates of the metropolitan police court in pursuance of

(a) Reported by W. P. EVERSLY, Esq., Barrister-at-Law.

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20 & 21 Vict. c. 43; and the material facts were as follows:

1. A dispute arose between the appellant and the respondents as to the amount the appellant should pay to the respondents for water supplied by them to him at his residence, and was referred to the magistrate for his decision.

2. At the hearing, the following facts were either proved or admitted by both parties. That the appellant was lessee for a term of which about seventy years were unexpired, at a ground rent of 15*l.* a year, of the house known as No. 34, Westbourne-park, in the parish of Paddington, which he occupied as his residence. The lease under which the appellant held contained covenants by the lessee to repair and insure, as well as the usual covenants by a tenant. That the portion of the claim or rate as to which the present dispute arose was made upon the appellant by the respondents in respect of the water supply to the said house for domestic purposes, and the amount of the said rate was arrived at by a calculation of 4*l.* per cent. upon a sum of 140*l.*, such sum being the gross annual value of the said premises as appearing in the valuation list for the time being in force under the provisions of 32 & 33 Vict. c. 67 (the Valuation (Metropolis) Act 1869.)

3. It was also proved that 118*l.* was the amount which the appellant's premises were assessed to the poor rate.

4. After hearing the contentions of both sides, the magistrate decided in favour of the respondents, and held that as the assessment for the water rate was governed by 15 & 16 Vict. c. 47, s. 46, and that as the "annual value" in the said 46th section was the exact definition of the "gross value," as defined in the Valuation (Metropolis) Act 1869, the respondents had charged the appellant on a proper basis for the water so supplied by them to him.

The question for the opinion of the court was whether the magistrate was right in deciding that sect. 46 of 15 & 16 Vict. c. 47 was applicable, and that the "gross value," as interpreted by the Valuation (Metropolis) Act 1869, was the proper basis of assessment for the purpose of the water rate to be charged by the respondents to the appellant, or whether he should have decided that such basis should be the "rateable value" of the said premises.

By 7 Geo. 4, c. cxl. s. 27:

The Grand Junction Waterworks Company shall be obliged to furnish a sufficient supply of water at a height not exceeding six feet above the flag pavement to the house of every inhabitant occupying a private dwelling-house in any square, place, street, or lane where the pipes of the said company shall be laid, for the use of his or her own family, at the following rates per annum (that is to say): Where the rent of such dwelling-house shall not exceed 20*l.* per annum, at a rate per centum per annum not exceeding 7*l.* 10*s.*; and where such rent shall be above 20*l.* and not exceeding 40*l.* per annum, at a rate per centum per annum not exceeding 7*l.*; and where such rent shall be above 40*l.* and not exceeding 60*l.* per annum, at a rate per centum per annum not exceeding 6*l.* 10*s.*; and where such rent shall be above 60*l.* and not exceeding 80*l.* per annum, at a rate per centum per annum not exceeding 6*l.*; and where such rent shall be above 80*l.* and not exceeding 100*l.* per annum, at a rate per centum per annum not exceeding 5*l.* 10*s.*; and where such rent shall be above 100*l.* per annum, at a rate per centum per annum not exceeding 5*l.*; and every such rate shall be payable according to the actual amount of the rent, where the same can be ascertained, and where the same cannot be ascertained, according to the actual

amount or annual value upon which the assessment to the poor rate is computed in the parish or district where the house is situated.

By 15 & 16 Vict. c. clvii., s. 46:

The company shall at the request of the owner or occupier of any house in any street within the limits of this Act in which any pipe of the company shall be laid, or of any person who under the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier, or other person, a sufficient supply of water for their domestic purposes at the rates hereinafter specified: that is to say, where the annual value of the dwelling-house or other place supplied shall not exceed 200*l.*, at a rate per centum per annum on such value not exceeding 4*l.*; and where such annual value shall exceed 200*l.* at a rate per centum per annum on such value not exceeding 3*l.*

By sect. 57:

Except as by this Act expressly provided, this Act or anything therein contained shall not repeal, alter, interpret, or in any measure affect any of the provisions of the recited Acts, or any of them, in force at the commencement of this Act.

By 10 & 11 Vict. c. 17, s. 68:

The water rates, except as hereinafter and in the special Act mentioned, shall be paid by and recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water; and if any dispute arise as to such value the same shall be determined by two justices.

By 32 & 33 Vict. c. 67, s. 4 (interpretation clause):

The term "gross value" means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenants' rates and taxes, and tithe commutation rent charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

The term "rateable value" means the gross value after deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid.

*B. E. Webster, Q.C. (Sutton and A. P. Poley with him) for the appellant.*—There are two important questions here: First, whether sect. 27 of 7 Geo. 4, c. cxl. has been repealed by 15 & 16 Vict. c. clvii. s. 46; secondly, whether "annual value" in the same section of the latter Act is equivalent to "gross annual value," or "net rateable value." First, I contend that the basis of assessment provided by sect. 27 of 7 Geo. 4, c. cxl. is not altered by 15 & 16 Vict. c. clvii. s. 46. In this last Act there is no express provision repealing that part of sect. 27 of the earlier Act dealing with the annual value; and the Legislature intended not to alter the meaning of "annual value," or that "annual value" was not to be used exactly the same in the two Acts of Parliament, but only to alter the rate per cent. payable when the annual value of the premises exceeded 200*l.* per annum. Indeed, in sect. 57 of 15 & 16 Vict. c. clvii. there is an express provision that nothing in the Act should repeal or alter any of the provisions of the recited Acts (of which 7 Geo. 4, c. cxl. was one), except by express mention. Secondly, I further contend that the appellant's rent is not ascertainable within the Act of 4 Geo. 4. Here the appellant is owner of an unexpired term of years, and he pays no rent properly so called within the Act, for I admit his ground rent of 15*l.* per annum is not "rent" within this section, which I take to be an annual sum agreed to be paid to the landlord by the tenant for the use and occupation of a dwelling-



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house. There is no such agreed sum here, and the rent is not ascertainable; therefore under this section for the purposes of the water rate, recourse must be had to the poor rate assessment of the premises. There we easily ascertain the "annual value" of these premises to be 118*l.*, and not 140*l.* I admit my liability to be rated at the smaller sum, but deny it for the greater, and submit that the magistrate was wrong in his decision.

*O. Russell, Q.C.* (with him the *Solicitor-General*, Sir *F. Herschell, Q.C.* and *J. F. Clerk*).—The magistrate was right in holding that sect. 27 of 4 Geo. 4, c. cxi was repealed, and that the percentage was not to be paid upon the rateable value. My two points, then, are these: First, that the earlier Act is repealed by 15 & 16 Vict. c. clvii, sect. 46, in the sense that the two provisions cannot be deemed consistent with each other; Secondly, that by reference to decided cases "annual value" is equivalent to "gross value." Firstly, the argument of the appellant would create a different standard for premises of one of which the rent could be ascertained, and of the other of which it could not. I maintain there is no more difficulty in ascertaining the "gross annual value" than the "rateable value." I might give a startling illustration of the result of the appellant's argument. A landlord owns two contiguous houses in the same row, of exactly the same value; and in the same state of repair; one of these houses he inhabits himself, the other he lets to a tenant. In the case of No. 1 the rent is not ascertainable, according to the appellant; in that of No. 2 it is. Now according to his argument, the landlord would pay on the amount at which he is rated to the poor, while his tenant would have to pay on the sum he agreed to pay as rent, which would be a great deal more than the rateable value of the house No. 1. [FIELD, J.—Thus two standards of value would be created for two houses exactly alike? Yes, which the Legislature never could have intended. The amount in the rate book has nothing to do with the value or amount of the rent. Secondly, the "annual value" is the annual value to the person occupying the dwelling-house, in other words, the "rent" at which such a house would reasonably be expected to let, that is, "annual value" is equivalent to "gross rateable value."

*Webster*, in reply, cited *Rees v. Tomlinson* (9 B. & C. 163), on the point of the different standards of rateability, and *Rees v. Adames* (4 B. & C. 61), as laying down the canons applicable to rating.

The COURT at this point intimated that if they were of opinion that sect. 27 of 4 Geo. 4, c. cxi. was not repealed by sect. 26 of 15 & 16 Vict. c. clvii., there would be no need to argue the question of "annual value;" but if they decided adversely to Mr. Webster on that point, they would give him an opportunity of arguing the other question of the meaning of "annual value."

*Cour. adv. vult.*

May 26.—The judgment of the court was delivered by FIELD, J.:—The question raised on this case (which was stated by Mr. Major Cooke, one of the metropolitan police magistrates) was as to the principle upon which the respondents are entitled to charge the appellant for two quarters' supply of water to his dwelling-house, and which charge was based by the respondents upon an

annual value of 140*l.*, the appellant's contention being that he was liable to be charged on no greater annual value than 118*l.* The 140*l.* was the "gross estimated rental," as the 118*l.* was the "net annual value" of the premises as stated in the poor rate assessment of the appellant, which was in force at the time of the supply. The respondents claimed to be entitled to the greater sum by virtue of their special Acts. By one of these (7 Geo. 4 c. cxi. s. 27) the respondents were compelled to furnish a supply of water to inhabitants of private dwelling-houses at certain "rates" per annum graduated upwards from a rent not exceeding 20*l.* per annum "to 100*l.* per annum," and where the rent is above 100*l.* per annum, then "at a rate per centum per annum not exceeding 5*l.*" And the same section of the Act goes on to provide that the "rate" was to be "payable according to the actual amount of the rent of the premises, where the same can be ascertained, and where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor rate is computed." By a subsequent Act (15 & 16 Vict. c. clvii.), by which the respondents had further powers conferred upon them, it is enacted (sect. 46) that the company shall, at the request of the owner or occupier of a house, or of any person who shall be entitled to demand a supply under that Act, or any Act incorporated therewith, furnish such supply at the "rates" following, that is to say, "where the annual value of the dwelling-house shall not exceed 200*l.* at a rate per centum per annum on such value not exceeding 4*l.*; and where such annual value shall exceed 200*l.* at a rate per centum per annum on such value not exceeding 3*l.*" This section does not contain the closing words of the 27th section of the previous Act, by which the mode of computing the "rate" is given; nor does this Act of 1852 repeal in express terms the prior Act, or any part of it. On the contrary, the 57th section of the later Act enacts that, except as expressly provided, the Act, or anything therein contained, shall not repeal, alter, interpret, or in any manner affect any of the provisions of the Acts recited, of which 7 Geo. 4, c. cxi. is one. The assessment to the poor rate must, as is well known, be made according to the provisions of the General Parochial Assessment Act (5 & 6 Will. 4, c. 97), upon "an estimate of the net annual value of the hereditaments," and such "net annual value" is defined as being the rent at which the same might reasonably be expected to let, "free of all usual tenants' rates and taxes and tithe rentcharge," and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain them in a state to command such rent. There are, therefore, two necessary steps to be taken in making the calculation in order to arrive at the sum upon which the assessment to the poor rate is to be computed, that is, firstly, gross estimated rental; and secondly, the result of net rateable value. In the present instance, however, the computation for the poor rate is not made under the provisions of the General Assessment Act, but under those of the Metropolitan Assessment Act (32 & 33 Vict. c. 67) by which the rateable hereditaments subject to it are divided into different classes, with a percentage applicable to each class, for the purpose of making a fixed deduction by which



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gross estimated rental is reduced to net rateable value. On the hearing of the present case before the magistrate, it was admitted that the appellant was the lessee of a term of which about seventy years were unexpired, at a ground rent of 15*l.* a year, of a house known as No. 34, Westbourne-park, which he occupied as his residence, and the lease of which contained covenants to repair and insure the premises, as well as the other usual covenants entered into by a tenant. The amount of the water rate which the respondents sought to charge against the appellant was arrived at by a calculation of 4 per cent. upon 140*l.*, the amount of the "gross estimated rental" appearing in the valuation list; and the appellant denied his liability to be charged upon any greater sum than 118*l.*, which appeared in the list as the "net rateable value," and the dispute thus existing between the parties was referred to the magistrate under the 68th section of the Waterworks Clauses Act of 1847. Before the magistrate the appellant's contention was founded upon what he alleged to be the true construction of the 27th section of the Act. 7 Geo. 4, c. cxi., but he was met *in limine* by the contention of the respondents that the whole of that section was repealed by the 46th section of the subsequent Act, and that it was by that Act alone that the water rate was governed. This contention was supported by the magistrate, who also held, upon the authority of the *Sheffield Waterworks Company v. Bennett* (27 L. T. Rep. N. S. 199, and 28 L. T. Rep. N. S. 509; L. Rep. 7 Ex. 409; 41 L. J. Ex. 233), that the "gross estimated rental" of the valuation list, and not the "net rateable value," was the true representative of the "annual value" of the 46th section. But we are unable to agree in this conclusion, for we do not think that the 27th section of the former Act is repealed by the 46th section of the subsequent Act. The first Act is expressly recited in the latter one, and not only is there no express repeal of it, but instead of any express repeal there is the enactment (sect. 57) which we have already adverted to. This, however, would not be enough to enable us to decide the question, for, although there is no express repeal, that effect would have been produced according to the ordinary rules of construction of statutes, if the enactments of the 46th section of the later Act cannot be construed so as to be consistent with the continuance of the earlier enactments in sect. 27; for in that case the inconsistent affirmative enactment would import a negative fatal to the earlier one. Now it is clear beyond doubt (as was admitted by Mr. Webster, who argued the case for the appellant) that so much of the 27th section as graduates the amount of the percentage according to the rent of the dwelling-house in stages or leaps from 20*l.* up to 100*l.*, and puts it 5 per cent. upon all above, is inconsistent with the subsequent enactment which gives a uniform charge of not exceeding 4 per cent. up to 200*l.*, and of not exceeding 3 per cent. on all rent above, and that so much therefore of the 27th section is by implication repealed. But he said that this inconsistency between the enactments goes no further, and that there is no inconsistency in adopting the later percentages, and applying to them the mode of computation provided by sect. 27 of the sum upon which the rate of 4 or 3 per cent., as the case may be, is payable, and in this contention we agree with him. It seems to us that if from sect. 27 the graduated scale

of rates, jumping by successive steps, is eliminated, and the more simple and general one of starting with 200*l.* a year, and diminishing the rate for all above is substituted, the whole of the rest of the 27th section may well stand together with the 46th. Repeal by implication is never to be favoured; it is no doubt the necessary consequence of inconsistent legislation wherever it occurs, but which must not be imputed to the Legislature unless absolutely necessary. We think, therefore, that the enactment of the 27th section defining the mode by which the sum upon which the percentage is to be calculated is in force, and therefore the next question is whether in the case now before us the "actual amount of the rent can be ascertained." What, then, is the "actual amount of rent?" It must, we think, mean some actual amount which has been *bond fide* arrived at by contract between the landlord and tenant (where such a contract exists) as the sum payable to the landlord by way of rent for the hereditament which is the subject of the letting. But in the case now before us no such contract exists, nor has any such actual amount been in any way covenanted for—the hereditament is in the occupation of its owner. It is true that he pays a rental to his landlord of a small sum, but that is, as it is called, a "ground," not a rack or other rent, for the demised hereditament, and Mr. Webster could not and did not contend that the tenant was entitled to have his water supplied upon the footing of that rent. But Mr. Russell said that "the actual amount of rent" could nevertheless be ascertained in the present case; for he said it is to be found in the amount of the "gross estimated rental" of the valuation list, which, applying to this case the principle which he said was at the base of the *Sheffield Waterworks Company v. Bennett* (*ubi sup.*), was the equivalent of "rent" or its equivalent "annual value." In that case "rent" and "annual" were the only words to be construed; there was neither "actual amount of rent" or reference to the poor law, and the court, not, however, without considerable doubt and hesitation, held that where a landlord takes upon himself voluntarily to pay, or is under a statutory obligation to pay, charges not in themselves in the nature of rent, in consideration of a larger sum than rent strictly speaking, the owning consumer is entitled to discard every part of the sum so paid which is not rent, and to have his supply based upon that which is actually rent. No doubt also if the principle is applied to a converse case in which a tenant pays a less sum by way of what is called rent on account of his undertaking to bear part of the landlord's necessary expenses in keeping the rateable hereditaments in a state to command the rent, it might be urged that the amount paid in money as for rent should be increased by the annual amount of the obligation so incurred, and thus bring the water charge to the "gross estimated rental," and that, as we understand it, was Mr. Russell's contention, who was able to point out some apparently startling inconsistencies which might occur upon any other view. But, however that might be in any case where the question shall arise, it is not necessary for us to decide the question in the present one, for we think that the Legislature in using the words it has in the 27th section, intended to free the question from all these difficulties, and that it

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intentionally created as the standard of charge either the actual rent (where ascertained), or in the alternative the poor rate assessment; and if the first words are to be read as compelling the persons supplying and supplied to go to the poor law assessment to find out the basis of computation, the latter words have no meaning, and so no alternative is given. This being so, the question in the present case is reduced (allowing for a very slight variation in words) to the question which we have just had to consider in the *Warrington* case (*ante*, p. 26), and we give it the same answer and for the same reasons. In arriving at this conclusion, we do not shut our eyes to the possibility that the application to the sale of water of a standard adopted for and adapted to a totally different purpose may, in some instances, produce results not altogether consistent with uniformity or equality of price, which in ordinary commercial transactions would be found; but we think that the Legislature intended to apply to the charge for supply of so universally necessary an article as water by a privileged body an already ascertained standard easily to be referred to, and upon which the company and the consumer could alike act, and that that standard is to be found either in a *bond fide* contract reduced to its true elements where that exists, or in "net rateable value," which is the actual basis of chargeability, rather than in gross estimated rental, which is only a step in the calculation. For these reasons we have come to the conclusion that the magistrate's order cannot be supported, and the order we make is that the annual value of the appellant's dwelling-house is to be taken at 118*l.*, the sum upon which the assessment to the poor rate is computed; and we allow the appeal with costs.

*Appeal allowed.*

Solicitors for the appellant, *Hollingsworth, Tyerman, and Andrews.*

Solicitors for the respondents, *Bircham and Co.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT WESTMINSTER.

April 20 and 21, 1882.

(Before BAGGALLAY, BRETT, and HOLKER, L.JJ.)

THE BOARD OF WORKS OF THE HACKNEY DISTRICT v. THE GREAT EASTERN RAILWAY COMPANY. (a)

*Metropolis Management Amendment Act 1862—Paving expenses—New street on bridge over railway—Land bounding or abutting on—Parapet walls.*

A railway company constructed a railway in a deep cutting at right angles to a road, and carried the road across the railway by means of a bridge, which was supported on stone piers erected upon the slopes of the cutting on either side of the line. There was a parapet wall on each side of the bridge running along the whole length of it. The district board paved the bridge, and called upon the railway company to contribute to the expense of paving the whole length of it, as owners of land bounding or abutting on a

new street within the meaning of sect. 77 of the *Metropolis Management Act 1862*. The magistrate found as a fact that the road in question was a new street within the meaning of that Act.

Held, that the railway company, being owners of the wall that ran along the side of the bridge, were owners of land bounding or abutting on the new street across the bridge, and were liable to contribute to the expense of paving the whole length of it.

The *London, Brighton, and South Coast Railway Company v. The Vestry of St. Giles, Camberwell* (4 *Ex. Div.* 239; 41 *L. T. Rep. N. S.* 162) distinguished.

*Judgment of Lord Coleridge, O.J. and Manisty, J. reversed.*

THIS was a summons taken out by the Board of Works of the Hackney District to recover from the Great Eastern Railway Company a sum of 74*l.* 2*s.* 8*d.* in respect of the cost of paving the new street or road, known as Cazenove-road, Stamford Hill. The magistrate dismissed the summons, but on the application of the Board of Works stated the following case:—

The respondents, under powers conferred upon them by an Act of Parliament, built a bridge carrying Cazenove-road over their line of railway, which is in a deep cutting.

The sum of 74*l.* 2*s.* 8*d.* was demanded by the appellants as the contribution of the respondents towards paving Cazenove-road, they being assessed as the owners of land bounding or abutting upon Cazenove-road for a distance of 44*ft.* 8*in.* upon the south side and for a distance of 48*ft.* upon the north side.

The road carried over the line of the respondents crosses it, running east and west on a bridge, which is supported on stone piers erected by the railway company upon the slope of the cutting on either side of the line.

No portion of the land of the respondents in respect of which it is sought to charge them is or can be used for any other purpose than for their railway.

It was contended by the respondents that they were not owners of land bounding or abutting upon the road within the meaning of the Act.

I was of opinion that the facts were the same (except that I found the road to be a new street) as in the case of *The London, Brighton and South Coast Railway Company v. The Vestry of St. Giles, Camberwell* (*ubi sup.*), and that the respondents were not the owners of land bounding or abutting on the road within the meaning of the Act.

The question for the opinion of the court is, whether the respondents are liable to pay the sum demanded to the applicants.

The Queen's Bench Division held that they were bound by the judgment in *The London, Brighton, and South Coast Railway Company v. The Vestry of St. Giles, Camberwell*, and gave judgment for the railway company, but gave leave to appeal.

The Board of Works now appealed.

Sir *Hardinge Giffard*, Q.C. (with him *Poland*) for the appellants.—The question whether the respondents are liable depends upon the construction to be put upon sect. 77 of the *Metropolis Management Amendment Act 1862* (25 & 26

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Vict. c. 102), which provides that "where any vestry or district board shall . . . have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses . . . of paving the same." This was an extension of the provisions of 18 & 19 Vict. c. 120, s. 105, by which the owners of houses forming the street were alone liable to contribute. Where there is a railway passing under a street, which street is bounded by walls that form part of a bridge, the property of the railway company, are those walls "land bounding or abutting on" such street within the above section? If the words were used in a conveyance there could be no doubt that the walls would pass. Even if there were no wall in this case, it is submitted that the land upon which the lines are placed would be land bounding or abutting on the street. The Act makes no distinction in respect of the adjoining land being on a different level; it still bounds the street. But the wall here undoubtedly bounds or abuts on the street; and a wall is as much land as a house is. The court below decided this case on the authority of *The London, Brighton, and South Coast Railway Company v. The Vestry of St. Giles, Camberwell* (4 Ex. Div. 239; 41 L. T. Rep. N. S. 162), but they did not agree with it. That case is distinguishable, however, because there was no wall. He cited

*The London and North-Western Railway Company v. St. Pancras Vestry*, 17 L. T. Rep. N. S. 654;  
*Higgins v. Harding*, L. Rep. 8 Q. B. 7; 27 L. T. Rep. N. S. 483;  
*Arnatt v. London and North-Western Railway Company*, 20 L. T. Rep. O. S. 80.

*Charles, Q.C.* and *French* for the respondents.—Unless it is held that the wall is land bounding or abutting on the street, the appellants must rely upon the land underneath the bridge on which the railway is made. But the cases cited do not support the contention that land in such a position is rateable for the purpose of paving a street across the bridge. The case of *The London and North-Western Railway Company v. The Vestry of St. Pancras* (*ubi sup.*) decides only that land separated from the street by a dead wall is rateable under the Act. *Higgins v. Harding* (*ubi sup.*) is in favour of the respondents rather than against them. The decision in that case is only that, where there is physical contact between the land of the railway company and the street, the company are liable under the Act. The question in each case is, Does the land in the particular case bound or abut upon the street? The land underneath the bridge can certainly not be said to bound or abut upon the street. Then, are the walls on each side of the street land bounding or abutting upon the street? It is submitted that they cannot be, as they are themselves part of the street. What is a street? The word "street" is defined by the interpretation clause in sect. 250 of 18 & 19 Vict. c. 120, and includes "any road, bridge, not being a county bridge," &c. . . . The whole bridge has therefore become a street, and has passed out of the ownership of the railway company. Then by 8 & 9 Vict. c. 20, s. 46, it is provided that, "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by

means of a bridge of the height and width, and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained at the expense of the company; provided always that, with the consent of two or more justices in petty sessions as after mentioned, it shall be lawful for the company to carry the railway across any highway other than a public carriage road on the level." So that the railway company are bound to keep this bridge in proper condition, and might be at any time indicted for non-repair. They cannot, therefore, be liable to contribute to the paving of the bridge by the district board. They also cited

*Coverdale v. Charlton*, 4 Q. B. Div. 104; 40 L. T. Rep. N. S. 88;  
*North Staffordshire Railway Company v. Day*, 8 E. & B. 836.

*Sir Hardinge Giffard, Q.C.* in reply.—Here the walls of the bridge make the street, but they are not part of the street.

*Our. adv. vult.*

April 21.—*BAGGALLAY, L.J.*—The question that we have to decide in this case is, whether the Great Eastern Railway Company is liable to contribute to the expenses of paving a certain street. Cazenove-road is a new street within the meaning of the Metropolitan Management Act 1855, and it has been paved by the Board of Works for the district under the powers given to them by that Act. By sect. 105 of the Metropolitan Management Act 1855 and sect. 77 of the Metropolitan Amendment Act 1862, the parties liable to contribute to the expense of such paving are the owners of the houses forming the street and the owners of the land bounding or abutting on such street. In the present case the railway company have constructed a railway in a cutting at right angles to the road, and have carried the road across the railway by means of a bridge. It is contended by the Board of Works that the railway company is liable to contribute to the expenses of paving a new street which is carried across this bridge, on the ground that it owns land which bounds or abuts on the new street. The railway company denies that its land does so bound or abut. The railway company further contend that, being by law required to maintain the bridge in a state of repair, they could not be called upon to contribute towards the expense of paving the new street. We have photographs of the *locus in quo*, and the position of the road and the line in question is described in paragraph 4 of the case: "The road carried over the line of the respondents crosses it, running east and west, on a bridge, which is supported on those piers erected by the railway company upon the slopes of the cutting on either side of the line." The magistrate held that the railway company did not own land bounding or abutting on the new street within the meaning of the Act; and he also found, as a fact, that the road in question was a new street. It is perfectly clear, from one of the photographs that we have before us, that there is an open passage leading down to the railway from the bridge in respect of which the railway company would be liable to be rated. Then running at right angles from the passage is a wall which bounds the street. It appears to me

that that is all land—any erection on the land notwithstanding, it is all land. The whole bridge is supported on stone piers that are built on the land of the railway company; the bridge is composed in part of the new street, in part of the wall and the piers; the wall is the boundary of the street at that point; therefore, the wall stands on, and is land belonging to the railway company bounding the new street. Then there is the case of *The London, Brighton and South Coast Railway Company v. The Vestry of St. Giles, Camberwell*. No doubt, if there had been no walls to this bridge, this case would have been governed by that. The magistrate thought that it was; the Queen's Bench Division also followed it, but gave leave to appeal. If the whole of the bridge here had constituted the street and there was no boundary wall, I do not say at present what my judgment would have been; at the same time I will not say that I would follow the *Brighton and South Coast Railway* case. But it is not necessary to decide that now. There is a clear distinction between this case and that. Then it was further argued that as the railway company were bound to maintain this bridge in a state of repair, they had an answer to a claim for contribution to the paving of the new road. I cannot follow that argument. Adjacent owners are called upon to contribute to the paving of the street, because of some supposed benefit that will accrue to them from the street being paved; that obligation cannot be affected by a previous obligation, not as adjacent owner, but by a person who happens to be an adjacent owner, to keep the bridge in repair. It has been suggested that the railway company might be called upon to keep the pavement of the new street in repair. It is not necessary to consider that now. The only question we have to consider is, whether as regards the one single work of paving the bridge, the railway company is liable to contribute, and I think that it is.

BART, L.J.—In this case I am sorry to say that the judges in the court below have not given us their opinions. They held themselves bound by *The London, Brighton, and South Coast Railway Company v. The Vestry of St. Giles, Camberwell* (*ubi sup.*). I wish that the Lord Chief Justice and Manisty, J. had given us their own opinions in the matter. The facts are that there is a railway in a deep cutting, over which the road is carried on a bridge; the Board of Works have determined to treat the road over that bridge as a street. The board resolved that it shall be paved; and have called upon the railway company to contribute towards the cost of paving the whole length of the street. The question is whether the board are entitled so to rate the railway company. They say that they are on two grounds: First, that they are entitled to rate the railway company in respect of the whole length of the street because the company are owners not only of the land on which the buttresses which support the bridge are built, but also of the land underneath on which the rails are. Secondly, it is said that if not on that ground, then because the company are owners of the walls which go along the length of the bridge, and which are to be considered as land and as the boundary of the street. With regard to the first contention, the board, in order to support it, would have to contend that, supposing the bridge and the

buttresses that supported it, and the land on which the buttresses were built did not belong to the company at all, but supposing the land underneath the bridge which touches the buttresses did belong to the company, although no part of the bridge belonged to the company, the company would be liable to be rated in respect of the whole length of the street. Where there is a new street, the Metropolitan Act 1855 says that the owners of houses forming such street shall pay the expense of paving it, and the Metropolitan Management Act 1862 says that the owners of the land bounding or abutting on such street shall be liable to contribute to the expense of paving it, as well as the owners of houses therein. My view of the second Act is that it means land in the same position as regards the street as houses in the first Act. I do not agree with Hawkins, J. in *Brighton Railway Company v. St. Giles, Camberwell*, as to the owners of such lands only being liable as would have been liable under the former Act had their lands been occupied by houses, because I think that the owner of land, not wide enough for a house to be built upon it, might yet be liable to contribute. Nor do I think that the liability in respect of adjoining land can depend on mere level. I can imagine land at a lower level than the street on which houses might be built to which there would be no access except from the street by steps perhaps, or in some other way. I will not say that in such a case the land cannot be said to be abutting on the street. It is not necessary, however, to decide this, as I think the second ground upon which the board base their contention is sufficient to decide this case. It seems to me that upon that ground the railway company are owners of land bounding or abutting on the street for the whole length of the bridge. We are bound to say that this is a new street running across the bridge; that has been found as a fact. But the width of the street is only the width of the footway and the carriage way; the walls that bound it are no part of the street any more than the houses on each side of a street are part of it. What are these walls? They are formed of brickwork, and supported upon buttresses fixed into the land. The buttresses, no one could doubt, would be part of the land for all purposes. It seems to me that the walls are equally to be considered so. Then these walls are lands. Whose land are they? If they were built on land not belonging to the company the question would not arise; but they are built on land belonging to the company, and are themselves, therefore, in my opinion, not only land, but land belonging to the company. These walls bound this street along its whole length at the same level, so that the question how far adjoining land must be level with the street in order to be said to bound or abut on it does not arise. As soon as it is decided that this wall is land, and that it bounds the whole length of the street, it follows that the company are liable to be rated for the whole length of the street. Whether that decision is consistent with *The London, Brighton, and South Coast Railway Company v. The Vestry of St. Giles, Camberwell* (*ubi sup.*) I do not stop to inquire; that will have to be considered hereafter. Then the only remaining question is whether there is anything to exempt the railway company from their liability to contribute towards the paving of this bridge. If this is a new street, the board

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has a right to pave it. Is there anything to prevent them from recovering the expenses from the owner of the land that bounds it? It is nowhere expressly provided that in the case of a street on a bridge crossing the railway the company shall not pay the cost of originally paving it. Is such an exception implied by any provision inconsistent with the company's liability? It is said to be inconsistent with the company's liability to pave that they are bound to keep the bridge in a sort of repair, not paved, before it is a street. I cannot see that that is inconsistent. It is then asked, Are the railway company to keep the pavement in repair? I decline to answer that question.

HOLKER, L.J.—The question here is, are the railway company owners of land that bounds or abuts upon the whole length of the street across this bridge? They confess that they are the owners of some land that abuts upon or bounds the new street. They are the owners of the piers and of that portion of the wall which rests upon the piers. They have paid in respect of that. Notwithstanding that, they have set up one contention here, which, if it was good, would free them altogether. The first question, however, is, Are the company owners of land which abuts upon the street? As to the land in the centre of the railway between the rails, it is extremely difficult to say that that land in any sense abuts on the street. It seems to me clear, however, that the wall is the property of the railway company, is not part of the street, and that the wall is land. It was decided in one case that, if you have land running along a street at some depth below it and separated by a wall, that the land abuts on the street. Why does it? Because the wall is a part of the land. It is admitted that if this was a solid wall going all the way down, the company would be liable. Does it make any difference that this wall is rested on piers, which piers rest on land of the railway company? Under those circumstances, is not the wall resting on the land of the railway company? Suppose this wall rested on an arch, which was carried across the line by a series of pillars, I understood it to be admitted in argument by counsel for the company that in such a case the wall would be land of the railway company. Suppose that a new street were built at a considerable elevation, and against it ran a viaduct of a railway, and that a series of arches and a wall bounded the new street, dividing it from the viaduct, could it be said that only so much of the wall as rested on the piers was abutting on the land of the company? For these reasons I think that this wall is built on the land of the railway company, and has become in law the land of the railway company. I think that the other point should never have been advanced before us at all.

*Appeal allowed.*

Solicitors for the appellant, *R. R. Ellis.*

Solicitor for the respondent, *O. A. Curwood.*

*Monday, May 1, 1882.*

(Before JESSEL, M.R., BRETT and COTTON, L.JJ.)  
THE PRISON COMMISSIONERS v. THE CLERK OF THE  
PEACE FOR MIDDLESEX. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Prison Act 1877 (40 & 41 Vict. c. 21), ss. 48, 60—  
Land purchased by prison authority before Act  
—Vesting of land in Prison Commissioners.*

*By the Prison Act 1877 (40 & 41 Vict. c. 21), s. 48,  
"The legal estate in every prison to which this  
Act applies, and in the site and land belonging  
thereto . . . shall, on and after the commence-  
ment of this Act, be deemed to be vested in the  
Prison Commissioners."*

*By sect. 60, "Prison, in addition to the meaning  
attached to it by the Prison Act 1865, includes  
any land or building bought or contracted to be  
bought before the commencement of this Act by a  
prison authority, for the purpose of enlarging or  
altering any prison, or adding to the appur-  
tenances of any prison."*

*Before the commencement of the Act, the Clerk of  
the Peace for Middlesex, acting for the justices  
(who, by 28 & 29 Vict. c. 126, s. 5, were the prison  
authority), had purchased the fee simple of certain  
land near Oldbath Fields Prison for the purpose  
of providing airing grounds and additional  
buildings for the officers. The land was in the  
occupation of tenants whose leases had not  
expired at the commencement of this action, which  
was brought by the Prison Commissioners for  
delivery of the title deeds and an account and  
payment of the rents and profits of the land.*

*Held (affirming the judgment of Lord Coleridge,  
C.J.), that the land had passed to the plaintiffs,  
and they were entitled to recover.*

APPEAL by the defendant from the judgment of  
Lord Coleridge, C.J. in favour of the plaintiffs.

The nature of the action and the question which  
came before the court for decision appear from the  
head-note.

The sections on the construction of which the  
decision was given are set out, so far as material,  
in the judgment of the Master of the Rolls.

*Webster, Q.C., and E. S. Wright, for the  
defendant, in support of the appeal.*—The plain-  
tiffs are not entitled to recover in this action, for  
the legal estate in the land in question is not  
vested in them. By sect. 48 of the Prison Act  
1877 (40 & 41 Vict. c. 21), "The legal estate in  
every prison to which this Act applies, and in the  
site and land belonging thereto . . . shall . . .  
be deemed to be vested in the Prison Commis-  
sioners." This land does not come within any of  
these words. It is not part of the prison within  
the meaning of the definition of the word "prison"  
contained in sect. 60, nor is it covered by the  
additional words in sect. 48, "land belonging  
thereto." Sect. 48 can only include land actually  
appropriated to the purposes of the prison, which  
is not the case here. They also referred to the  
Prison Act 1865 (28 & 29 Vict. c. 126), sects. 4, 5,  
8, 17, 18, 23, 24, 25, 31, 32, 33, 34, 35, 44, and  
the Prison Act 1877 (40 & 41 Vict. c. 21), sects.  
2, 5, 17, 18.

*Sir H. James, A.G., Sir F. Herschell, S.G., and  
A. L. Smith appeared for the plaintiffs, but were  
not called upon to argue.*

JESSEL, M.R.—The question in this case depends

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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on the construction of the Prison Act 1877 (40 & 41 Vict. c. 21). The conveyance is, in my opinion, conclusive as to the nature of the purchase of the land, and therefore it is not proper for us to consider the resolutions which were passed by the justices before the purchase was carried out; any negotiations which may have taken place are immaterial. We must look at the conveyance to see what was the title of the clerk of the peace to the land. Now for what purpose could the prison authority buy land under the Prison Act 1865 (28 & 29 Vict. c. 126)? It is plain that they must buy for some of the purposes referred to in sect. 23 of that Act, by which "subject to the conditions hereinafter mentioned, any prison authority may alter, enlarge, or rebuild any of its prisons, or may, if necessary, build other prisons in lieu of or in addition to any subsisting prisons"; and this power is given subject to the sanction of the Secretary of State (sect. 24). Then, by sect. 44: "Any prison authority may purchase or hold such lands . . . as they may require for the purposes of this Act," and the section incorporates most of the provisions of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18); there is an exception as to compulsory purchase; there is a power of purchasing by agreement simply for the purposes of the Act, but the power to purchase otherwise than by agreement can only be exercised "in respect of lands contiguous to a prison, and required for the purpose of enlarging a prison or rendering it more commodious or safe." This limitation only applies to purchase by compulsion, and if the prison authority wanted to buy by compulsion, it must be for one of two purposes, for enlarging the prison, or for rendering it more commodious or safe. The result, therefore, in my opinion, is, that these words have no bearing on the present case. The question is, whether the prison authority could buy for any other purpose except those specified in sect. 23. I am of opinion that they could not. Mr. Wright said there was a common law authority on the part of the magistrates, but I think there was not. Sect. 8 of the Act of 1865 imposed the obligation to provide prisons, and enacted that the expenses of carrying into effect the provisions of the Act should be defrayed out of the county rate. Therefore I think there was not a common law authority, but a new power created by statute. If this is so, the definition of "prison" in the Act of 1877 (40 & 41 Vict. c. 21), s. 60, vests this land in the Prison Commissioners. By that section, "Prison, in addition to the meaning attached to it by the Prison Act 1865, includes any land or building bought or contracted to be bought before the commencement of this Act by a prison authority, for the purpose of enlarging or altering any prison, or adding to the appurtenances of any prison." The land here could not have been bought for the purpose of rebuilding, for rebuilding would take place on the same site where the previous building had stood, and that would be on land already belonging to the prison authority. Then it must have been bought for the purpose of enlarging or altering, if it was bought for any of the purposes referred to in sect. 23, and consequently it passes to the Secretary of State by sect. 5 of the Act of 1877, subject to the other sections of that Act by which it is vested in the Prison Commissioners, the plaintiffs; and they are entitled to judgment. Suppose, however, that

all I have already said is erroneous, and that the land has not vested as I have stated, still it appears to me that sect. 48 of the Act of 1877 comprises this land; by that section "The legal estate in every prison to which this Act applies, and in the site and land belonging thereto . . . shall on and after the commencement of this Act be deemed to be vested in the Prison Commissioners." Everything that is used as a prison is included in the word "prison" in this section, and there are in addition the other words, "the site and land belonging thereto;" surely this is land belonging to the prison; it was bought by the prison authority for prison purposes. Therefore, on either view, I think the decision of the Lord Chief Justice is right, and the appeal ought to be dismissed.

BRETT, L.J.—The Lord Chief Justice held that this land was purchased for altering or enlarging the prison, and it is admitted that if he is right in fact the appellant has no case. I do not mean at all to say that I think he was not right in this view, but I think it is immaterial how this may be, for the land was bought by the clerk of the peace on behalf of the magistrates, and it was declared to be bought for some purpose connected with the prison. In the deed of conveyance it is declared that the clerk of the peace buys the land to hold it in trust for prison purposes. There may be no estoppel, because there is no contract between the justices and the plaintiffs; but it is impossible to imagine that, as a matter of fact and evidence, the justices could say they did not buy for prison purposes. It is admitted that they did; but it is said for some prison purposes they could buy and hold land, and that such land does not pass to the Prison Commissioners by the Act of 1877; it is said that they could buy land for the purposes of the Act of 1865, in certain cases, without the land passing to the commissioners under the Act of 1877. In my opinion this contention is untenable. The case does not turn on the Act of 1865, but on the Act of 1877. The words of this latter Act are made wide in order to transfer every description of land bought under the Act of 1865 for prison purposes. It seems to me that the words of sects. 5, 48, and 60 of the Act of 1877 are made expressly large and wide in order to obviate the argument which has been used before us to-day.

COTTON, L.J.—The only question is, whether the land is vested in the Prison Commissioners. Sect. 60 of the Act of 1877 does not vest it; but we must look to sect. 48, and it seems to me plain that this section vests it, while, if the construction put on sect. 60 and the facts found by the Lord Chief Justice are right, this land comes within the definition of "prison," and the plaintiffs are entitled to succeed. If this is not so, then the prison authority wanted land which does not come within the definition of "prison," but which is "land belonging thereto" within the meaning of sect. 48 of the Act of 1877, and they wanted it for the purposes of the prison. This land was bought and conveyed to a trustee for the purposes of the Act of 1865, and I think it must be, if not "prison," "land belonging thereto" within the meaning of sect. 48 of the Act of 1877.

*Judgment affirmed.*

Solicitors for plaintiffs, *Hare and Fell*, agents for the *Treasury Solicitor*.

Solicitors for defendant, *Nicholson and Herbert*.

[Ct. of App.]

BLACKMORE v. THE VESTRY OF MILE END OLD TOWN.

[Ct. of App.]

Saturday, June 17, 1862.

(Before BRETT and COTTON, L.JJ.)

BLACKMORE v. THE VESTRY OF MILE END OLD TOWN. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Vestry—Surveyors of highways—Flap placed in highway to protect water-meter—Injury caused by dangerous condition of flap—Liability of vestry—18 & 19 Vict. c. 120, ss. 96, 116.*

*By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 96, vestries are made surveyors of highways, and by sect. 116 they have power to water the streets.*

*Plaintiff was injured in consequence of the dangerous condition of an iron flap, which belonged to a vestry, and was placed in the highway by the vestry for the purpose of covering and protecting a meter, belonging to a water company, and used for measuring the water supplied by the company to the vestry for the purpose of watering the streets. In an action against the vestry to recover damages for the injury so caused:*

*Held, that, as the flap had not been placed in the highway by the defendants in their capacity of surveyors of highways, but for the purpose of protecting the water-meter, they were liable for their neglect to keep the flap in a safe condition, and plaintiff was entitled to recover.*

*Judgment of Denman and Lopes, J.J. affirmed.*

*White v. Hindley Local Board (32 L. T. Rep. N. S. 460) approved.*

THIS action was brought to recover damages for personal injury. The plaintiff, while walking in the street in the defendants' parish during the snowstorm of the 18th Jan. 1881, slipped on the iron flap or cover of a box which contained a water-meter, and fell and broke his leg. The water-meter belonged to a water company, and was used to measure the water supplied by the company to the defendants for the purpose of watering the streets. The box containing the meter and the flap on which the plaintiff slipped belonged to the defendants, and had been put down by the defendants in the highway for the purpose of protecting and covering the meter. The injury to the plaintiff was caused by the condition of the flap, which had been left until it was worn smooth, and so became slippery and dangerous. At the trial, before Grove, J., the jury found a verdict for the plaintiff, and the question, on the argument of a rule nisi on the ground of misdirection, was whether the defendants were exempt from liability in consequence of being surveyors of highways.

By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 96:

Every vestry and district board shall, within their parish or district (exclusively of any other persons whatsoever), execute the office of and be surveyor of highways, and have all such powers, authorities, and duties, and be subject to all such liabilities, as any surveyor of highways in England is now or may hereafter be invested with or liable to by virtue of his office, under the law for the time being in force, so far as such powers, authorities, duties, and liabilities are not inconsistent with this Act. . . . And all streets being highways, and the pavement, stones, and other materials thereof, and all other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, or by any vestry or district board under this Act, shall

vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate.

By sect. 116:

Every vestry and district board shall have full power and authority to cause all or any of the streets in their parish or district to be watered as often as they think fit, and also to cause any wells to be dug and sunk in such public places as they think proper, and also to erect and fix any pumps in any public places for the gratuitous supply of water to the inhabitants of the parish or district.

The Divisional Court (Denman and Lopes, J.J.) discharged the rule, and the defendants appealed.

*Kemp, Q.C. and Pitt-Lewis* for the defendants.—The defendants being surveyors of highways, and the soil of the street being vested in them as such surveyors, they are not liable to an action for damages for personal injury sustained by the plaintiff owing to the non-repair of the highway. The flap was part of the pavement of the highway, and the case is the same as if the plaintiff had been injured owing to the paving stones not being properly attended to, in which case the vestry clearly would not be liable. The case of *White v. Hindley Local Board* (32 L. T. Rep. N. S. 460; L. Rep. 10 Q. B. 219), which will be relied on for the plaintiff, differs from the present case in this, that there the defendants were held liable because they were owners of the sewer, to which the grid, the defective condition of which caused the injury, belonged, whereas here the defendants are not the owners of the water-meter. The decision in that case is not binding on the Court of Appeal. They also cited

*Rolls v. The Vestry of St. George's, Southwark*, 4 L. T. Rep. N. S. 140; 14 Ch. Div. 785;

*Hamilton v. The Vestry of the Parish of St. George's, Hanover-square*, 29 L. T. Rep. N. S. 428; L. Rep. 9 Q. B. 42.

*Waddy, Q.C. and Orispe*, for the plaintiff, were not called on.

BRETT, L.J.—I am of opinion that this is a very clear case. It obviously comes within the principle of *White v. The Hindley Local Board of Health* (L. Rep. 10 Q. B. 219), and the only question is, are we prepared to say that case was wrongly decided? Here the defendants are surveyors of highways, and also by 18 & 19 Vict. c. 120, s. 116, they are something else; they act in a capacity which is independent of their position as surveyors of highways, and in which they have power to water the streets. That is no part of the duty of surveyors of highways, but rather is like the powers of lighting and watering which are sometimes given to commissioners by different Acts of Parliament. Here the vestry act in two capacities, and the flap was laid down for two purposes; it was not laid down merely for the purpose of the highway, but in order to protect the meter which belongs to the vestry. The meter is there because they pay the water company, not by a fixed rate, but by the quantity of water supplied. The flap is there to protect the meter which is put there for the benefit of the vestry. The case is like *White v. The Hindley Local Board of Health*, because here, besides being surveyors of highways, the vestry also act in a capacity which gives them power to water the roads, and in my opinion they are liable in their second capacity, and not because they are surveyors of highways. I think the decision of the Court of Queen's Bench

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.



CHAN. DIV.] MAYOR, &C., OF HYDE v. GOVERNOR AND CO. OF THE BANK OF ENGLAND. [CHAN. DIV.]

in *White v. The Hindley Local Board of Health* was right, and if so it follows that the appeal in the present case must be dismissed.

COTTON, L.J.—I am of the same opinion. 18 & 19 Vict. c. 120, s. 116, gives the vestry power to water the roads. Sometimes there is some difficulty, where persons act in two different capacities, in deciding to which capacity a particular act is to be attributed, but I think this case is plain. The question is, was the flap put down by the vestry acting as surveyors of highways, or was it put down for a different purpose, namely, to protect the meter? The flap was not put down by the vestry for the purpose of pavement, and, because they were surveyors of highways, that does not take away their liability for the defective condition of the flap, which belongs to them, and was put down for a different purpose. I am of opinion that the decision of the Divisional Court is right.

*Judgment affirmed.*

Solicitors for plaintiff, *Noon and Clarke.*

Solicitors for defendants, *Deprez, Austen, and Juteum.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

June 8 and 12, 1882.

(Before FRY, J.)

THE MAYOR, ALDERMEN, AND BURGESSES OF THE CORPORATION OF HYDE v. THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND. (a)

*Public Health Act 1875 (38 & 39 Vict. c. 55), s. 310—District local board constituted a borough—Property vesting in the borough—Right to transfer Bank Annuities—National Debt Act (33 & 34 Vict. c. 71).*

*By the Public Health Act 1875, sect. 310, it is provided that, where a district under a local board is constituted or included in a borough, all the powers . . . and properly exercisable by . . . or vested in such local board under that Act or any local Act for similar purposes, or any general Act of Parliament . . . shall pass to and be exercisable by and vested in the council of such borough.*

*The district of the local board of Hyde was constituted a borough by charter of incorporation in Feb. 1881, there being at that time a sum of Consolidated Bank Annuities registered in the name of the local board in the books of the Bank of England, being an investment made by them under the Act, of moneys borrowed by them, also under the Act.*

*Held, that the Bank Annuities were property acquired by the local board under the Act, and were by the Act vested in the mayor, aldermen, and burgesses as a corporation acting by the council.*

#### DEMURRER.

By this action the mayor, aldermen, and burgesses of the borough of Hyde, in Cheshire, claimed a declaration that they were entitled to a sum of 545*l.* 13*s.* 1*d.* Consolidated Five per Cent. Bank Annuities, standing in the books of the Bank of England in the name of "The Hyde Local Board, Hyde, Cheshire," and to the divi-

dends due and to become due upon the same, and to all the rights of registered stock-holders in respect of the stock. The plaintiffs further claimed an order on the defendants to pay the dividends due, and all future dividends, and to register the plaintiffs as entitled to the Bank Annuities in the books of the bank.

The sum of stock in question was purchased on the 9th Feb. 1881 by the local board for the district of Hyde, and it was duly registered as above mentioned. The purchase was by way of an investment by the board of moneys received by them in respect of private improvements from rates levied under the Public Health Act 1875, and was made pursuant to sect. 234 of that Act, sub-sect. 4 of which provides that

The money may be borrowed for such time not exceeding sixty years, as the local authority, with the sanction of the Local Government Board, determine in each case; and, subject as aforesaid, the local authority shall either pay off the moneys so borrowed by equal annual instalments of principal or of principal and interest, or they shall in every year set apart as a sinking fund and accumulate in the way of compound interest by investing the same in the purchase of exchequer bills or other Government securities, such sum as will with accumulations in the way of compound interest be sufficient, after payment of all expenses, to pay off the moneys so borrowed within the period sanctioned.

By an Order in Council and charter of incorporation, dated the 18th Feb. 1881, the district of the local board was constituted a borough, and the corporation claimed the stock in question, upon the ground that it became vested in them by sect. 310 of the Public Health Act 1875, which provides as follows:

Where after the passing of this Act a district or part of a district under the jurisdiction of improvement commissioners, or a district or part of a district under the jurisdiction of a local board, is constituted or included in a borough, all the powers, rights, duties, capacities, liabilities, obligations, and property, exercisable by, attaching to, or vested in such improvement commissioners or local board (as the case may be) under this Act, or under any local Act for purposes the same as or similar to those of this Act, or under any general Act of Parliament, within or for the benefit of such district or part of a district, shall pass to and be exercisable by and vested in the council of such borough.

The authorities of the Bank of England, however, refused to recognise the plaintiffs' right and to register them as holders of the stock, or pay them the dividends. The legal grounds for this refusal, which were now brought before the court in the form of a demurrer to the plaintiffs' action, appear in the arguments and judgment. In addition to the sections of the Public Health Act, the following section of the National Debt Act 1871 (33 & 34 Vict. c. 71) was referred to:

Sect. 22. In the offices of the respective accountants-general of the Banks of England and Ireland books shall continue to be kept wherein all transfers of stock shall be entered. Every such entry shall be conceived in proper words for the purpose of transfer, and shall be signed by the party making the transfer, or, if he is absent, by his attorney thereunto lawfully authorised in writing under his hand and seal, attested by two or more credible witnesses. The person to whom a transfer is so made may, if he thinks fit, underwrite his acceptance thereof. Except as otherwise provided by Act of Parliament, no other mode of transferring stock shall be good in law.

By the interpretation clause of the last-mentioned Act "person" is stated to include corporation.

*Kekewich, Q.C. and W. Latham* for the demurrer.—The bank cannot transfer the stock, as

(a) Reported by J. F. WAGGENT, Esq., Barrister-at-Law.



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required by sect. 310 of the Public Health Act 1875, to the council of the borough, for a transfer can only be made to a person or a corporation, which the council is not :

National Debt Act 1871 (33 & 34 Vict. c. 71), s. 22. The council is not a corporate body. In the Act 5 & 6 Will. 4, c. 76, s. 6, the body corporate of a borough are enabled to act by their council. Further, we say that sect. 310 of the Public Health Act 1875 applies only to property acquired under that Act, and that any rights which the corporation acquired must be limited to those acquired by the former local board under the Act :

*Attorney-General v. Birmingham, Tame, and Rea Drainage Board*, 44 L. T. Rep. N. S. 901; L. Rep. 17 Ch. Div. 685.

We submit that the intention and operation of the Act was to transfer to the council all managing powers, but not to vest property in them in the legal sense of vesting :

*Re Smyth*, 4 De G. & Sm. 499.

*Cozens-Hardy*, Q.C. and *Phipson Beale* for the plaintiffs.—If the words of the Act are admitted to be sufficient to vest the beneficial interest, they are also sufficient to vest the property in the legal sense. The sum of consols in question, although borrowed under the powers of the Act, should be treated as any other kind of property, and sect. 310 provides for the vesting in the council of property vested in the local board under any Act. The bank is not under the burden of inquiring as to the equitable title to the stock : (per Jessel, M.R., in *Howard v. Bank of England*, L. Rep. 19 Eq. 295-299.) As to the rights of the council, we say they are secured by sect. 12 of the Public Health Act 1875, and the term "council," as used in sect. 310, is a short expression for "the mayor, aldermen, and burgesses acting by the council." There are several instances in the Act of the council being referred to as the urban authority (see sects. 198, 246, 270). In the present case the former local board or urban sanitary authority are now the council.

*Kekewich*, Q.C. in reply.—It has not been shown that the legal ownership of the stock has passed by the Act from the body in which it was originally vested. In some of the statutes, where similar language is used, the property is directed to pass by actual transfer or conveyance; e.g., 9 & 10 Vict. c. 74; 9 & 10 Vict. c. 87. Even if the property vested in the council, then the objection arises that it can only be said that it is incorporated by implication, which, however, cannot be, for the implication must be necessary, and there is nothing in the statutes under consideration to lead the court to such a necessary inference: (*Grant's Law of Corporations*.)

FAR, J.—The question which I have now to determine arises under the Public Health Act of 1875. The local board of the district of Hyde, in the county of Chester, had been duly constituted under that Act; under that Act and sect. 213 of that Act they had power to levy private improvement rates upon property which might be improved under the powers of the Act; they had, under sect. 233, a power to borrow money, and under sect. 234 they had the duty of repaying the money, either by instalments, or by the formation of a sinking fund, which they were directed to invest in the purchase of Exchequer bills, or other Government securities. It appears

that this local board did certain improvement works; they levied a certain private improvement rate; they borrowed certain money which was to be repaid in the course of ten years; they set aside the produce of the improvement rate in the purchase of Bank Annuities; and those Bank Annuities are the sum now in question. Subsequently to their having so done, the Crown was pleased to grant a charter of incorporation to the district which was included in the Hyde Local Board District, and, thereupon, the contingency provided for by the 310th section of the Public Health Act 1875 occurred, for, after the passing of that Act, the district under the jurisdiction of the local board was constituted a borough. Now the 310th section provides that on the happening of that contingency "all the powers, rights, duties, capacities, liabilities, obligations, and property exercisable by, attaching to, or vested in such improvement commissioners or local board (as the case may be) under the Act, or under any local Act for purposes the same or similar to those of this Act, or under any general Act of Parliament, within or for the benefit of such district or part of a district, shall pass to and be exercisable by and vested in the council of such borough." The plaintiffs, who describe themselves as the mayor, aldermen, and burgesses of the borough of Hyde, and also as "the council of the said borough," claim the transfer of the Bank Annuities from the Bank of England, and the Bank of England have declined so to transfer, and by this demurrer they have raised the question of their obligation to so transfer. By the National Debt Act of 1870, sect. 22, the mode of transfer of such annuities is defined. It is in cases of ordinary persons to be in the well-known manner; it is to be in writing under the hand of the person, the transferor, or his attorney, and attested by two or more credible witnesses, "and, except as otherwise provided by Act of Parliament, no other mode of transferring stock shall be good in law." The question, therefore, is, whether the 310th section of the Act of 1875 is a mode of transferring stock other than that mentioned in the 22nd section of the National Debt Act 1870. Now, in the first place, it is suggested that the word "property" is not large enough to carry the legal interest in these annuities, and that all that is operated upon by the word is the equitable interest in the consols. I have a difficulty in following that argument, and for this reason, that the legal estate in an annuity is property just as much as the equitable estate is, and the Act has said that all the property vested in such local board under the Act shall pass. I am bound to give full effect to those words. My attention has, in the next place, been called to a decision of Knight Bruce, V.C., as he then was, in *Re Smyth* (*ubi sup.*). That case determined that, where the Trustee Act has said that the right to call for a transfer of consols shall be vested in trustees, that does not vest the consols, but only vests the right to call for a transfer of them. But this statute says that "the property" shall be vested, and it is difficult to see how the proposition that the words giving a right to call for a transfer do not vest property shows that the words saying the property shall be vested will give only a right to call for the transfer, and will not vest the consols. That argument, therefore, appears to me to be untenable. Then, in the next place, it is said that

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the property in question is not property vested under the Act. To answer that inquiry, whether it will be or not, I must have reference to the other sections of the Act. Now, it appears by sect. 12 that "all such property real and personal, including all interests, rights, and easements in, to, and out of property real and personal (including things in action), as belongs to or is vested in, or would but for the Act have belonged to or been vested in the council of any borough, or any improvement commissioners or local board as the urban sanitary authority of any district under the Sanitary Acts, or any board of guardians as the rural sanitary authority of any district under those Acts, shall continue vested or vest in such council, improvement commissioners, or local board, or board of guardians as the local authority of their district under this Act, subject to all debts, liabilities, and obligations affecting the same property;" and further, by sect. 13, "all existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto, shall vest in and be under the control of such local authority." It is said that the property which so vested in the local board by force of those particular enactments, and any similar words which may be found in the Act, if the local board existed in 1875—a point upon which I have no information whatever—and that property only, will be transferred from the local board to the corporation by force of sect. 310. On the other hand, it is contended that the true meaning of "property vested under the Act" will include not only that property, but all property which has come to the sanitary authority by force and virtue of the exercise of their authorities and powers. I have come to the conclusion that the latter is the true view and meaning of it. In the first place, it is obvious that the general scope and intention of these clauses is to make the corporation the universal successors to the local board, to place it as regards all its powers in exactly the same position; and as regards all its property it is also placed entirely in the same position. If it is to have the powers, it is natural it should have the property, which either has resulted from the exercise of the powers in the past, or is to be acquired by the continuance of the exercise of the powers in the future. Again, the language "vested under the Act" is not to be mistaken for a narrow construction referring to the particular provisions, and its true meaning appears to me to extend to everything which, if the Act had not passed, would not have come to the hands of the corporation. As I have already pointed out, the corporation has the power of making rates, has the power of making general rates, has the power of making private improvement rates, and has the power of purchasing consols with the money so produced, for the purpose of forming a sinking fund. All those powers are powers given by the Act. The property resulting to the local board from the exercise of those powers appears to me to be described with reasonable exactitude as property vested in the local board under the Act. I have been referred to a decision upon similar words with regard to the words "liabilities and obligations;" but that decision only shows that an action brought by the local board for an alleged nuisance is not a liability or obligation created under the Act. Why

should it be so? The obligation is created by force of a judgment of the court in consequence of the wrong doing of the local board. It is not a liability under the Act; it is not an obligation under the Act; it only arises from wrong committed by the board, and the ordinary law gives a right to certain remedies against the wrong doer. That decision, I think, throws no light whatever upon the true construction of this Act. Then arises this question: In whom does this section vest the property? The difficulty arises from the words of this section, which vests it nominally in the council. It has been contended that that can only vest an equitable interest. The conclusion at which I have arrived is, that with very considerable inexactitude and looseness of language, the word "council" is in that section used for the words "mayor, aldermen, and burgesses acting by the council." I arrive at that conclusion, because, in the earlier legislation, particularly in the Act of 1872, there are sections which show that the mayor, aldermen, and burgesses acting by the council are treated by the Legislature, and spoken of by the Legislature, as being the council. The 4th section of that Act provides that in a borough, constituted as such either before or after the passing of this Act, the mayor, aldermen, and burgesses acting by the council shall be the urban sanitary authority, and in a subsequent proviso of that Act the council are spoken of as having jurisdiction over the borough. Again, in a later section of the same Act, namely, sect. 22, power is given to the Local Government Board to transfer to the council of the borough the jurisdiction and powers of the Improvement Commissioners. In those cases it appears to me reasonably plain that the intention of the Legislature was not to create a new body corporate consisting of the council alone, but to transfer to the mayor, aldermen, and burgesses the particular powers in question to be acted upon and exercised by the council. No doubt, inasmuch as the council is the soul and the hand of the corporation, there is no great difficulty in using the words "the council" for the body for whom they are to act, for whom they are to deliberate, and whose decisions are binding on the body. In the same way, in the Public Health Act of 1875, there is strong evidence that the Legislature has used the words "the council" to mean the mayor, aldermen, and burgesses acting by the council. One trace of that is to be found in the 12th section to which I have already referred, because it is to be observed there that the property already vested in the council of any borough is to remain vested in the council; but it appears from an examination of the earlier Acts by the learned counsel on both sides that, although much of the property was vested in the mayor, aldermen, and burgesses, no property was vested in the council; and therefore, if I were to read the word "council" in the strict and proper sense, and not to hold it to include mayor, aldermen, and burgesses, that portion of the 12th section would fail of any operation, whereas, if I read it as a short description of mayor, aldermen, and burgesses, the intention of the Legislature has effect given to it; the property is vested in the corporation and continues in the corporation. It is scarcely needful for me to refer to the other sections, which are numerous, to which Mr. Cozens-Hardy has called my attention; but I will only say that in the 198th section, the 207th

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section, the 246th section, and the 297th section, similar expressions are to be found which import what the Legislature meant by the council. I hold, therefore, that the same meaning must be given to the word "council" in the 310th section, and the effect of it is to vest in the mayor, aldermen, and burgesses of the borough of Hyde the right not only to receive the dividends but to effect the transfer of the Consolidated Annuities which were part of the property of the local board before the incorporation of the borough. I therefore overrule the demurrer of the defendants and, as a matter of course, I must overrule it with costs. By consent, the statement of claim can be treated as amended by striking out the council as co-plaintiff, and then claiming that the property is vested in the plaintiffs under the Act.

Solicitors: for the plaintiffs, *Sharpe, Parkers, Pritchard, and Sharpe*, for *J. Hibbert*, Town Clerk of Hyde; for the defendants, *Freshfields and Williams*.

## QUEEN'S BENCH DIVISION.

June 12 and 13, 1882.

(Before GROVE, MATHEW, and NORTH, JJ.)

GREEN v. BROAD AND HUTT. (a)

*False imprisonment—Notice of action—Larceny Act—Inaccuracy as to date of arrest—Validity of notice—24 & 25 Vict. c. 96, s. 113.*

The plaintiff in the action alleged that he had been unlawfully, maliciously, and without reasonable cause detained and imprisoned by the defendants. The plaintiff in his statutory notice to the defendant H., who was a police constable, assigned the 13th April as the date of his wrongful arrest, whereas the evidence at the trial proved that it was on the 12th of April. At the trial the judge nonsuited the plaintiff on the ground (*inter alia*) that the statutory notice was not satisfied by reason of the variance of the dates, and that what the defendant H. had received was no notice at all. The plaintiff moved for a new trial.

Held, on the argument of the rule (by Mathew and North, JJ., Grove, J. doubting), that the judge at the trial was wrong in nonsuiting the plaintiff; and that, as the notice was accurate in every particular except the date, which was wrong only by a day, it was a sufficient and valid notice under the statute.

THIS was a rule calling upon the defendants to show cause why the nonsuit against the plaintiff should not be set aside and a new trial had on several grounds. For the purposes of the present case the rule called upon the defendant Hutt, who was a police constable, to show cause why the nonsuit should not be set aside and a new trial had on the ground (*inter alia*) that the notice of action was sufficient. The facts of the case material for this point were as follows:

Broad was trustee in liquidation of certain co-operative stores, and, on the days when the stock was being sold off, employed Hutt, the defendant, who was a member of the detective force, to prevent thefts being committed, and to apprehend those whom he reasonably suspected of having committed any felony. One of the orders given to him was to stop persons who left the premises without producing a voucher or receipt for the goods he was taking away.

The plaintiff attended the sale, made purchases, paid for the goods, but threw away the vouchers. The plaintiff left the premises, but was stopped by Hutt, who asked him for his vouchers, which the plaintiff failed to produce, whereupon Hutt made him go back to the stores.

On his return the plaintiff proved that he had purchased the goods, but the defendant would not let him depart; and it was not until Hutt was told to let the plaintiff go that he was able to leave the premises.

The plaintiff then took steps to enforce his claims for his alleged wrongful arrest, and served the following notice of action upon the defendant Hutt: "I, B. O. Green, &c., according to the form of the statute in such case made and provided, give you notice that I, the said B. O. Green, will, at, or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be sued out of Her Majesty's High Court of Justice against you, at the suit of me, the said B. O. Green, and proceed thereupon according to law; for that you the said W. Hutt did, on the 13th day of April 1881, at the warehouse of the City of London Co-operative Association Limited, Nos. 25, &c., Newgate-street, in the said City of London, unlawfully, maliciously, and without reasonable and probable cause, assault, detain, and imprison me, and keep me so imprisoned at the said warehouse for the space of one hour and upwards, to the damage of me, the said B. O. Green, &c."

The action was tried before Pollock, B., who nonsuited the plaintiff on the ground (*inter alia*) that the above notice was no notice at all, by reason of the variance between the date of the arrest therein assigned, and the date proved at the trial. A rule nisi for a new trial was obtained.

By 24 & 25 Vict. c. 96, s. 113:

All actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action.

Waddy, Q.C. for the defendant Hutt, showed cause.—The nonsuit on the point of insufficiency of notice was quite right. Hutt, as a police officer acting in pursuance of the provisions of the Larceny Act 1861, was entitled to notice under sect. 113 of that Act. Now it is clear law that notice under this and similar statutes must be strictly accurate in all essential matters; the date of the fact which forms the ground of action is most material, and ought to be given with complete accuracy; otherwise it is no notice under the Act. The notice of action must be altogether accurate:

*Martins v. Upcher*, 3 Q. B. 662;

*Forbes v. Lloyd*, 16 Ir. Rep. C. L. 552 (per Fries, C. B. 562).

H. Matthews, Q.C. (*O. H. Anderson* with him) for the plaintiff in support of the rule.—There is authority to show that this nonsuit was wrong, and that the question whether the defendant acted *bonâ fide* and without malice ought to have been left to the jury:

*Leete v. Hart*, L. Rep. 3 C. P. 322; 37 L. J. 157, C. P.;

*Hicks v. Faulkner*, 46 L. T. Rep. N. S. 127; 8 Q. B. Div. 167.

(a) Reported by W. P. EVERSLY, Esq., Barrister-at-Law.

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I do not admit that the defendant Hutt is such a constable as is entitled to notice. [The learned counsel then argued that the defendant, as a member of the detective force of the City of London, acting under private orders, was not entitled under the Act, as a constable, to notice of action.] Assuming, however, he was entitled to notice of action, this notice is sufficiently good and valid. It informs him of the whole ground of the plaintiff's action:

*Jones v. Bird*, 5 B. & Ald. 837;

*Smith v. West Derby Local Board*, 38 L. T. Rep. N. S. 716; 47 L. J. 607, C. P.

GROVE, J.—I am of opinion that this rule ought to be made absolute as against the defendant Hutt. This case was an action for malicious arrest brought against Hutt (and another defendant), who was the person who actually arrested the plaintiff. At the trial the learned judge nonsuited the plaintiff as against Hutt; and I am of opinion that that nonsuit was wrong, and that the judge ought to have left to the jury the question whether or not Hutt was acting in an honest belief that the plaintiff had committed a felony. The ground on which the nonsuit proceeded was that the notice of action which was served on Hutt was bad. On the supposition that Hutt acted as a constable, I think notice of action was necessary under 24 & 25 Vict. c. 96, s. 113. The question then arises whether this notice was good. The notice alleged that the plaintiff's arrest took place on the 13th April, whereas it was on the 12th. For my own part I should have thought it sufficient notice of the matter, but I must candidly admit I feel hampered by certain decisions, viz., *Leete v. Hart* (L. Rep. 3 C. P. 322; 37 L. J., 157 C. P.); *Martins v. Upcher* (3 Q. B. 662; 11 L. J., 291 Q. B.), and *Smith v. West Derby Local Board* (38 L. T. Rep. N. S. 716; 47 L. J. 607, C. P.), that both time and place must be given. I think the notice ought to be accurate both as regards time and place, and ought not to vary in those particulars from the evidence given at the trial. I do not, however, think it necessary to do more than express an opinion on the point, for a decisive judgment is not called for, as I think the learned judge was wrong in removing the case from the jury on the question of Hutt's reasonable suspicion and belief that a felony had been committed by the plaintiff.

MATHEW, J.—I am unable to agree with the ruling of the learned judge at the trial as regards Hutt. As to the notice, there is admittedly a slip in the date, but the place, the nature of the charge, and the parties are all accurately described; indeed, the notice is perfectly in accordance with the facts, except that it substituted 13 for 12. It has been held that we are bound by decisions that make absolute accuracy in the notice a necessity. I think they contain mere dicta on the subject, and are not binding upon us. I am of opinion that mere verbal inaccuracy as to time and place is not fatal to the validity of a notice under the Larceny Act, and that the judgment of the learned judge at the trial was wrong.

NORTH, J.—I am of opinion that a notice under this Act ought to specify both time and place of the wrongful act complained. Now this notice does specify the offence; here everything is accurately referred to and set out. The facts are not

disputed, except that the date of the 13th of April instead of the 12th is given. Now, this is not a material variance, indicating that what was alleged in the notice was different from that which really took place, and so possibly calculated to injure and prejudice the defendant. This notice gives sufficient information.

*Rule absolute for a new trial.*

Solicitors for the plaintiff, J. and M. Pontifex.  
Solicitor for the defendants, H. Montague.

Saturday, June 17, 1882.

(Before DAY, J.)

BELL AND ANOTHER v. BASSETT. (a)

*Ecclesiastical law—Local Act—Rate for ecclesiastical purposes—Contract for valuable consideration—Compulsory Church Rates Abolition Act 1868—51 Geo. 3, c. cl., s. 19—31 & 32 Vict. c. 109, s. 5.*

*An arrangement embodied in a private or local Act, and which is based on good and valuable consideration, and provides for the levying of church rates, though not in the strict form of an agreement between the parties affected, is a "contract" within 31 & 32 Vict. c. 109, s. 5, and protects the rate levied in pursuance of it for ecclesiastical purposes.*

NISI PRIUS.

This was an action tried before Day, J. without a jury, to recover instalments of a rate called the rector's rate, brought by the plaintiffs, the churchwardens of the parish of Saint Paul, Covent Garden, against the defendant, who was an inhabitant of the parish.

The statement of claim alleged that, in pursuance of the provisions of the Act, 12 Car. 2 (Private Act), intituled "An Act for making the Precinct of Covent Garden parochial," and of the Act 51 Geo. 3, c. cl. (private Act), which was an Act to amend the former statute, the plaintiffs had made two rates in 1880 and 1881; and that the rates had been duly affirmed and allowed by law; and that the defendant, as such inhabitant, was liable to pay the said rates, but that he had not paid the same.

The statement of defence alleged that the rate had been made for "ecclesiastical purposes," and was bad within 31 & 32 Vict. c. 109, s. 1, that the rates were not duly made or confirmed, and that the plaintiffs had a sufficient balance in hand from former rates, and should not have made these rates.

The reply alleged that the defendant had not appealed to the justices at any quarter sessions against the said rates, pursuant to 51 Geo. 3, c. cl. By 51 Geo. 3, c. cl., s. 19:

Whereas by the said Act of His late Majesty King Charles the Second, a perpetual yearly payment to the rector of the said parish, and his successors, of the sum of one hundred pounds, was charged on certain houses in Covent Garden, in the said parish. And whereas the said houses are now the estate of the Most Noble John, Duke of Bedford, and he is desirous that the same and certain other houses of him, the said duke, situated in Covent Garden aforesaid, and which, together with the houses so charged by the said Act form the Piazza in Covent Garden aforesaid, which extends from Russell-street to King-street, may be charged with the payment of a further yearly sum of eighty pounds to the said rector and his successors for the time being, for the

(a) Reported by W. P. EVERSOLEY, Esq., Barrister-at-Law.

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better support and maintenance of the said rector and his successors. Be it therefore further enacted, that the said rector and his successors shall for ever hereafter have and be entitled to an additional yearly sum of eighty pounds, to be issuing out of and charged upon all and singular the houses charged by the said recited Act with the payment of the said yearly sum of one hundred pounds, and also out of and upon all other the houses in Covent Garden aforesaid now forming the Piazza there, which extends from Russell-street aforesaid to King-street aforesaid, to be paid and payable to the said rector and his successors quarterly, on the several days of payment whereon the said sum of one hundred pounds is by the said Act made payable; and that the first quarterly payment thereof shall be made on the 24th day of June 1811, and that the said rector and his successors shall have all such powers and remedies for the recovery of the said additional yearly sum of eighty pounds as by the said recited Act are given and provided for the recovery of the said therein-mentioned yearly sum of one hundred pounds.

By 31 & 32 Vict. c. 109, s. 1:

From and after the passing of this Act no suit shall be instituted or proceeding taken in any ecclesiastical or other court, or before any justice or magistrate to enforce or compel the payment of any church rate made in any parish or place in England or Wales.

By sect. 5:

This Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be made or levied in lieu of or in consideration of the extinguishment or of the appropriation to any other purpose of, any tithes, customary payments, or other property or charge upon property, which tithes, payments, property or charge, previously to the passing of such Act, had been appropriated by law to ecclesiastical purposes as defined by this Act, or in consideration of the abolition of tithes in any place, or upon any contract made, or for good or valuable consideration given, and every such enactment shall continue in force in the same manner as if this Act had not passed.

By sect. 10:

In this Act "ecclesiastical purposes" shall mean the building, re-building, enlargement, and repair of any church or chapel, and any purpose to which by common or ecclesiastical law a church rate is applicable, or any of such purposes.

A. Wills, Q.C. (B. A. McCall with him) appeared for the plaintiffs.—We admit this rate was within the Compulsory Church Rate Abolition Act 1868 (31 & 32 Vict. c. 109), and it included the salary of the parish clerk and sexton:

*Gathercole v. Wade*, Burn's Eccl. Law, 888a;

*Rand v. Green*, 3 L. T. Rep. N. S. 298; 30 L. J. 80, C. P.; 6 Jur. N. S. 808;

*Steer's Parish Law*, 4th edit. 57.

It was, therefore, partly applicable to ecclesiastical purposes; but is protected by sect. 5 of the Act. The parish has been liable to tithes, but by the division the tithes in the new parish were extinguished, and a new provision made for the support of the clergy. There was a "contract made for valuable consideration given;" for we find the statute of 12 Car. 2 reciting that the then Earl of Bedford had erected the church, and given a rectory house and stipend of 100*l.* a year, and enacting that the parish should be divided from St. Martin's-in-the-Fields, and charging the yearly sum of 250*l.* upon all the houses of the inhabitants of the new parish of St. Paul's, Covent Garden, except the then Bedford House. This annual sum was to be collected by a rate to be made by the churchwardens, and to be divided between the rector, curate, clerk, and sextons. The Act of 51 Geo. 3, c. 61, increases the salaries and the amount of the rate, and by sect. 19 it appears that the then Duke of Bedford consented

to charge his property with a further sum of 80*l.* a year; and Russell House, which then extended from Covent Garden to the Strand, was no longer exempted from the rate. The Duke increased his liability, and the parishioners increased theirs; and the Legislature sanctioned the contract by this Act. These facts distinguish this case from *Watson v. Parish of All Saints, Poplar* (46 L. T. Rep. N. S. 201; Price's Church Guide, 93). The other objections are not open to the defendant, he has a right of appeal to quarter sessions, and no objection open on such appeal is now open:

*Reg v. Kingston*, 27 L. J. 199, M. C.; EL. BL. & EL.

256;

*Churchwardens, &c., of Birmingham v. Shaw and others*, 10 Q. B. 868.

This rate is good on the face of it:

*Reg v. Newman*, 29 L. J. 117, M. C.;

*Reg. v. Bradshaw*, 2 L. T. Rep. N. S. 233; 29 L. J. 176, M. C.

A. Charles, Q.C. (R. S. Wright with him) appeared for the defendant.—If the other objections are not open to me, the only question is, whether this rate is protected by sect. 5 of the Act of 1868. [DAY, J.—Were not the parishioners relieved from all tithes by the Act of 12 Car. 2?] It is not so expressed as relief, and that Act has been repealed. This case cannot be distinguished from *Watson v. Parish of All Saints, Poplar* (*ubi sup.*). Sect. 19 of 51 Geo. 3, c. 61, gives effect only to the voluntary benevolence of the Duke of Bedford, which is not referred to in the preamble. There is no contract, and there is no consideration moving the parishioners. You cannot look outside the Act for evidence of it.

McCall, in reply, was stopped.

DAY, J.—In this case I give judgment for the plaintiffs, and I do so without the least hesitation, because I am happy to think that this is one of those cases in which an erroneous judgment will certainly not be allowed to remain unchallenged. If I am deciding wrongly, which is very possible, although I have a very strong opinion on the subject, my error will very soon be set right, and the parties will not be prejudiced. If the matter had stood on the statute of Charles II. alone, I should have said that this rate was doubly protected under the 5th section of 31 & 32 Vict. c. 109, because I should have been of opinion that this rate was made and levied "in lieu of, or in consideration of the abolition of tithes" in the precincts of Covent Garden, which was constituted a parish by the Act of Charles II. But I am impressed by the argument of Mr. Charles, and I am inclined to think that this rate can now only be supported under the Act of 51 Geo. 3, c. 61, that there was no abolition of tithes by the later Act by way of consideration for the imposition of the additional burden on the parishioners, and that, therefore, that portion of the 5th section of 31 & 32 Vict. c. 109, which maintains liability to church rates where they are "in consideration of the abolition of tithes in any place," does not protect the rate which has been made in this parish. Under the Act of 51 Geo. 3, c. 61, I think that the rate is a good and valid rate, because I think that it is a rate made upon "a contract made, or for good or valuable consideration given"—the last words of protection found in the 5th section of 31 & 32 Vict. 109. Now it is quite true that there

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is a recital in the preamble of 51 Geo. 3, c. cl. to the effect that it is desirable to increase the allowance made to the rector, the curate, the clerk, and the sextons, by reason of the increased price of provisions. That is the general notion which appears to me to influence what I will term the contracting parties. I look upon this statute as evidencing a contract to which certainly the Duke of Bedford was a party on the one hand, and the parishioners on the other, and I am of opinion that the whole statute must be taken together. Looking at it as a whole, it seems to me that the arrangement, which appears to be in the nature of a contract, was a reasonable and natural arrangement. The parishioners and the Duke of Bedford have a common interest in the adequate maintenance of the rector, curate, and officials, and they are desirous that they should be supported in a manner suitable to their position. Owing to the increased price of provisions, the allowance previously made was inadequate, and accordingly the Duke of Bedford, on the one hand, said that he would increase the rentcharge which he had previously paid, that he would abandon the exemption of a large portion of the parish represented by Bedford House, and make that liable with the other houses to the rates, thereby reducing the pound rate, and that he would also extend the area of property upon which his rentcharge is to be raised. The parishioners, on the other hand, submitted to the payment of a larger rate—perhaps larger in proportion than the benefit they derived from the submission, if I may say so, of Bedford House to the general rateability; but still, having regard to the interest and the due administration of public worship, the Duke of Bedford making these large concessions on his part—they agree to submit to an increased annual rate being levied on them. Now it seems to me that there is abundant reason to suppose and to infer, if it were necessary to infer it, that this was an arrangement made between these parties by reason of the rector and the church officials seeking to have an increase of their allowance, and the duke expressed his readiness to do so on the parishioners also coming forward, and submitting to an increased sum being imposed on them by way of an annual rent. It seems to me that that is the true nature of the transaction, and that there is therefore consideration for the submission of the parishioners to the increased rate, producing 520*l.* a year, should henceforth be imposed on them, the Duke of Bedford agreeing, also, to contribute a much larger sum than he had hitherto done by virtue of a common arrangement. It is true that one does not find a recital in the form in which an agreement would have been drawn by a conveyancer, but one must look at the Act as a whole. Although it is true that a submission to the rate by the parishioners is not in terms to be found in sect 2 of the Act, and the agreement by the Duke of Bedford to provide an increased sum by way of rentcharge is to be found in sect. 19, still, I do not see that that makes any real or substantial difference when one is trying to find out what the gist of the transaction is. Then, on the other hand, it is said the Duke of Bedford purported to do this out of benevolence. It is very likely he did it out of benevolence, but one cannot help seeing that whilst he was submitting to an increased rentcharge out of his benevolence, he might as

well have said that the parishioners agreed to pay an increased rentcharge out of their benevolence, because it seems to me that they agreed to do so for the benefit of their minister and officials of the church, and to secure better and more adequate services of the church. I must say that I think that this is in the nature of a contract, and that there is abundant consideration for the rate for which the parishioners submitted themselves as they appear to me to have done, by this statute of 51 Geo. 3 c. cl., which was passed practically to confirm an arrangement made between these parties. This distinguishes the case from *Watson v. Parish of All Saint's, Poplar* (46 L. T. Rep. N. S. 201). Under these circumstances I am of opinion that the plaintiffs are entitled to judgment in respect of both rates, and I give judgment accordingly with costs.

*Judgment for plaintiffs.*

Solicitors for plaintiffs, *J. O. Hutton and Co.*  
Solicitors for defendant, *Harding and Co.*

*Tuesday, June 27, 1882.*

(Before FIELD and JAVE, JJ.)

REG. v. VANE AND OTHERS (Justices of Cumberland); *Re THE GUARDIANS OF THE PENRITH UNION v. THE OVERSEERS OF THE PARISH OF CASTLE SOWERBY.* (a)

*Elementary Education Acts 1870 and 1876—School-owning district—Contributory district—School attendance committee—Burden of expenses of committee shared by contributory district—33 & 34 Vict. c. 75, ss. 49, 50, 51, 74—39 & 40 Vict. c. 78, ss. 4, 21, 23, 28, 31, 32.*

*O. S., a parish in the union of P., had not a school board of its own, but was made, by an order of the Education Department, a contributory district of the neighbouring parish of O., in which there was a school board, and the children of O. S. were in the habit of attending the school board school in O. In 1877 the guardians of the P. Union appointed, under the authority of 39 & 40 Vict. c. 79, s. 7, a school attendance committee for certain parishes of the union, including O. S., and the school attendance committee appointed school attendance officers for the said parishes. In 1880 the school attendance committee incurred certain expenses in connection with enforcing the attendance of children at school, and issued a precept to the overseers of S. O. requiring contribution of the share of the parish in such expenses. The overseers refused to pay the said contribution on the ground that the parish of O. S. was under the jurisdiction and control of the parish of O., and not under that of the school attendance committee. The guardians then summoned the overseers of O. S. before two justices for the county of O., who took the same view as the overseers, and dismissed the summons. The guardians of the P. Union appealed.*

*Held, on appeal, that the justices were wrong, and that, notwithstanding O. S. was a contributory district to O., it was not a parish "under any other local authority" within the meaning of the Education Act 1876, and so was under the jurisdiction of the school attendance committee appointed by the guardians of the P. Union,*

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

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*whose order for the payment of the contribution was right and proper.*

THIS was a rule obtained by the guardians of the Penrith Union calling upon certain justices of the county of Cumberland and the overseers of the parish of Castle Sowerby, in the same county, to show cause why the said justices should not issue a warrant of distress upon the goods of the said overseers of Castle Sowerby for 6*l.* 15*s.* 6*d.*, the amount of a contribution required of them by a precept of the Penrith guardians, of the 9th April 1880, in respect of certain expenses incurred under the Elementary Education Act 1876.

The facts of the case were shortly as follows :

1. Castle Sowerby, a parish in the union of Penrith, in the county of Cumberland, had no school board constituted for it, and its schools were voluntary schools. Caldbeck, an adjoining parish, is in the union of Wigton, had a school board constituted for it in 1874, and the schools in the latter parish were under the control and direction of the school board.

2. Owing to the insufficiency of accommodation at their own parish schools at Castle Sowerby, it was deemed more convenient that the children living on the Caldbeck side of Castle Sowerby should attend a school in the former instead of those in the latter parish. This plan was carried out by an order made by the Education Department, under the Elementary Education Act 1870 (sect. 49) that the parish of Castle Sowerby should become a contributory district of the parish of Caldbeck. It was afterwards directed under the provisions of sect. 50 of the same Act, that two persons should be elected by Castle Sowerby to be members of the school board of Caldbeck.

3. In 1878 the school board of Caldbeck made certain bye-laws regulating the attendance of children, &c., for its school district. In the interpretation clause of these bye-laws "the term district means the school district of Caldbeck with Castle Sowerby (contributory)."

4. In 1877 the guardians of the Penrith Union in pursuance of various provisions of the Elementary Education Act 1876, appointed a school attendance committee for certain parishes in their union. Among these parishes was included that of Castle Sowerby. The school attendance committee, as they were empowered to do, with the consent of the guardians of the Penrith Union and the Local Government Board, appointed school attendance officers for the parishes. The school attendance committee also proceeded to make bye-laws affecting these parishes, including Castle Sowerby; these bye-laws were sanctioned by the Queen in Council in March, 1881.

5. On the 24th of April 1878, the guardians of the Penrith Union issued a precept under 39 & 40 Vict. c. 79, s. 31, requiring from the overseers of Castle Sowerby a contribution of 6*l.* 13*s.* 1*d.* in respect of school attendance expenses, which they duly paid.

6. On the 9th of April 1880, the guardians of the Penrith Union issued another precept to the overseers of Castle Sowerby, requiring a contribution of 6*l.* 15*s.* 6*d.* The overseers refused to pay this contribution on the ground that Castle Sowerby was under the jurisdiction and control of the Caldbeck School Board, and not of the guardians of the Penrith Union, and therefore they

were not liable to contribute to the expenses incurred by the school attendance committee of the Penrith Union.

7. In Sept. 1881 the overseers of Castle Sowerby were summoned under the provisions of 2 & 3 Vict. c. 84, s. 1, by the guardians of the Penrith Union, before two justices acting for the Leath Ward division of the county of Cumberland, for the non-payment of the said sum of 6*l.* 15*s.* 6*d.*, but the justices dismissed the summons. The guardians of the Penrith Union thereupon moved for and obtained the above rule.

By 2 & 3 Vict. c. 84, s. 1 :

In every case in which any contribution by overseers or other officers of any parish of moneys required by the board of guardians or persons acting as guardians for such parish, or for any union which shall include such parish for the performance of their duties shall be in arrear, it shall be lawful for any two justices acting within the district wherein such parish shall be situate, on application under the hand of the chairman, &c., to summon the said overseers or other officers to show cause, at a special sessions to be summoned for the purpose, why such contribution has not been paid, and after hearing the complaint preferred under the authority of such chairman, &c., and on behalf of such board, if the justices at sessions shall think fit, by warrant under their hands and seals to cause the amount of the contribution so in arrear, together with the costs occasioned by such arrear, to be levied and recovered from the said overseers, &c., in like manner as moneys assessed for the relief of the poor may be levied and recovered; and the amount of such arrear, together with the costs as aforesaid, when levied and recovered, to be paid to the said board.

By 33 & 34 Vict. c. 75, s. 49 :

The Education Department may by order direct that one school district shall contribute towards the provision or maintenance of public elementary schools in another school district or districts, and in such case the former [or contributing district] shall pay to the latter [or school-owning district or districts] such proportion of the expenses of such provision or maintenance, or a sum calculated in such manner as the Education Department may from time to time prescribe.

By sect. 50 :

Where one school district contributes to the provision or maintenance of any school in another school district, such number of persons as the Education Department (having regard to the amount to be contributed by the contributing district) direct, shall be elected in the contributing district, and shall be members of the school board of the school-owning district, but such last-mentioned district shall, except so far as regards the raising of money and the attendance of children at school, be deemed alone to be the district of such school board; such members shall be elected by the school board, if any, or, if there is none, by the persons who would elect a school board if there were one, in the same manner as a school board would be elected.

By sect. 51 :

... An order respecting a contributory district shall be evidence of the formation of such district, and after the expiration of three months from the date thereof shall be presumed to have been duly made, and no objection to the legality thereof shall be entertained in any legal proceeding whatever.

By sect. 74 :

Every school board may from time to time, with the approval of the Education Department, make bye-laws for all or any of the following purposes : (1) Requiring the parents of children of such age not less than five years nor more than thirteen years, as may be fixed by the bye-laws, to cause such children (unless there is some reasonable excuse) to attend school. (2) Determining the time during which children are so to attend school. (3) Providing for the remission or payment of the whole or any part of the fees of any child where the parent satisfies the school board that he is unable from poverty



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to pay the same. (4) Imposing penalties for the breach of any bye-laws. (5) Revoking or altering any bye-laws previously made.

By 39 & 40 Vict. c. 79, sect. 4:

It shall be the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading, writing, and arithmetic, and if such parent fail to perform such duty, he shall be liable to such orders and penalties as are provided by this Act.

By sect. 7:

The provisions of this Act respecting the employment of children shall be enforced: (1) In a school district within the jurisdiction of a school board, by that board; and (2) In every other school district by a committee (in this Act referred to as a school attendance committee) appointed annually, if it is a borough, by the council of the borough, and, if it is a parish, by the guardians of the union comprising such parish. Every such school board and school attendance committee (in this Act referred to as the local authority) shall, as soon as may be, publish the provisions of this Act within their jurisdiction in such manner as they think best calculated for making those provisions known.

By sect. 21:

In a school district not within the jurisdiction of a school board, if it is a borough, the school attendance committee may if they think fit, and if it is a parish, the school attendance committee for the union comprising such parish, on the requisition of the parish, but not otherwise, shall make bye-laws respecting the attendance of children at school under section seventy-four of the Elementary Education Act 1870, as if such school attendance committee were a school board.

By sect. 23:

For the purposes of this Act section seventy-four of the Elementary Education Act 1870, and all enactments of that or any other Act referring to bye-laws under that section, shall be construed as if "school board" included the authority authorised by this Act to make bye-laws. . . . It shall be the duty of every local authority to enforce the bye-laws made by that authority in pursuance of section seventy-four of the Elementary Education Act 1870.

By sect. 28:

Every local authority, but subject in the case of a school attendance committee to the approval hereinafter mentioned, shall direct one or more of their officers, or the officers of the council or guardians by whom the committee are appointed, to act in the execution of this Act, and of any bye-laws in force within the jurisdiction of such authority, and may, if they think fit, pay him or them for so doing, and may, if need be, appoint and pay officers for the purpose.

By sect. 31:

A school attendance committee under this Act shall not incur any expense, or appoint, employ, or pay any officer without the consent of the council or guardians by whom the committee were appointed, and where they are appointed by guardians, also of the Local Government Board, but with such consent may employ and pay any officer of such council or guardians. The expenses [if any] of a school attendance committee shall be paid. . . . (2) Where the committee is appointed by a board of guardians, out of a fund to be raised out of the poor rate of the parishes in which the committee act for the purposes of this Act, according to the rateable value of each parish. For the purpose of obtaining payment of such expenses, the board of guardians shall have the same powers as they have for the purpose of obtaining contributions to their common fund under the Acts relating to the relief of the poor.

By sect. 32:

. . . . A school attendance committee appointed by guardians shall act for every parish in the union which is not for the time being under any other local authority within the meaning of this Act.

*Macaskie* showed cause.—The question here is whether the parish of Castle Sowerby is liable to contribute to the school attendance expenses incurred by the school attendance committee

appointed by the Penrith Union Guardians, and really turns upon the construction of sect. 50 of 33 & 34 Vict. c. 75, and of sect. 32 of 39 & 40 Vict. c. 79. Owing to defective school accommodation at Castle Sowerby, some of its children were sent to attend the Caldbeck schools, and Castle Sowerby elected two members to the Caldbeck school district, and contributed to the school expenses of that district. Then came the Act of 1876, and the guardians of the Penrith Union included Castle Sowerby among those parishes which were to be under the control of their school attendance committee, which committee ordered the overseers of the parish of Castle Sowerby to pay two sums of money, one of which has been paid; but I contend that both orders were *ultra vires*, and that the overseers of Castle Sowerby were justified in not paying the second contribution. For all practical educational purposes Castle Sowerby is under the jurisdiction of the Caldbeck School Board, and so is not "a parish in the union which is not for the time being under any other local authority within the meaning" of the Education Act 1876, s. 32, which alone would give jurisdiction to the school attendance committee appointed by the guardians of the Penrith Union.

*Charles, Q.C. (F. H. Jones and Mallon with him)* were not called upon.

*FIELD, J.*—I am of opinion that the magistrates were wrong in not issuing their warrant, and that this rule ought to be made absolute. The subject, I admit, is one of considerable complication. The parish of Castle Sowerby has no school board of its own, but was made a contributing district to the school board of the neighbouring parish of Caldbeck. The Caldbeck School Board have no power to enforce attendance of children coming from, or punish parents living in, Castle Sowerby. I think the school attendance committee appointed by the Penrith Union are alone the proper persons to decide questions of the children's attendance, for they possess the necessary powers to enforce the attendance, and the like. Though it may be more convenient for the children of Castle Sowerby to go to Caldbeck, still the expenses of enforcing the attendance of the children of Castle Sowerby form part of the expenditure of the school attendance committee of the Penrith Union, and therefore the burden of the committee's expenditure should be shared in by Castle Sowerby.

*CAVE, J.*—I am of the same opinion. The Education Act of 1870 (sect. 74) gave powers to school boards to make bye-laws for the attendance of children in their school districts; but where a school district was made contributory to a school-owning district, no power was given to the latter to make bye-laws affecting such contributing district, for I am of opinion that sects. 50 and 74 of the Education Act of 1870 did not give power to a school board to make bye-laws for the purpose of enforcing the attendance of children from the contributing school district; neither, under this legislation, had the guardians of the Penrith Union such power in this particular case. The Education Act of 1876, in its 21st section, provided for that want. In sects. 21 and 32 it enacted that it should be in the power of the school attendance committee appointed by the union to make bye-laws, as though such school attendance committee were a school board, and to act for every parish in



[H. OF L.] MANAGERS OF THE METRO. ASYLUM DIST. v. HILL AND OTHERS (Appeal No. 1). [H. OF L.]

the union which was net for the time being under any other local authority within the meaning of the Act. In the present case the guardians of the Penrith Union appointed a school attendance committee, which made an order on this parish of Castle Sowerby to contribute its share of the expenses of enforcing the attendance of children within that union. I think the guardians were quite right in making this order for the payment of these expenses, and that the rule ought to be made absolute.

*Rule absolute.*

Solicitors for the applicants, *Gedge, Kirby, Millett, and Morse*, for *Arnison and Co.*, Penrith.

Solicitors for the respondents, *Thomsen and Edwards*, for *S. K. James*, Penrith.

### HOUSE OF LORDS.

March 2, 3, 6, 7, 9, 10, 20, 21, 23, 24, and  
May 22, 1882.

(Before the LORD CHANCELLOR (Selborne), Lords  
O'HAGAN, BLACKBURN, and WATSON.)

THE MANAGERS OF THE METROPOLITAN ASYLUM  
DISTRICT v. HILL AND OTHERS (Appeal No. 1). (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*New trial—Grounds for granting—Admissibility  
of evidence—Costs of previous trial.*

*The ordinary reasoning according to which the verdict of a jury on a question of fact ought not to be disturbed, unless the preponderance of the evidence against the verdict be strong and clear, does not apply to cases in which the verdict depends upon a question of science which is not fully solved, but is still within the region of bona fide controversy.*

*The importance of the verdict to others besides the parties to the litigation, and also the novelty of the question at issue, are elements to be taken into consideration in deciding whether a new trial should be granted or not.*

*Where a new trial is granted on the ground of the unsatisfactory nature of the verdict, a condition should not be imposed that the party applying for the new trial should pay the costs of the previous trial.*

*In an action brought in respect of a nuisance alleged to be caused by the construction and maintenance of a hospital for infectious diseases, the plaintiffs proposed to call evidence as to the effect of other similar hospitals on the surrounding neighbourhoods:*

*Per Lord Selborne, L.C.: Evidence of facts by which the effect (or absence of effect) of such hospitals could be either positively or approximately ascertained, would be admissible and material.*

*Per Lord Watson: Evidence relating to collateral facts is only admissible when such facts will, if established, afford a reasonable presumption as to the matter in dispute, and when such evidence is reasonably conclusive.*

*Foulkes v. Chadd* (3 Doug. 157) discussed and approved.

THIS was an appeal from a judgment of the Court of Appeal in an action brought by the respondents against the appellants, in respect of a nuisance alleged to be caused to them by the construction

and maintenance by the appellants under their parliamentary powers of a hospital for small-pox patients at Hampstead.

The action was tried before Pollock, B. and a special jury at Westminster in Nov. 1878, when the jury, in answer to questions left to them by the learned judge, found that the hospital was a nuisance *per se*, and also that there had been negligence and want of reasonable care in the management thereof by the defendants. The defendants contended that they were acting under the statutory powers conferred upon them by the Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6), and were entitled to judgment notwithstanding the findings of the jury.

Pollock, B. reserved the case for further consideration, and after argument gave judgment for the plaintiffs with costs: (40 L. T. Rep. N. S. 491; 4 Q. B. Div. 483.)

The Queen's Bench Division (Cookburn, C.J. and Mellor, J.) made absolute a rule for a new trial, on the ground that the verdict was against the weight of evidence, and, on cross appeals to the Court of Appeal, Bramwell, Brett, and Cotton, L.JJ. affirmed the judgment of Pollock, B. on the question of the statute, and affirmed the judgment of the Queen's Bench Division as to the new trial, on condition that the defendants paid the costs of the former trial, Brett, L.J. dissenting on this point: (42 L. T. Rep. N. S. 212.)

The defendants appealed to the House of Lords both against the order imposing on them the liability to pay the costs of the former trial as a condition of having a new trial (Appeal No. 1), and also on the question of the effect of the Metropolitan Poor Act 1867 on the question of their liability (Appeal No. 2).

This appeal (No. 2) was decided against the appellants (44 L. T. Rep. N. S. 653; 6 App. Cas. 193), and they accordingly proceeded with Appeal No. 1.

A preliminary objection was taken that the appeal would not lie, as being for costs only, but it was overruled by the House of Lords (43 L. T. Rep. N. S. 225; 5 App. Cas. 582), and the appeal was heard on the merits.

*Benjamin, Q.C., Willis, Q.C., Anderson, and Proudfoot* appeared for the appellants.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Bompas, Q.C.*, and *Finlay, Q.C.* appeared for the respondents.

The argument turned chiefly upon the evidence, which is sufficiently set out in the report of the case when before Pollock, B., and in the judgments of their Lordships.

The cases of *Harris v. Aaron* (4 Ch. Div. 749; 36 L. T. Rep. N. S. 43) and *Graham v. Campbell* (7 Ch. Div. 490; 38 L. T. Rep. N. S. 195) were cited on the question of the power of the Court of Appeal to impose a condition as to costs; *Solomon v. Bitton* (8 Q. B. Div. 176) as to the principles on which the courts will act in granting a new trial; and *Foulkes v. Chadd* (3 Doug. 157) on the question of the admissibility of certain evidence as to the effect of other hospitals under the management of the appellants on the surrounding districts.

*Willis, Q.C.* was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 22.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Selborne).—My Lords: The principal question which your Lordships have now to determine is whether there ought to be a new trial, the conditional order of the Court of Appeal for that purpose having lapsed by reason of the non-performance of the condition by the appellants. If that condition (which was that the costs of the first trial should be paid by the appellants within a certain time) ought, in your Lordships' judgment, to have been imposed, it would be difficult now to relieve the appellants from the consequence of their neglect to comply with it. But my opinion is that, if it was right to make an order for a new trial, the Queen's Bench Division was also right in directing that the costs of the first trial should abide the event. In determining whether there ought in this case to be a new trial, the nature of the question as well as the character and state of the evidence concerning it appears to me to be material. The issues were (1) whether a small-pox hospital, of the character and capacity of that at Hampstead, and situated as that hospital was relatively to the houses and lands of those adjoining proprietors who were plaintiffs in the action, was necessarily and *per se* a nuisance to those proprietors (when it was full of smallpox patients), however well it might be managed? and (2) whether there were any faults or defects in the management of that hospital during the time which preceded the commencement of this action which made it a nuisance to those proprietors, in a way, or in a degree, in which it might not otherwise have been so? The jury found both those questions in favour of each and every one of the plaintiffs. Without entering into particulars as to these matters I think it enough to say that the evidence relating to them appears to me to have been insufficient to support the verdict, if the finding on the main issue were set aside. While, therefore, I am not myself disposed to say, with the judges in the Queen's Bench Division, that the verdict on this secondary issue was so unsatisfactory as alone to be a sufficient cause for a new trial, I think the converse view, that the verdict on the secondary issue ought not to stand, if on the main issue a new trial is ordered, is correct. Limiting myself to the main issue, I consider it important to observe that the jury had not, in this case, to find a verdict on a common question of fact, depending on the memory or the credit of witnesses, who (if they remember accurately and speak truly) must be capable of understanding what they have seen and heard. Nor was the question one of scientific knowledge, ascertained and verifiable by experiment, as to which any expert, properly qualified, could speak with the same certainty as concerning things which are the direct objects of sense. It was a problem of medical science, not yet fully solved, but still within the region of *bond fide* controversy. I think it would be a fallacy to apply to a case of that kind the ordinary reasoning, according to which the verdict of a jury on a question of fact ought not to be disturbed when there has been evidence on both sides, unless the preponderance of evidence against the verdict is strong and clear. If, indeed, nothing were at stake beyond the right of the plaintiffs to receive a certain sum of money by way of damages for a particular trespass, the maxim, *Interest reipublice*

*ut sit finis litium*, might be in point, even in a case of this problematical kind, as (in patent cases especially) may sometimes be liable to happen. But, when much more than this is at stake, it may well be that a single verdict on such an issue, which appears to the court to have been founded upon an inconclusive and unsatisfactory state of evidence, ought not to stand, even though an opposite verdict might also have been open to a similar objection. The court which has to determine whether a new trial shall be granted ought to weigh the importance of the question, and the consequences depending on its proper decision, with strict impartiality. The plaintiffs (of course) ought not to have less than justice, because the duties of an important branch of public administration, with reference to the public health, and to the care and treatment of poor persons suffering from a dangerous disease, may be embarrassed and rendered difficult, or even made impracticable, by their success; but, on the other hand, less than justice ought not to be done to those who have the care of those large public interests because of any inequality of pecuniary resources, which may possibly exist, as between the parties to such a litigation. I think that there ought to be a new trial in this case, because the verdict of the jury, upon the main issue, does appear to me to have been founded upon a state of evidence which is not to my mind satisfactory, having regard to the nature and importance of the question to be determined. I abstain from going into any of the details of that evidence. I think it is sufficient to say that the theoretical part of the evidence does not seem to me to be sufficient to support the verdict; and that there are deficiencies in the practical part, which might be (and, I think, ought to be) supplied, before it can be satisfactory to draw from it the conclusions which the jury has drawn. If evidence could be given of any similar or other facts, from which the effect (or absence of effect) of other hospitals, and particularly of those at Homerton and Stockwell, on the surrounding neighbourhoods, could either positively or approximately be ascertained, it would, in my opinion, be admissible and material. I cannot, however, agree with the Court of Appeal in regarding the objection, which was successfully taken at the trial, to the reception of the evidence then tendered relative to the hospitals at Homerton and Stockwell, as a sufficient reason for making it a condition of the new trial that the costs of the first trial should be paid by the appellants. That objection was suggested by the learned judge who tried the action, before it was taken by the appellants' counsel, by whom it was, not without considerable hesitation and reluctance, adopted; and, under these circumstances, it would, I think, be too much to make the appellants pay costs in consequence of it, from which, in the event of a final decision in their favour, they would otherwise be free. If, indeed, a new trial were granted solely to let in that evidence, as an indulgence to the appellants themselves, the case would be different. But it is not so; nor does it appear to me to be probable, from what passed at the trial, that, if the evidence offered as to the hospitals at Homerton and Stockwell had then been admitted, it would have been less open to criticism than that as to Hampstead itself. If so, it cannot now be assumed that

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such evidence would have made a new trial unnecessary. I must, therefore, move your Lordships to reverse the order appealed from, and to restore the order for a new trial, as made by the Queen's Bench Division.

LORD O'HAGAN.—My Lords: This case, in trial and in argument, has occupied an extraordinary amount of public time and judicial consideration; but, in the view which I take of it, and which is, I believe, entertained by your Lordships, I do not think that, in its present stage, its details should be made the subject of any lengthened criticism. I do not think that, sending it to a new trial, we should anticipate or control the action of a jury in matters which are mainly proper for their determination, and I shall only refer in a few words to its general course and character, so as to make intelligible the grounds of the opinion I have formed. Two questions are raised before this House.—First, Should there be a new trial? Secondly, If so, should it be directed on the terms imposed by the Court of Appeal, or any other terms, or with the reservation made by the Queen's Bench Division? The learned judge before whom the cause was tried, the judges of the Queen's Bench Division, and the judges of the Court of Appeal have unanimously answered the first question in the affirmative; and I see no reason to quarrel with a conclusion sustained by such great authority. Several of their Lordships have intimated that, if the controversy had only regarded the character of the asylum as a nuisance *per se*, they would have refused or hesitated to grant a new trial; and this on the ground that, as to that controversy, the judge who tried the cause has not expressed dissatisfaction with the verdict; and that the conflicting medical evidence and the statistical evidence, which might have possibly warranted a finding either way, were properly for the consideration of the jury, whose decision should not be disturbed without some coercive reason. But, even if there had been nothing else in the case, and nothing in the verdict attracting distinct judicial dissatisfaction, I should have been disposed to say that a new investigation is desirable. The matters at issue were of great novelty and vast public importance. The verdict and the injunction which necessarily followed it may affect deeply the health and safety of the community at large, and render very difficult, at least, if not impossible, the legal establishment of any hospital in any populated district for the reception of patients labouring under small-pox, or, perhaps, other contagious diseases. And if this single verdict, followed by injunction, is, without further inquiry, to be held binding and irreversible, the consequences, in seasons of danger from epidemics such as are too frequent in this and other cities, might be of a very formidable kind. I do not say that the proof adduced might not have been so conclusive and the verdict so clearly right, as to dissuade your Lordships from putting the parties to the great expense and vexation of another trial, perhaps even more lengthened and more costly than the last. But it seems to me that there is here in the balance of evidence, and in the suggested imperfection, and possibly misleading operation, of the statistics, which may have determined the judgment of the jury, enough to make us pause before we pronounce a ruling—fraught with results so very serious—to be final and

irreversible. As I have said already, I do not think it judicious, pending another trial, and with a view to the action of another jury, to criticise the evidence in detail; and I content myself with this general indication of the ground on which I conceive that the findings on the first and second issues, even if they stood alone, should not be considered satisfactory. Taking together the two branches of the case, which are necessarily interwoven, and can scarcely, for the purposes of this appeal, be dealt with apart from each other, I am of opinion that they must both be submitted to a new inquiry. I desire to say that I found that opinion on the reasons I have stated, and not at all on the exclusion of the evidence as to Homerton and Stockwell. Relying on those reasons, I do not feel it necessary to discuss the propriety of the exclusion, but I am not prepared to say that the learned Judge was wrong in rejecting the evidence, especially because of the non-fulfilment of the conditions on which he offered to receive it. Without proof as to the state and management of the other hospitals, so as to establish a substantive similarity, any inferences drawn from a comparison of their operation with that of the Hampstead asylum might have been quite fallacious and deceptive. But, even without regard to this, I am not quite satisfied that the evidence was admissible, whether such conditions were or were not fulfilled. It was not pertinent to the issue tried as to Hampstead only. No notice had been given, in the pleadings or otherwise, that it would be offered. It would have involved the jury in a multitude of collateral inquiries, calculated to confuse and embarrass them; and it might have been endlessly prolonged by an indefinite multiplication of objects of comparison. To keep such investigations within reasonable limits, and secure promptitude, precision and satisfaction in the administration of justice, it seems to me that Courts should be very jealous of the admission of such proof. If it had been admitted here, an inquiry as prolonged, as difficult, and probably as abortive as that which was applied for so many days to the Hampstead asylum, might have been equally applied to each of the others, and to as many more, though numbering hundreds, as might have been alleged to have like characteristics, and to offer in their action on their neighbourhoods the same statistical results. I do not see how judicial inquiries at Nisi Prius can be restrained within a practicable and manageable compass, in many cases, if the admissibility of such evidence be declared. The case of *Foulkes v. Chadd* (3 Doug. 157), to which attention was called by one of your Lordships, appears to me to be of weight in favour of the view I am submitting. There, an embankment had been erected for the exclusion of the sea from certain lands, and the question was, whether it had been the cause of the choking up of the harbour of Wells? Evidence that other harbours on the same coast, similarly situated, where there were no embankments, had been choked about the same time as that of Wells was offered and rejected. But an engineer was allowed to give his opinion that the embankment did not cause the mischief. On a motion for a new trial, this opinion, formed by a skilled witness on proved facts, was held to have been rightly admitted; and the case, from that day forth, has been held to make such testimony, beyond question, admissible. Lord Mansfield expresses, in these terms,

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the judgment of the court as to the rejected evidence:—"As to the evidence respecting the situation of other harbours on the same coast, we think that if there were no embankments, it was admissible in illustrating Mr. Smeaton's opinion, but as to harbours in which there were embankments, we think it was improper, since *litum lite resolvit*." As I understand it, the distinction seems to me well founded. Evidence establishing that the silting up, elsewhere, took place in the absence of an embankment, may have shown conclusively that the engineer was right in believing it to have arisen from some other causes. But if, on the contrary, the embankment's proved existence made the cases—the case in controversy and the case of illustration—identical, proof as to the one could scarcely avail to explain, or vary, or confirm the proof as to the other. In this case, the testimony of skilled witnesses was given in abundance and without objection; and, for the purpose of testing its value, cross-examination might have been applied as to the two hospitals alleged to be similar to that at Hampstead, and their effect on people and property around them; but I do not know that there is any authority for the admission, under such circumstances, directly and substantively, of such evidence. I think the judgment of Lord Mansfield is an authority the other way, applicable to the state of facts before us, founded on intelligible principle and conducive to the convenience and efficiency of courts of justice. On the second and very important question as to costs, if I am right in thinking that the evidence rejected was not properly admissible, the condition imposed by the Court of Appeal should not be allowed to burthen the defendants. In my view, the objection was legitimate and the ruling upon it correct; and the making of it gave no ground for imposing on them the costs of the first trial. But even should that view be erroneous, as I must consider it, if your Lordships are of another opinion, I agree with Brett, L.J., that in the case of a new trial, granted on the ground of the unsatisfactory nature of the verdict and for the express purpose of more accurately ascertaining the rights of the parties, it is contrary to practice and to principle to require of a litigant, who may ultimately prove to be entitled to succeed, the payment of the costs of another who has temporarily had a wrongful triumph. And, especially, I cannot understand why the taking of an objection which, whether well or ill founded, was originated by the judge, on whose pressure it was so taken by the defendants' counsel—presumably on reasonable grounds—should induce the serious punishment of his client by the imposition of the costs of an inquiry in which, possibly, it may appear that he ought to have prevailed. I am, therefore, of opinion that there must be a new trial, and that the ruling of the Queen's Bench Division should be affirmed by your Lordships in all its parts.

Lord BLACKBURN.—My Lords: The respondents in this case brought their action against the appellants for maintaining a small-pox hospital at Hampstead in such a manner as to be a nuisance to them respectively, in respect of their property adjoining the site of the hospital. It was clear on the evidence that the appellants did maintain on a space of about eight acres of ground a hospital, into which they received at one time a larger number of patients than had been before

known to be received at one time into any hospital for small-pox. The trial was somewhat embarrassed by a wish to find those facts which would be material if the construction ultimately put on the statutes under which the defendants act had been different from what it has been determined to be. It must be taken now, since the decision of this House in *Metropolitan Asylum District v. Hill*, Appeal No. 2 (6 App. Cas. 193; 44 L. T. Rep. N. S. 653), that the Legislature, though authorising the appellants to erect and maintain hospitals for the reception of small-pox patients, and to raise funds for that purpose, did not confer on them any power to erect or maintain any hospital in such a manner as to be a nuisance to the owners of property in the vicinity, even though such should be the necessary and inevitable consequence of maintaining the hospital at all; and that the respondents have the same rights to recover damages, and the same remedies for the prevention of what is shown to be an injury in the technical sense, *injuria cum damno*, as they would have had against any one erecting and maintaining the hospital in the same manner without any authority from Parliament. No one can doubt that the erection of a small-pox hospital in any locality, even if it be proved to demonstration that it is not a source of real danger, will have a tendency to deter persons from coming to reside in the neighbourhood, and so will depreciate the value of ground which would otherwise fetch a high price as building ground. But this, though it may be a source of serious pecuniary loss to the owner of that building land, is not a matter for which he can recover damages; it is *damnum absque injuria*. The jury, in this case, after a long trial, have answered six questions put to them by Pollock, B., before whom the case was tried, and from those answers it sufficiently appears that they thought it proved that the maintenance of the hospital, however skilfully and carefully it was maintained, was a nuisance to each of the respondents. But the finding, if satisfactory, that the hospital was a nuisance *per se* to each of the respondents entitles them to have an injunction to restrain the appellants from carrying on the asylum so as to be a nuisance to all or any of the respondents. This is a very important matter, casting great, if not insuperable, difficulty in the way of carrying out the scheme of having separate hospitals for the treatment of those ill of infectious disorders, which the Legislature appear to have approved of. For, though it might be contended that, consistently with this verdict, a hospital for the reception of a smaller number of patients might be maintained on this spot without being a nuisance to the respondents, yet if the appellants were to maintain a hospital there for any number of small-pox patients, they would do so at their peril and subject to a great disadvantage so long as this verdict stands. The question actually before the House is this. The Queen's Bench Division made an order that the verdict should be set aside and a new trial had between the parties; and that the costs be reserved until after such new trial. I may observe that, before the Common Law Procedure Act, 1854, the practice had become inveterate not to grant a new trial as against the weight of evidence, except on payment of costs; by the 44th section of that Act this was altered, and it was made the rule that the costs of the first trial

should abide the event, unless the court shall otherwise order. Those words, "shall abide the event," have a technical sense; and it was sometimes a matter of dispute whether the event of the second trial was the same as that of the first (see *Dawson v. Harris*, 11 C. B. N. S. 801), and to avoid any dispute as to what was the event the rule was often made as it has been in the present case: No complaint has been made as to this. On appeal, the majority of the Court of Appeal ordered "that the plaintiffs' appeal herein be dismissed if within two months the defendants elect to pay, and if, within fourteen days after completion of taxation the defendants pay the costs of the former trial, except in so far as such costs were increased by the plaintiffs' contention that the defendants had been guilty of negligence in the management of the hospital, and that all other costs be costs in the cause; and it is further ordered that if the defendants do not so elect and pay such taxed costs within the times before mentioned, then that the plaintiffs' appeal herein be allowed with costs." The appellants have not complied with this condition, and now on this appeal the two questions arise:—First, Whether the new trial should have been granted at all. Second, Whether the condition which the Court of Appeal attached to the granting of that new trial was one which ought to have been attached. I will deal with those two questions separately. I think that in this case a new trial ought to be granted. It is not easy, probably it is impossible, to lay down any precise rule as to when a new trial shall be granted or refused as against evidence, and I shall not attempt to do so. The power to do so is intrusted to the courts for the purpose of securing that, as far as is practically possible, justice should be done. And the mode in which it is exercised, and the principles on which the courts act in doing so seldom got into the reports, whilst there was no appeal on such questions. Perhaps now they will get better known. The constitution of this country has entrusted the determination of facts to the jury; but even when the jury had acted properly on the materials before them, it may well be that, without imputing blame to any one, it may appear that the nature of the case was such that it was not sufficiently investigated, or as Bramwell, L. J. says, sifted, and that a verdict founded on such imperfectly investigated materials is unsatisfactory. Even if that is made out, it does not follow that there should be a new trial. The court has in its judicial discretion to weigh the delay, vexation, and expense of a new trial, all in fact which forms the foundation of the maxim *Interest reipublice ut sit finis litium*, against the injustice which may be worked in the particular circumstances by treating a verdict so unsatisfactorily obtained as conclusive; and I think, though as I have already said, it would be difficult to find reported authorities for it, that the importance of the consequences of the verdict is always an important element in coming to a decision on such a question. It is for this reason that I have pointed out the important effects of the verdict, finding that the hospital is a nuisance *per se* if it stands. I am not at all prepared to say that, if the verdict only affected the payment of a sum of money to the respondents, I should think it right to interfere; at the same time, I am not to be understood as saying that I should not. I think

that a further and very important element to be taken into account is, whether the question in issue is one of novelty, such that the litigants could not reasonably be expected to grapple with it and understand it at once, and this is what weighs most with me. I think that the respondents obtained their verdict principally, if not entirely, by the effect of their statistics, by which they undertook to show that the proportion of small-pox cases in the immediate vicinity of the hospital whilst it was open was much greater in proportion to the population than in other districts similar in character, but not near a hospital. Both sides called the evidence of experts, which at least since the decision of *Foulkes v. Chadd* (3 Doug. 157), now one hundred years, has always been received on questions involving science. This is I think in truth a mode, and practically the best if not the only mode, of getting at the results of the extensive experience of professional men. If the facts did show that, not once or twice only but during the whole course of these two epidemics, there was more disease in the neighbourhood of the hospital than in other localities where everything was similar, except that there was no hospital there, I think the conclusion that the hospital was the cause of that excess of disease is one which the jury might draw. But I cannot think there has been such an investigation into these statistics as to satisfactorily establish the foundation for this inference. It may be that further investigation will confirm the finding of the jury; it may be that it will disprove it. All that I now say is that I think there has not been such an investigation as to be a satisfactory ground for deciding such a novel and important question, and therefore that there should be a new trial. The next question is whether the condition which the majority of the Court of Appeal has attached to the new trial ought to have been so attached. I have come to the conclusion that it ought not. The respondents (plaintiffs below) wished to give evidence of a similar state of statistics round Stockwell and Homerton, two hospitals maintained by the same appellants. After a good deal of hesitation, the appellants' counsel, I think almost at the request of the judge, objected to the reception of this evidence, and it was rejected. There is very little, if any, authority on the question whether such evidence was admissible. In *Foulkes v. Chadd* (already referred to) the question was whether the silting up of Wells harbour, which commenced soon after an embankment had been made for the purpose of excluding the sea from some lands previously overflowed by the tide, was due to the maintenance of the embankment to such an extent as to make it a nuisance. Evidence was offered to show "that other harbours on the same coast, similarly situated where there were no embankments, had begun to fill up and be choked about the same time as Wells harbour. They also called Mr. Smeaton, an eminent engineer, to show that in his opinion the bank was not the cause of the mischief. The evidence was rejected." A new trial was granted. Lord Mansfield first gives the reasons for holding that Mr. Smeaton's judgment formed on facts was very proper evidence. And this part of the case has been often cited and acted upon. He is then reported to have said, "as to the evidence respecting the situation of other harbours on the same coast, we think that if there

were no embankments it was admissible in illustration of Mr. Smeaton's opinion; but as to harbours in which there were embankments, we think it was improper since *litem lite resolvit*." I have some difficulty as to what the principle of the distinction here laid down is meant to be; and as far as I know there is no subsequent case which throws any light upon it. But, acting on principle and common sense, I should say that the plaintiff in such a case as the present could derive no benefit from proof that disease had been communicated by another hospital unless he was able to show that the management of that hospital was such as to show that it was not communicated in consequence of the neglect of precautions taken in the case before the court. I do not say positively that without such proof the evidence would be inadmissible as being an attempt *litem lite resolvere*; only that in my opinion it at least ought not to have any weight; and I think it clear that the defendant might give evidence that in other hospitals the disease was not communicated, to raise the inference that a hospital did not, necessarily at least, cause the communication of contagion. But if it could be proved (and in the case of hospitals managed by the same body evidence to that effect probably could be procured sufficient at least against them) that all such precautions were observed, the evidence, if admissible, would be such as to have weight. I am sensible of the force of the remark that such inquiries might be pushed so far as to make a trial of such an issue by a jury impracticable, and as the laws of evidence are framed with a view to a trial at Nisi Prius, I should not like, without further argument and consideration, to say positively that such evidence might not be properly rejected on the ground that a proceeding at Nisi Prius ought to be restrained within practicable limits, though I am not prepared to decide that it might be properly so rejected, and I do not think it necessary to decide this point. For I think that there ought to be a new trial, even though I agreed with what I understand to be the opinion of the whole Court of Appeal, that evidence was on the objection of the appellants (defendants below) rejected which ought to have been received, and that a good deal of evidence which might have been brought forward on their behalf was not produced. If I thought that the objection of the appellants prevented the reception of evidence which would have made the verdict satisfactory, I should have to consider the ground given by Cotton, L. J., who says that those who caused the verdict to be not satisfactory ought not to have a new trial unless they pay the costs occasioned by their objection. I do not mean to decide that this principle should always be decisive, but only that where the facts raise such a point; it seems to me, as at present advised, an element to be taken into account by the court in exercising their discretion. But I think that if the objection had not been made, and the evidence as to the statistics around Stockwell and Homerton had been received, it would almost to a certainty have been even more open to the objection that it was not sufficiently investigated than the evidence actually given, and, if so, instead of making the verdict satisfactory it would have added another reason for thinking it not satisfactory. So thinking, I am obliged to differ from the majority of the Court of Appeal. I think that this condition ought not

to have been imposed, and consequently that the order of the Queen's Bench Division should be restored.

LORD WATSON.—My Lords: I also am of opinion that there ought to be a new trial in this case. The learned judge who presided at the trial submitted six different questions to the jury, but these in reality raised only two issues of fact, the first being whether the hospital, under careful and skilful management, was in itself a nuisance to each of the respondents, and the second whether there had been such defects in the management of the appellants as to occasion nuisance to the respondents, or one or more of them. Upon both issues the jury found in favour of each and all of the respondents. The two issues thus affirmed by the jury are quite independent of each other. No real danger, which is capable of being obviated by skilful management, can be attributed to the mere existence of the hospital, but risks of infection to the neighbourhood, inseparable from a collective mass of small-pox patients within its walls, if such there be, may be aggravated, and other real perils may be created, by want of proper and reasonable care on the part of the managers. Had the second been the only issue submitted to the jury, I should have doubted whether a finding in favour of any one of the respondents would have been satisfactory, but I should have had little hesitation in holding that the indiscriminate finding of the jury in favour of all the respondents was not warranted by the evidence, and consequently that there must be a new trial. It so happens, however, that the verdict of the jury upon the first issue, if it be allowed to stand, is sufficient for the purposes of the respondents, and will entitle them to a more sweeping and effective remedy than they could demand under the second issue, being nothing less than the suppression of the present hospital; and the unsatisfactory character of their findings upon the second issue, whilst it may suggest a doubt as to the discrimination exercised by the jury in dealing with somewhat imperfect evidence, in a case of extreme nicety, does not of itself afford a sufficient good ground for setting aside that verdict. It is therefore necessary to consider upon its own merits the verdict of the jury upon the first issue, which raises a question of great and general importance. Whether the hospital at Hampstead was or was not conducted with reasonable care and skill is a matter with which the appellants and respondents are chiefly, if not solely, concerned. Whether that or a similar hospital must, even with the best of management, necessarily occasion nuisance to its neighbourhood, is a question which concerns many besides the present litigants; and the consequences of the verdict would probably extend to rights and interests, public and private, in all large centres of population throughout the kingdom. These appear to me to be considerations which ought not to be disregarded in considering whether there ought to be a new trial in the present case. In determining whether there shall be a new trial, the real function of the court is to see that no injustice is done, and it is my opinion that, in a case like the present, the court is entitled, if not bound, to look beyond the interests of the litigants. As between them, if no other interests were involved, it might be doing full justice to allow a verdict to become



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final, although the merits of their controversy had not been satisfactorily or sufficiently investigated. On the other hand, the materials laid by them before the jury may be so incomplete and insufficient that the verdict must of necessity be unsatisfactory, not merely because the litigant parties have failed duly to investigate the case, but because it may seriously prejudice the rights of others who were not parties to the investigation. Being of opinion that the verdict must be assumed to rest mainly if not wholly upon certain facts immediately connected with Hampstead Hospital, which the jury must have held to be established by the evidence, I agree with your Lordships in thinking that the evidence bearing upon these facts is in some respects so incomplete that the verdict founded upon it cannot be satisfactory, and, upon this part of the case, I shall not venture to repeat what has already been so well said by your Lordships. In regard to the evidence bearing upon the Stockwell and Homerton Hospitals, which was tendered by the respondents and rejected by the presiding judge, I have felt more difficulty than some of your Lordships. I do not for a moment doubt that collateral evidence of that description is, subject to certain conditions, receivable. In the Scotch case of *Hamilton v. Tennant and Co.* (1 Rob. 821), where the discharge of gaseous matter from the chimney of a chemical work was complained of as a nuisance by the proprietor of land in its vicinity, Lord Cottenham held that the effect of the discharge upon other properties in the neighbourhood was legitimate matter of inquiry; and I apprehend that, on the same principle, evidence of the effect of similar discharges from other chimneys would have been admissible. Still, there appears to me to be an appreciable distinction between evidence having a direct relation to the principal question in dispute and evidence relating to collateral facts, which will, if established, tend to elucidate that question. It is the right of the party tendering it to have evidence of the former kind admitted, irrespective of its amount or weight, these remaining for consideration when his case is closed; but I am not prepared to hold that he has the same absolute right when he tenders evidence of facts collateral to the main issue. In order to entitle him to give such evidence, he must, in the first instance, satisfy the court that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute; and I am disposed to hold that he is also bound to satisfy the court that the evidence which he is prepared to adduce will be reasonably conclusive, and will not raise a difficult and doubtful controversy of precisely the same kind as that which the jury have to determine. It appears to me that it might lead to unfortunate results if the court had not the power to reject evidence of collateral fact which does not satisfy both of the conditions which I have endeavoured to indicate. If it be the right of a litigant to offer just as much or as little testimony as he thinks fit in support of an alleged collateral fact, which would admittedly be useful if proved, then it must be his right to submit to the jury any number of issues precisely similar to that which they are empanelled to try, and to support these by proof far more unsatisfactory than the evidence bearing directly upon the leading issue. Upon this point,

the case of *Foulkes v. Chadd* (3 Doug. 157) appears to me to be an authority deserving of consideration. The question of fact which had been sent for trial was, whether the silting up of a harbour was due to the erection and maintenance of an embankment by which the tidal water had been confined within narrower limits. One point adjudged was that the opinion of skilled engineers was competent evidence; but it was also decided that, whilst collateral evidence as to the silting action of the tide in the case of harbours where there were no embankments was admissible, such evidence as to harbours where there were embankments was inadmissible. The ratio assigned for the decision was, that to admit the evidence would be to resolve *litem lite*, which, in my opinion, can only signify that Lord Mansfield and the other learned judges of the King's Bench thought that the action of the tide upon alluvial matters could in the one case be satisfactorily investigated, and that in the other the evidence as to the effects of an embankment in aggravating silt would give rise to controversies as doubtful as that involved in the issue before the jury. I am not, however, in a position to hold that the local statistics, with regard to Stockwell and Homerton, which the respondents proposed to put in, ought to have been rejected. The fact that the disease is found to be prevalent in dwelling-houses near to a small-pox hospital, and not obviously exposed to other sources of contagion, would, if established, tend to elucidate the first issue; and it may be that these statistics were such as to show that the localities affected were in that position. In that case, the evidence tendered could not be characterised as an attempt to illustrate *obscurum per obscurius*. Holding these views, I should prefer, for my own part, not to decide anything as to the admissibility of the evidence in question, leaving it to the respondents to tender it anew, in such shape as they may be advised. I have only to say, in conclusion, that I have been unable to appreciate the grounds upon which the majority of the Lords Justices made their order for a new trial conditional upon payment of the costs of the former trial, by the respondents, within a limited time. In a case like the present, of novelty and difficulty, and involving extensive inquiry into local facts and statistics, I do not think it can be imputed as matter of blame to either party that the evidence was not so complete as to afford materials for a satisfactory verdict. And even if I had been clearly of opinion that the statistics with regard to Stockwell and Homerton ought to have been received, I should not have thought that taking an objection to the reception of evidence, in conformity with the already expressed opinion of the presiding judge, was conduct deserving of the penalty which was attached to it by the Court of Appeal.

*Judgment of the Court of Appeal reversed.  
Order of the Queen's Bench Division  
restored.*

Solicitors for the appellants, *Few and Co.*  
Solicitors for the respondents, *Bompas, Bischoff,  
and Dodgson.*

Q.B. DIV.] OVERSEERS OF CHORLTON-UPON-MEDLOCK v. GUARDIANS OF CHORLTON UNION. [Q.B. DIV.]

## Supreme Court of Judicature.

## HIGH COURT OF JUSTICE.

## QUEEN'S BENCH DIVISION.

March 31 and April 1, 1882.

(Before MATHEW and CAVE, JJ.)

THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF CHORLTON-UPON-MEDLOCK v. THE GUARDIANS OF THE POOR OF THE CHORLTON UNION AND THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF ARDWICK. (a)

*Poor rate—Buildings occupied by corporations for public purposes—Restriction on profits—Rateable value.*

*Where premises do not come into the market to be let to tenants, but are occupied by public bodies in discharge of their statutory duties, e.g., corporations and school boards, who are restricted as to the profits to be derived from their user of the premises, the gross estimated rental and rateable value are to be ascertained by finding out what a tenant unrestricted as to charges would give as rent for the premises.*

The Corporation of Worcester v. The Droitwich Union (34 L. T. Rep. N. S. 288) distinguished.

SPECIAL CASE stated by consent by order of North, J., pursuant to 12 & 13 Vict. c. 45, s. 11, for the opinion of the court as follows:

Appellants are the overseers of the poor of the township of Chorlton-upon-Medlock, in the city of Manchester and within the Chorlton Union.

Respondents are the guardians of the poor of the Chorlton Union and the overseers of the poor of the township of Ardwick, also in the said city and union.

The said city comprises six townships.

The said union comprises twelve townships, three of which are within the city.

In conformity with the provisions of 25 & 26 Vict. c. 103, s. 32, notice of appeal to General Quarter Sessions of Hundred of Salford was given by the appellants on the 2nd Feb. 1882 against the valuation list of the said respondent township, as confirmed by the respondent assessment committee, on the following grounds: "That the rateable hereditaments comprised in such valuation are valued at sums less than the annual rateable value thereof, to wit, the Mayfield baths and laundries situated in Stove-street, and the board schools situate in Armitage-street, in the respondent township."

"The question for the opinion of the court is by what process the gross estimated rental and rateable value are to be ascertained in the case of tenements which do not come into the market for the purpose of being let to tenants, such as those buildings occupied by municipal corporations, guardians of the poor, and school boards for public purposes in discharge of their respective statutory duties.

Under the provisions of various Baths and Washhouses Acts, the corporation purchased in 1878 the said Mayfield Baths and Laundries from a private company for the sum of 852*l.* 12*s.* 8*d.*, and since that date have expended a further sum of 10,846*l.* 13*s.* 3*d.* upon the premises.

By the same Acts maximum charges were fixed which the corporation were empowered to make for the user of the baths and laundries by the public.

From the 31st Aug. 1880 to the 31st Aug. 1881 there was a loss in the working of the baths and laundries to be made up out of the poor rate of 531*l.* 10*s.* 10*d.*

If the charges were increased the number of persons frequenting the baths and laundries would probably diminish in a corresponding ratio.

Profit in the commercial sense cannot be made by a tenant at the baths and laundries.

Any loss which may arise in the occupation and carrying on of the baths and laundries by the corporation is made up by a charge upon the poor rate and equally distributed according to rateable value over all the townships within the city.

The corporation pay to the owners of the land, the site of the baths and laundries, the sum of 89*l.* 17*s.* 6*d.* The fair annual value or rent for the said land is 103*l.* The annual cost of repairs and insurance is 80*l.*

If the baths and laundries were now in the market to be let to a tenant as baths and laundries subject to the restrictions imposed by statute, a tenant could not be found who would be willing to take them.

The said premises are capable of being put to other uses, and if they were now in the market to be let to a tenant unfettered and unrestricted to be used as baths and laundries, or for any other purpose, a tenant could be found who would be willing to take them.

The said baths and laundries could not now be erected by a contractor for a less sum than 17,000*l.* If a contractor purchased the land, and erected the baths and washhouses he would require to be paid an annual rental of 1168*l.*

If the corporation were in the market to rent premises suitable for use as baths and laundries, such accommodation as is provided by the said baths and laundries could not be obtained by the said corporation for a less rent than 1150*l.*

As regards the board schools, the School Board for the City of Manchester, under the powers and provisions of the Elementary Education Act (33 & 34 Vict. c. 75), purchased in 1878 the land, the site of the said schools, for a sum of 2234*l.* 5*s.* 3*d.*, and erected thereon the said school buildings at a further cost of 8945*l.* 17*s.*

The schools are frequented by children of any class, who receive instruction at certain fees fixed by the school board under the powers given by sect. 17 of the Act.

The Education Department limits the fee to be charged to scholars to 9*d.* per week.

Profit in the commercial sense cannot be made by a tenant at the schools.

Any loss which may arise in the occupation of the schools by the school board is made up by a charge upon the poor rate, and equally distributed according to rateable value over all the townships within the city.

The loss during one year, 1881, amounted to 71*l.* 5*s.* 3*d.*

The fair annual rent of the land is 90*l.*

The average annual cost of repairs and insurance is 46*l.*

If the schools were now in the market to be let to a tenant as schools subject to the restric-



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tions imposed by statute, a tenant could not be found who would be willing to take them.

The said premises are capable of being put to other uses, and if they were now in the market to be let to a tenant unfettered and unrestricted to be used for any purpose, a tenant could be found who would be willing to take them.

The schools could not now be erected by a contractor for less than 8000*l*.

If a contractor purchased the land and erected the schools he would require and reasonably expect an annual rental of 620*l*.

If the school board were in the market to rent premises suitable for use as schools, such accommodation as is provided by the said schools could not be obtained at a less rent than 620*l*.

Four methods of arriving at the gross estimated rental and rateable value were then proposed for the opinion of the court, and amounts were agreed upon as the gross estimated rental and rateable value respectively, as regards each of the methods.

1. By calculating the annual interest upon the money expended in the purchase or erection of the premises, and deducting the annual sum expended in repairs, insurance, &c.

2. By finding what a contractor would require as rent for the said premises.

3. By finding what a tenant unrestricted as to charges would give as rent for the premises to be used as baths, laundries, or schools.

4. By finding the profit which the corporation or school board respectively makes or can make by its occupation of the said premises.

*Hopwood, Q.C. (Meadows White, Q.C., and Ooghill with him) for the appellants.*

*Addison, Q.C. (O. A. Russell with him) for the respondent guardians.*

*Smyly, for the respondent overseers, relied upon*

*The Mayor, &c., of Worcester, v. The Assessment Committee of the Droitwich Union, 34 L. T. Rep. N. S. 238; 2 Ex. Div. 49.*

**MATHEW, J.**—I think our judgment must be for the appellants. The correct mode of estimating the rateable value is by the third of the methods stated in the case, that is by finding out what would be given by a tenant as rent for the premises; in other words, by the ordinary principle of what they would be worth to a hypothetical tenant. It is said, however, that as regards this particular property there is no rateable value, because under the particular enactments referred to in the case, the premises have been released from rateability. In order to decide this we must have regard to all the circumstances. It is said on the one side that the case of *The Corporation of Worcester v. The Droitwich Union* (*ubi sup.*) applies, and on the other hand that it does not. In that case it is clear that the Act of Parliament imposed fetters on the land itself, which rendered it impossible to make use of it for any other purpose; but in the present case the property had a rateable value up to the time when it was acquired by the Corporation of Manchester, and I am unable to see anything in the Act which leads to the conclusion that it has been deprived of that rateable value. It is quite true that the corporation are unable to make higher charges than the Act specifies, and that their ability to make greater profits is thus limited;

but that fact does not indicate that the assessment is to be made on a different footing from that upon which assessments are made all over the kingdom. I am supported in my opinion by this fact, that if the Acts under which the corporation make use of this property have the effect the respondents contend for, the inhabitants of the township where the property lies would have a greater burden cast upon them, because the corporation may select what locality they please, and then throw upon that locality a greater burden of rate where there is, as here, a deficit. If the appellant's contention be well founded then, if there be any deficit on account of the baths, washhouses, and schools, it will be made up out of the rate of all the townships. I think for these reasons that the *Droitwich* case does not apply, and that this property is rateable.

**CAVE, J.**—I am of the same opinion. To obtain the gross and the rateable value of any premises, you must take them as they stand, and ask what rent the owner could obtain in the market if he wished to let them. If there is a restriction on the use of the tenement, the market value would, of course, be affected by it; but, where there is simply a restriction on the use that a particular tenant may make of it, I think that should be disregarded, except in the case where the assessment is based on the amount of profit made. As to the first suggested method of arriving at the rateable value, where there is a substantial demand and supply, and the premises are fit and proper for the purposes for which they are required, it may not be an unfair way of ascertaining the gross estimated rental. The second mode suggested never can be correct, but the third shows clearly, in my opinion, how the gross estimated rental and rateable value should be found. The fourth is the right mode where the premises are of no value except for certain restricted purposes, or of greater value when used for those purposes than for any other ordinary purposes. It would be correct in this latter case to take the gross profits, and then, by taking the deductions, which I need not go into, the rateable value could be arrived at. But this does not arise here, because, undoubtedly, the premises would be of greater value if there were no restrictions upon the profits, and the market value is clearly ascertainable by the third mode submitted.

*Appeal allowed.*

Solicitors for appellants, *Bower and Cotton*, for *Lyne*, Manchester.

Solicitors for the respondent union, *Chester and Co.*, for *Orofton*, Manchester.

Solicitors for the respondent overseers, *Layton and Jacques*, for *Lings*, Manchester.

Monday, April 3, 1882.

(Before MATHEW and CAVE, JJ.)

THE NEWPORT URBAN SANITARY AUTHORITY v. GRAHAM. (a)

*Public Health Act 1875—Houses "adjoining or abutting" on a street—No access to street—38 & 39 Vict. c. 55, s. 150.*

*The back premises of respondent's houses were divided by a wall from the street. There was no access from the houses to the street, the level of*

(a) Reported by W. J. SMITH, Esq., Barrister-at-Law.)

Q.B. Div.] THE LOCAL BOARD OF BEXLEY v. THE WEST KENT MAIN SEWERAGE BOARD. [Q.B. Div.]

which was five feet lower than that of the houses.

*Held*, that the houses adjoined or abutted on the street within the meaning of sect. 150 of the Public Health Act 1875, and that the respondent was liable to pay his proportion of paving, &c., the street.

CASE stated by Justices of Monmouth under 20 & 21 Vict. c. 43, s. 2.

The case so far as is material was as follows:—A complaint was made before the justices of Monmouth against Robert Graham, the respondent, for nonpayment of 19l. 7s. 10d. and interest, due as his proportion of the expenses incurred by the Urban Sanitary Authority of Newport, in paving, channelling, and other works done upon St. Julian-street, in that borough, under sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55).

The respondent is the owner of the houses No. 32, 33, and 34, York-place, which have open yards behind them, and are bounded by a stone wall about twelve feet high which separates them from St. Julian-street. There is no door in this wall, or any access to St. Julian-street.

If York-place were to be paved the respondents' property would have to bear its share.

It was contended for the respondent: (1) That his property derived all street advantages of access, lighting, postal matters, channelling, and sewerage from the front of the houses in York-place. (2) That the boundary wall at the back of the respondent's property separates and divides it entirely from St. Julian-street, and the level of the ground at the back is about five feet above the level of St. Julian-street. (3) That the houses in that street have been on one side built up to and adjoin the said boundary wall, and on the other side to within a few feet thereof. (4) That if the urban authority should call upon the owners in York-place to pave, &c., the respondent would have to pay his share for these improvements at the front of his houses. (5) That there was no access direct or indirect to or from the said houses into St. Julian-street. (6) That the houses did not "abut" upon St. Julian-street within the meaning of the Public Health Act 1875.

The justices decided in favour of the respondent, and dismissed the complaint.

The question for the opinion of the court was whether the respondent under the above circumstances was liable to pay the amount claimed.

*W. Graham* for the appellants.—The real question to be decided is, whether the fact that there is no access from the respondent's property to the street upon which the works were done frees him from liability to contribute to the cost. The case relied on by the other side is *The London School Board v. St. Mary, Islington* (33 L. T. Rep. N. S. 504; 1 Q. B. Div. 65), but that case is in fact no authority, because there was access from the house there in question to the road. Anyone who went to the house used the street. He also cited

*Mayor, &c., of Manchester v. Chapman*, 18 L. T. Rep. N. S. 640; 37 L. J. 173, M. C.;

*Reg. v. Newport Local Board*, 32 L. J. 97, M. C.;  
*London and North-Western Railway Company v. St. Pancras Vestry*, 17 L. T. Rep. N. S. 654.

*Howard Smith* for the respondent.—The test of liability to contribute is beneficial access, and here there is none. In *The London School Board v. St. Mary, Islington* (*ubi sup.*), Cockburn, C.J.,

after remarking that the justice and equity of the case must be looked to, says: "That being so, it matters nothing in point of the justice of the case that the house, instead of actually fronting the street, stands in the rear of the street, if it has its access from the street. It is the benefit of access to the premises which must be supposed to be the foundation of the liability which the Legislature thinks fit to impose." I rely on this dictum.

*MATHEW, J.*—The Act says that the owners or occupiers of the premises "fronting, adjoining, or abutting on such parts thereof as may require to be severed," etc., are liable either to execute the works themselves or to contribute to the expenses. It is impossible to say that the respondent's property does not adjoin or abut, for in point of fact it does both, and therefore he is liable, and the appeal must be allowed.

*CAVE, J.* concurred.

*Appeal allowed.*

Solicitors for the appellants, *Cole and Jackson*.  
Solicitors for the respondent, *Raw and Co.*

Saturday, May 22, 1882.

(Before MANISTY and WATKIN WILLIAMS, JJ.)

THE LOCAL BOARD OF BEXLEY v. THE WEST KENT MAIN SEWERAGE BOARD. (a)

*Arbitration—Local Government Board—Power of board to state a special case—Reference by consent—Common Law Procedure Act 1854* (17 & 18 Vict. c. 125), s. 5—*Compulsory reference—38 & 39 Vict. c. 163, s. 93.*

*The Act of Parliament by which a sewerage board was incorporated provided that all controversies between the board and any constituent authority should be referred to the Local Government Board, whose decision thereon should be final and conclusive.*

*Disputes having arisen between the plaintiffs and defendants during certain sewerage operations conducted by the defendants in the plaintiffs' district, the same were referred to the Local Government Board, who stated a case for the opinion of the court.*

*Held*, that there was no power to state a special case, the reference not having been by consent of the parties within the meaning of sect. 5 of the Common Law Procedure Act.

THIS was a case stated by the Local Government Board for the opinion of the court, of which the following are the material parts:—

The plaintiffs were, by virtue of the Public Health Act 1875 and other Acts, constituted the surveyors of the high roads within the district of Bexley. The defendants, the West Kent Main Sewerage Board, were incorporated under and by virtue of an Act of Parliament of 38 & 39 Vict. c. 163, entitled the West Kent Main Sewerage Act 1875, for the purpose of constructing a sewer and other drainage works in certain districts, amongst others the parish of Bexley. By sect. 8 of the Act it is provided that the sewerage board, in making their sewer and filtering bed, may from time to time, so far as they find it necessary or convenient for effecting the objects of the works, break up, cross over or under, or stop up temporarily or permanently, any street, highway, path, sewer,

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

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drain, creek, and watercourse, and any pipe or tube for water, gas, telegraph, or other purposes, doing so little damage as may be, and making compensation for any damage done.

Whilst certain sewerage alterations and improvements were being effected in the parish of Bexley by the defendants, certain damage was done to the roads by the carts of persons with whom the defendants had contracted to remove the soil pending the operations. Damage to the roads was also committed by several other means, the particulars of which, for the purposes of this report, it is unnecessary to set forth.

The plaintiffs having made a claim against the defendants for compensation under the above section, the defendants disputed their liability to pay any such compensation, and thereupon the matters in difference stood referred to the Local Government Board, under the 93rd section of the above statute, the 38 & 39 Vict. c. 163. That section provided:

Except as in this Act expressly provided, if at any time any difference arises between the board on the one hand, and any constituent authority or authorities, or person or persons, on the other hand, or between any two constituent authorities, or between any constituent authority and any parish or part of a parish, or person or persons, respecting any assessment of a main sewer rate, or any injunction, notice, or any determination of the board, or any controversy or other matter under this Act, the same shall, by virtue of this Act, stand referred for decision to the Local Government Board, whose decision thereon, and respecting the costs of the reference, shall be binding and conclusive.

The Local Government Board having, under their seal, stated a case for the opinion of the court, the case now came on for argument.

*H. Tindal Atkinson* for the plaintiffs.

*E. M. Bray* for the defendants.

Counsel having opened the case on behalf of the plaintiffs, the Court called upon him to show what power the Local Government Board had to state a case, having regard to sect. 93 of 38 & 39 Vict. c. 163.

*H. Tindal Atkinson*.—It is submitted this is an arbitration by consent, and is subject to the provisions of sect. 5 of the Common Law Procedure Act 1854. That section provides that, "It shall be lawful for the arbitrator, upon any compulsory reference under this Act, or upon any reference by consent of the parties, where the submission is or may be made a rule of any of the Superior Courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court; and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court." In the case of *Be The Dore Valley Railway Company* (20 L. T. Rep. N. S. 717; 1 L. Rep. 4 Ch. App. 554), it was held by James, V.C., and affirmed by the Lords Justices on appeal, that the provisions of the Common Law Procedure Act, 1854, with regard to remitting matters to the reconsideration of the arbitrator, and enlarging the time for making the award, applied to references under the Lands Clauses Act, and that the court had jurisdiction to extend the time for making the award. References under the Lands Clauses Acts are by consent of the parties; all that is prohibited is a reference to any other arbitrator than the one fixed by that Act. Here also, the arbitrator only

is fixed, and the reference is by consent within the meaning of the Common Law Procedure Act, 1854. [WILLIAMS, J.—Can it be said that there has been any submission here?] In *Ex parte Harper* (L. Rep. 18 Eq. 539) it was held that the reference to arbitration of a question of disputed compensation pursuant to sect. 25 of the Lands Clauses Consolidation Act, is a "submission to arbitration by consent" within the meaning of the 17th section of the Common Law Procedure Act, and the submission may be made a rule of court. In *Rhodes v. The Airedale Drainage Commissioners* (31 L. T. Rep. N. S. 59; 35 L. T. Rep. N. S. 46; 1 C. P. Div. 402), the Court of Appeal held that the umpire in the arbitration under the Lands Clauses Act, in which each party had appointed an arbitrator, had power to make his award in the form of a special case for the opinion of a Superior Court. The ground of that decision was that the appointment of the arbitrator was, by the terms of sect. 25 of the Lands Clauses Act, a submission to arbitration on the part of the party by whom the same was made, and that the arbitration was, therefore, an arbitration by consent within sect. 5 of the Common Law Procedure Act. This is a private Act, and is therefore in the nature of an agreement, and so constitutes a submission.

*E. M. Bray*, for the defendants, also argued in favour of the power of the board to state a case.

MANISTY, J.—I am of opinion, upon the construction of the 93rd section of the West Kent Drainage Act, 1875, that there is no power to state this special case. That section enacts that "if at any time any difference arises between the board on the one hand, and any constituent authority or authorities (as the sewerage board and the local board for the district) on the other hand, or between any constituted authority and any parish or part of a parish, or person or persons, with respect to any assessment, rate, notice, or any controversy or other matter under the Act, the same shall by virtue of this Act, stand referred for decision to the Local Government Board, whose decision thereon shall be final and binding." The object of this provision seems to have been to avoid all litigation before the ordinary tribunals of the country by transferring all controversies and questions to the Local Government Board for final and conclusive decision. That was manifestly the intention of the Act, and it seems to me that we should defeat that intention by hearing this special case. I am of opinion that this was not a reference by consent within the meaning of sect. 5 of the Common Law Procedure, because there has been no consent and no submission to arbitration. The decision of the Court of Appeal in the case of *Rhodes v. The Airedale Drainage Company* (31 L. T. Rep. N. S. 59; 35 L. T. Rep. N. S. 46; 1 C. P. Div. 402) turned entirely upon the words of sect. 25 of the Lands Clauses Consolidation Act 1845. That section expressly says that the appointment of an arbitrator by each party respectively shall be deemed a submission to arbitration on the part of the party by whom the same shall be made. The arbitration was therefore held, by the effect of that section, to be an arbitration by consent within the meaning of sect. 5 of the Common Law Procedure Act. It is clear, therefore, that that decision does not affect this case. For these reasons, I am of opinion we cannot hear this special case.

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WATKIN WILLIAMS, J.—I am of the same opinion. The Bexley Local Board and the West Kent Main Sewerage Board happen to have a number of controversies between them, touching questions of some difficulty, as to what ought and ought not to constitute grounds for compensation for injuries done by the sewerage board, or by persons with whom they have contracted, in carrying on certain sewerage operations. The two boards being desirous of having these questions settled by this court, have accordingly embodied them in the form of a special case, under the seal of the Local Government Board. Now, can we hear it? The only authority the court could have to entertain this proceeding is that conferred by the Common Law Procedure Act, 1854, sect. 5. That section provides that "it shall be lawful for the arbitrator upon any compulsory reference under the Act (which does not apply to this case), or upon any reference by consent of the parties." The private Act of the defendants, the 38 & 39 Vict. c. 163, s. 93, directly provides that all disputes shall stand referred to the Local Government Board, whose decision shall be final and conclusive—expressly substituting, as it seems to me, its own tribunal in the place of the ordinary courts of justice for the purpose of settling their disputes. The tribunal is specially selected, and it is clearly intended that any tribunal or proceeding other than that pointed out in the section should be absolutely excluded. I wish to say further, that this case appears to have been stated for the purpose of obtaining the judgment or opinion of the court, not upon stated facts, but upon a number of speculative and abstract questions. It would, in my opinion, be most objectionable for the court to have to decide such questions, which would involve a treatise upon an extremely difficult point of law for the guidance of the sewerage board in performing their duties. It was never intended by the Common Law Procedure Act that arbitrators should be enabled to seek the opinion of the Superior Courts upon questions of such a kind. I therefore concur in holding that this court is bound to refuse to hear this case.

*Hearing refused.*

Solicitor for the plaintiffs, *Sidney Matthews.*

Solicitors for the defendants, *May, Sykes, and Batten.*

*Tuesday, June 13, 1882.*

(Before FIELD and CAVE, JJ.)

BEATTY AND OTHERS (apps.) v. GILLBANKS (resp.). (a)

APPEAL FROM INFERIOR COURT.

*Unlawful assembly*—The "Salvation Army"—*Assembly of persons for lawful purpose*—*Knowledge by them that such assembly would cause others to commit a breach of the peace*—*Liability for such breach*—*Sureties to keep the peace.*

The appellants, with a considerable number of other persons, forming a body called the "Salvation Army," assembled together in the streets of a town for a lawful object, and with no intention of carrying out their object unlawfully, or by the use of physical force, but knowing that their assembly would be opposed and resisted by other persons in such a way as would in all probability tend to the committing of a breach of the peace on

the part of such opposing persons. A disturbance of the peace having been created by the forcible opposition of a number of persons to the assembly and procession through the streets of the appellants and the Salvation Army, who themselves used no force or violence, it was

*Held, by Field and Cave, JJ. (reversing the decision of the justices), that the appellants had not been guilty of "unlawfully and tumultuously assembling," &c., and could not therefore be convicted of that offence, nor be bound over to keep the peace.*

*Held also, that knowledge by persons peaceably assembling for a lawful object that their assembly will be forcibly opposed by other persons, under circumstances likely to lead to a breach of the peace on the part of such other persons, does not render such assembly unlawful.*

CASE stated by justices pursuant to the Summary Jurisdiction Act 1879, and the 20 & 21 Vict. c. 43.

At a petty session for the division of Axbridge, in the county of Somerset, held at Weston-super-Mare, in the said division, on the 29th March 1882, the three appellants Beatty, Mullins, and Bowden were charged on the complaint of the respondent Gillbanks, the superintendent of constabulary within the said division, for that the appellants had unlawfully and tumultuously assembled, with divers other persons, to the number of 100 or more, in public thoroughfares, called Walliscoteroad, Regent-street, and other places within the said parish of Weston-super-Mare, on the 26th March inst., to the disturbance of the public peace and against the peace of our Lady the Queen. And upon the hearing of such complaint, the justices found that the allegations therein contained had been proved, and did order the appellants to be severally bound in their recognisances respectively, with two sureties, to keep the peace for the term of twelve calendar months, and in default to be imprisoned for three calendar months, or until they did severally sooner comply with the aforesaid order.

The appellants being dissatisfied with that decision, the justices, on their application, stated and signed the following case, setting forth the facts and grounds of their aforesaid determination, for the opinion of the Queen's Bench Division of the High Court, as follows:

CASE.

At the hearing of the before-mentioned complaint, the following facts were proved:

(a) The Salvation Army is an organised body of persons who are and have for some time been in the habit of forming themselves into processions of more than 100 persons, and in such processions parading the principal streets and public places of the town.

(b) These processions are formed at the hall of the Salvation Army, and, after their formation, proceed, headed by a musical band and flags and banners, through the streets, collecting, and for the purpose of collecting, as they go, a mob of persons with whom, attended by much shouting and singing, uproar and noise, they eventually return to the hall, where a meeting is then held.

(c) The appellant Beatty is captain and a leader of the Salvation Army, and organises and directs these processions and meetings.

(d) The other appellants Mullins and Bowden

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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are also leaders of the Salvation Army, and assist in organising and directing the processions and meetings.

(e) There is another organised band of persons at Weston-super-Mare, called the Skeleton Army, which also parades the streets and is antagonistic to the Salvation Army and its processions.

(f) There are numbers of other persons at Weston-super-Mare who, as soon as the Salvation Army has formed for the purpose of thus parading the streets as aforesaid, are in the habit of assembling in a mob of great numbers about and around and in front of the procession of the Salvation Army. Some of these, together with the Skeleton Army, assemble to dispute the passage of the Salvation Army through the said streets and places, some to encourage such passage, with shouting, singing, uproar, and noise, to the great terror, disturbance, annoyance, and inconvenience of the peaceable inhabitants of the town and to the endangering of the public peace.

(g) On several occasions previous to the 23rd March last the procession of the Salvation Army, accompanied by such a mob as aforesaid, has come into collision with the said Skeleton Army and other persons who are antagonistic to the Salvation Army, and thereupon a free fight, great uproar, blows, tumults, stone-throwing, and disorder have ensued.

(h) On the 23rd March last the Salvation Army formed their aforesaid procession and paraded the streets and places, accompanied by a disorderly and riotous mob of over 2000 persons who had been collected as the Salvation Army proceeded. In the midst of the said mob were fighting and great disturbance, stone-throwing, and noise. The police were for a long time overpowered and unable to cope with the disturbance, and the Salvation Army forced their way through several public streets to a public place called the Railway-parade, where a general fight occurred. The appellant Beatty led and directed the Salvation Army on this occasion, but neither he nor the other appellants were seen to commit any overt act of violence. The police were ultimately reinforced and the crowd then dispersed. In all probability bloodshed and injury were prevented by the interference of the police.

(i) The matters set out in the last paragraph caused great terror and alarm in the minds of the peaceable inhabitants at the said place, who believed, and had good reason to believe, that the aforesaid processions would lead to a repetition of the aforesaid disturbances, and would endanger life, property, and the public peace; and who, in consequence, brought the matter to the notice of the sergeant of police in charge of the peace of the town and made complaints to him thereupon.

(j) In consequence of these matters a notice was issued signed by two of the magistrates, and copies of it were placarded in conspicuous parts of the said town and were served on the principal appellant Beatty, in these terms:

Public Notice.—Whereas it hath been made to appear unto us, the undersigned, two of Her Majesty's justices of the peace for the county of Somerset, acting in and for the division of Axbridge in the same county, upon the oath of divers persons, that a riotous and tumultuous assembly did take place on the night of the 23rd March, in certain public streets at Weston-super-Mare, in the said county, and further, that there are reasonable grounds for apprehending a repetition of such riotous

and tumultuous assembly in the public streets of Weston-super-Mare as aforesaid; we do therefore hereby require, order, and direct all persons to abstain from assembling to the disturbance of the public peace within the said parish.—Given under our hands and seals at Weston-super-Mare aforesaid this 24th March 1882. (Signed by two Magistrates.)

(k) On Sunday, the 26th March, at 10.30 a.m., whilst numbers of the inhabitants of the said town were proceeding to their respective places of worship, the Salvation Army, under the direction of the appellants, was formed into a procession of 100 or more persons, and, having been so formed, commenced to march away from their hall, through the aforesaid streets and public places of the said town. The appellants marched at the head of the procession, which was surrounded by a tumultuous and shouting mob of some hundred persons, which rapidly increased as the procession passed on.

(l) The said police sergeant met the procession (after it had paraded through certain principal public streets) in a public street called Walliscote-street, and with others of the police force stopped the advance of the procession, and asked the appellant Beatty if he was leading the procession, and if he had received a copy of the notice. The appellant Beatty admitted that he was leading the procession and had received the notice. The sergeant of police told him that he must obey the notice, and must desist from leading the procession, and must disperse at once or he would be arrested. The appellant Beatty refused to comply and marched on at the head of the procession some twenty yards further, and told the sergeant that he should still proceed, and thereupon he was arrested. After he was arrested he shouted to the procession to proceed. The other appellants, Mullins and Bowden, then took the direction of the procession and persisted in leading it on, whereupon they also were arrested. Neither of the appellants were guilty of any overt act of violence other than the acts aforesaid, and submitted quietly to their arrest.

(m) The aforesaid assembling of the Salvation Army and march of the said procession and collection of the said mob was a terror to the peaceable inhabitants of the said town, and to those who were going to their places of worship as aforesaid, and was calculated to endanger and did endanger, and was calculated to cause a breach of the public peace; and there was good and sufficient cause for the inhabitants to suppose, and any rational person knowing the aforesaid circumstances would suppose that, unless the procession and mob were dispersed, there would be a repetition of the aforesaid violent and tumultuous acts, and that there would be a breach of the peace.

(n) The appellants intended to parade their procession through the principal streets and public places of the town, and to collect on their march a large mob of persons to accompany them; and they had good reason to expect that they would come into collision with the said Skeleton Army and other persons antagonistic to the procession, and they had good reason to expect that there would be the same fighting, stone-throwing, and disturbance, as there had been on previous occasions, and intended on meeting such opposition to force their way through the said streets and places as they had done on previous occasions. It was contended for the appellants

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that there had not been any unlawful and tumultuous assembling on their part, that they had not been guilty of the charge and complaint made against them, and that their arrest had been unlawful, and that they should be discharged. The magistrates, however, thought that the charge had been made out, and decided against the appellants as above stated.

The questions of law stated for the opinion of the court were, whether these facts so found to be proved as aforesaid constituted the offence charged in the complaint, and whether the order made—that the defendants should find sureties to keep the peace—was valid.

*Edward Clarke, Q.C.* (with him were *Sutherland* and *L. O. Jackson*), for the appellants, submitted that there was no evidence of any unlawful or tumultuous assembly, or any conduct on the part of the appellants amounting to a disturbance of the public peace, or causing terror to the inhabitants of the town. It was not suggested that there was any riot. To make an assembly unlawful, it must be an assembly for an unlawful purpose, or, if the purpose for which the persons assemble is a lawful one, the assembly itself must be conducted in a disorderly and tumultuous manner. In the present case it was clear from the evidence in the case itself that the purpose was a perfectly innocent and lawful one, and that the assembly itself was peaceable and orderly. The argument on the respondent's part is, that because some other persons objected to the Salvation Army parading quietly through the streets and turned out to forcibly oppose them, therefore the appellants were guilty of unlawfully assembling. [*Cave, J.*—That is to say, because others unlawfully opposed their assembling, therefore their assembling was unlawful.] An unlawful assembly is defined as an assembly of persons with intent to do an unlawful act, or to do a lawful act in a tumultuous way, or so as to excite public terror. That is the largest definition of it, but there is nothing to be found in any case or textbook to the effect that, where persons are lawfully doing a certain act, the unlawful interference therewith by other persons can make that lawful act unlawful. The law interferes to check the wrongdoer, and not the person acting lawfully. The wrongdoers here were the Skeleton Army. The rule and the law relating to and regulating such assemblies have been well and clearly stated in various cases. In *Reg. v. Vincent* (9 C. P. 91), *Alderson, B.*, at p. 109, lays it down as law that any meeting assembled under circumstances which, in the opinion of rational and firm men, are likely to be dangerous to the peace of the neighbourhood is unlawful; but he goes on to say that, "the alarm must not be merely such as would frighten foolish and timid persons, but must be such as would alarm persons of reasonable firmness and courage." To the same effect are the rulings of *Littledale, J.* in *Reg. v. Neale* (9 C. & P. 431), and *Holroyd, J.* in *Redford v. Burley and others* (3 Stark. N. P. C. 76). The object of the appellants here was both laudable and lawful, and the manner of carrying it out was peaceable and orderly. The case finds no act of violence on their part, and though the information alleges that the peace would be broken by them, nothing of that sort happened. The only noise and violence that occurred were on the side of the

Skeleton Army. The merely walking four abreast through the streets was not unlawful in itself, nor in the conduct of the Salvation Army was there anything to produce terror or alarm. [*Field, J.*—Suppose the appellants knew that their procession would be opposed, and that violence might probably ensue, and they still proceeded with it?] The answer to that is, that their procession being lawful they were entitled to be and ought to have been protected by the authorities from such opposition. If it were not so, mob rule would soon take the place of law and order. It is disorderly rowdies and riotous roughs whom the police should put down, and not lawful and peaceable processionists. He referred also to *Dalton's Country Justice*, cap. 136, sect. 1, and *Hawk. P. C.*, book 1, cap. 28, sect. 10.

*A. B. Poole* (with whom was *Valpy*), for the respondent, *contra*, submitted that the cases cited for the appellants were very different from the present one; but that, if not, still the words there describing an unlawful assembly were amply sufficient to cover the case now before the court. Here, however, the appellants have not been indicted or punished for unlawfully assembling, but simply bound over to keep the peace and be of good behaviour. [*Field, J.*—No persons can be forced to find sureties to keep the peace without having done something to render them liable to be so bound.] Bearing in mind what had so recently before happened, the justices were justified, even if the assembly were not absolutely unlawful, in calling on the appellants to find sureties for the peace. [*Cave, J.*—In what does the procession of the Salvation Army differ from that of every village club in the kingdom?] They parade the streets intending to collect a mob. [*Field, J.*—Surely not a "mob" in the evil sense of the word. Their object is to awaken some sense of religion in the lower classes, and with that view they go through the streets singing hymns in order to induce the people to follow them to their meeting-house and join in their religious services. Can that fairly be called "collecting a mob?"] As a fact, they do collect together the roughest and lowest classes, and, however meritorious may be their object in itself, they know that it causes disturbances. They may not desire to fight or throw stones, but they know such things will probably follow their gathering. [*Cave, J.*—Am I forced to stay within doors because I know that a man intends to knock me down if I go out? and, if I go out, am I guilty of provoking a breach of the peace? *Field, J.*—And who, in such a case, ought to be bound over?] The appellants assembled in large numbers, which is unlawful. [*Cave, J.*—What is an unlawful number?] As many as are likely to lead to a disturbance. In *Russell on Crimes*, p. 387, 4th edit., citing *Hawk. P. C.*, it is said that the assembling of a man's friends for the defence of his person against those who threaten to beat him if he go to such a market, is unlawful, though they may lawfully assemble to defend him in his house against a threatened assault, for, it is added, "a man's house is looked upon as his castle." It may be admitted that the Salvationists did not intend to force their way against opposition by fighting their opponents, but they intended to force their way by pushing on, and

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that would inevitably lead to disturbance and violence. By that persistence, though not themselves guilty of any riotous and tumultuous acts, they were the cause of them, and were properly called on to find sureties. Under the circumstances stated in the case, the assembly, whatever the object of the appellants might be, was from its very commencement unlawful, and the magistrates were justified in the course they adopted. He referred also to the cases cited for the appellants, and relied on them as showing the assembly was an unlawful one.

*E. Clarke, Q.C.* was not called on to reply.

*FIELD, J.*—I am of opinion that this order cannot be supported, and must therefore be discharged. The appellants, it appears, together with a large number of other people, belong to a body of persons called the Salvation Army, who are associated together for a purpose which cannot be said to be otherwise than lawful and laudable, or at all events cannot be called unlawful, their object and intention being to induce a class of persons who have little or no knowledge of religion and no taste or disposition for religious exercises or for going to places of worship, to join them in their processions, and so to get them together to attend and take part in their religious exercises, in the hope that they may be reclaimed and drawn away from vicious and irreligious habits and courses of life, and that a kind of revival in the matter of religion may be brought about amongst those who were previously dead to any such influences. That undoubtedly is the object of the Salvation Army, and of the appellants, and no other object or intention has been or can be imputed to them; and, as has been said by their learned counsel, and doubtless with perfect truth, so far are they from desiring to carry out that object by means of any force or violence, their principles are directly and entirely opposed to any conduct of that kind, or to the exercise or employment of anything like physical force; and, indeed, it appears that on the occasion in question they used no personal force or violence, but, on the contrary, when arrested by the police, they submitted quietly without the exhibition of any resistance either on their own parts or on that of any other member of their body. Such being their lawful object and intention, and having no desire or intention of using force or violence of any kind, it appeared that on this 26th March they assembled, as they had previously done on other occasions, in considerable numbers at their hall, and proceeded to march thence in procession through the streets of the town of Weston-super-Mare. Now that, in itself, was certainly not an unlawful thing to do, nor can such an assembly be said to be an unlawful one. Numerous instances might be mentioned of large bodies of persons assembling in much larger numbers, and marching, accompanied by banners and bands of music, through the public streets, and no one has ever doubted that such processions were perfectly lawful. Now the appellants complain that, for having so assembled as I have before stated, they have been adjudged guilty of the offence of holding an unlawful assembly, and have in consequence been ordered to find sureties to keep the peace, in the absence of any evidence of their having broken it. It was of course

necessary that the justices should find that some unlawful act had been committed by the appellants in order to justify the magistrates in binding them over. The offence charged against them is "unlawfully and tumultuously assembling with others to the disturbance of the public peace, and against the peace of the Queen," and of course before they can be convicted upon the charge clear proof must be adduced that the specific offence charged has been committed. Now was that charge sustained? There is no doubt that the appellants did assemble together with other persons in great numbers, but that alone is insufficient. The assembly must be a "tumultuous assembly," and "against the peace," in order to render it an unlawful one. But there was nothing so far as the appellants were concerned to show that their conduct was in the least degree "tumultuous" or "against the peace." All that they did was to assemble together to walk through the town, and it is admitted by the learned counsel for the respondent, that as regards the appellants themselves, there was no disturbance of the peace, and that their conduct was quiet and peaceable. But then it is argued that, as in fact their line of conduct now was the same as had on previous similar occasions led to tumultuous and riotous proceedings with stone-throwing and fighting, causing a disturbance of the public peace and terror to the inhabitants of the town, and as on the present occasion like results would in all probability be produced, therefore the appellants, being well aware of the likelihood of such results again occurring, were guilty of the offence charged against them. Now, without doubt, as a general rule it must be taken that every person intends what are the natural and necessary consequences of his own acts, and if in the present case it had been their intention, or if it had been the natural and necessary consequence of their acts, to produce the disturbance of the peace which occurred, then the appellants would have been responsible for it, and the magistrates would have been right in binding them over to keep the peace. But the evidence as set forth in the case shows that, so far from that being the case, the acts and conduct of the appellants caused nothing of the kind, but, on the contrary, that the disturbance that did take place was caused entirely by the unlawful and unjustifiable interference of the Skeleton Army, a body of persons opposed to the religious views of the appellants and the Salvation Army, and that but for the opposition and molestation offered to the Salvationists by these other persons, no disturbance of any kind would have taken place. The appellants were guilty of no offence in their passing through the streets, and why should other persons interfere with or molest them? What right had they to do so? If they were doing anything unlawful it was for the magistrates and police, the appointed guardians of law and order, to interpose. The law relating to unlawful assemblies, as laid down in the books and the cases, affords no support to the view of the matter for which the learned counsel for the respondent was obliged to contend, viz., that persons acting lawfully are to be held responsible and punished merely because other persons are thereby induced to act unlawfully and create a disturbance. In Russell on Crimes (4th edit. p. 387), an unlawful assembly is defined as follows: "An unlawful assembly,



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according to the common opinion, is a disturbance of the peace by persons barely assembling together with the intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it nor making a motion towards the execution of it." It is clear that, according to this definition of the offence, the appellants were not guilty, for it is not pretended that they had, but, on the contrary, it is admitted that they had not, any intention to create a riot, or to commit any riotous or other unlawful act. Many examples of what are unlawful assemblies are given in Hawkins' Pleas of the Crown, book 1, cap. 28, sects. 9 and 10, in all of which the necessary circumstances of terror are present in the assembly itself, either as regards the object for which it is gathered together, or in the manner of its assembling and proceeding to carry out that object. The present case, however, differs from the cases there stated; for here the only terror that existed was caused by the unlawful resistance wilfully and designedly offered to the proceedings of the Salvation Army by an unlawful organisation outside and distinct from them, called the Skeleton Army. It was suggested by the respondent's counsel that, if these Salvation processions were allowed, similar opposition would be offered to them in future, and that similar disturbances would ensue. But I cannot believe that that will be so. I hope, and I cannot but think, that when the Skeleton Army, and all other persons who are opposed to the proceedings of the Salvation Army, come to learn, as they surely will learn, that they have no possible right to interfere with or in any way to obstruct the Salvation Army in their lawful and peaceable processions, they will abstain from opposing or disturbing them. It is usual happily in this country for people to respect and obey the law when once declared and understood, and I hope and have no doubt that it will be so in the present case. But, if it should not be so, there is no doubt that the magistrates and police, both at Weston-super-Mare and everywhere else, will understand their duty and not fail to do it efficiently, or hesitate, should the necessity arise, to deal with the Skeleton Army and other disturbers of the public peace as they did in the present instance with the appellants, for no one can doubt that the authorities are only anxious to do their duty and to prevent a disturbance of the public peace. The present decision of the justices, however, amounts to this, that a man may be punished for acting lawfully if he knows that his so doing may induce another man to act unlawfully—a proposition without any authority whatever to support it. Under these circumstances, the questions put to us by the justices must be negatively answered, and the order appealed against be discharged.

CAVE, J.—I am entirely of the same opinion. The question in this case is, whether these persons were guilty of the offence of unlawfully and tumultuously assembling together to the disturbance of the public peace and that of the Queen, and I am of opinion that they were not. The learning on the subject of "unlawful assemblies" is to be found in Hawkins' Pleas of the Crown and Dalton's Country Justice. In the first-mentioned authority the definition of an unlawful assembly is given, which my brother Field has referred to in his judgment; but it is there

further said: "This seems to be much too narrow a definition; for any meeting whatever of great numbers of people with such circumstances of terror as cannot but endanger the public peace and raise fear and jealousies among the king's subjects seems properly to be called an unlawful assembly, as when great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests, for no man can foresee what may be the event of such an assembly;" and further it is said: "Also an assembly of a man's friends for the defence of his person against those who threaten to beat him if he go to such a market, &c., is unlawful, for he who is in fear of such assaults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorder to the disturbance of the public peace. Yet an assembly of a man's friends in his own house for the defence of the possession thereof against those who threaten to make an unlawful entry therein, to or for the defence of his person against those who threaten to beat him therein, is indulged by law, for a man's house is looked upon as his castle:" (Hawk. P. C., book 1, c. 28, ss. 9, 10.) So far Hawkins; but Dalton, in his Country Justice, goes further where, in cap. 136, s. 1, it is said: "An unlawful assembly, riot or rout, is where three or more shall gather together, come, or meet in one place, to do some unlawful act with violence, and that unlawful act must be *malum in se* and not *malum prohibitum*. As when three persons or more shall come and assemble themselves together to the intent to do any unlawful act with force or violence against the person of another, his possessions or goods; as to kill, beat, or otherwise ways to hurt or to imprison a man; to pull down a house, wall, pale, hedge, or ditch; wrongfully to enter upon or into another man's possession, house, or land, or to cut or take away corn, grass, wood, or other goods wrongfully, or to hunt unlawfully in any park or warren, or to do any other unlawful act with force or violence, against the peace or to the manifest terror of the people; if they only meet to such a purpose or intent, although they shall after depart of their own accord without doing anything, yet this is an unlawful assembly." Now, putting these several passages from these old authorities together, it seems to me to be impossible to hold that the appellants here have been brought within them as being guilty of unlawfully and tumultuously assembling. The meeting or assembly of the Salvation Army was for a purpose not unlawful. Was there an intention on their part to use violence? If, though their meeting was in itself lawful, they intended, if opposed, to meet force by force, that would render their meeting an unlawful assembly; but it does not appear that they entertained any such intention. On the contrary, when met and resisted by the Skeleton Army, they used no violence of any kind, and manifested no intention of meeting their opponents with like violence to that which the latter offered to them. I come therefore to the conclusion that the appellants were not guilty of unlawfully assembling, and that, for the reasons and on the grounds before mentioned, the judgment



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of the court should be pronounced in their favour.

*Judgment for the appellants with costs.*

Solicitors for the appellants, *Whittington, Son, and Baker.*

Solicitors for the respondents, *Crowder, Anstie, and Co.,* for *J. O. Simmons, Axbridge.*

Wednesday, Nov. 23, 1881.

(Before GROVE and LOPES, JJ.)

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*Revenue—Inhabited house duty—“Servant or other person”—Clerk dwelling with wife, children, and servant on the premises—Caretaker for protection—41 Vict. c. 15, s. 13, sub-sect. 2—Exemption.*

The appellant, a banker, was the owner of premises which he occupied and used as a bank, and for the purpose of carrying on his business as a banker therein. The premises comprised three coal cellars and strong room under ground, a front and back sitting-room, with a kitchen and scullery on the ground floor, a front sitting-room and two bedrooms on the first floor, and five bedrooms on the second floor. One coal cellar and the strong room, the front and back ground-floor room, and the front sitting-room on the first floor, were used by the appellant for the purpose of his bank. The kitchen and scullery, one bedroom on the first floor, and two on the second floor, were occupied by one Somerford, who dwelt therein for the protection of the bank (the rest of the cellars and rooms being unused), and his family, viz., his wife and a son and daughter, both of age, and the son being occupied in the County Court office, dwelt there with him, Somerford himself being in the employ of the appellant as a clerk, at a salary of 100l. a year, which included the services of himself and family in taking down and putting up the bank shutters, cleaning the offices, lighting the fires, and answering the door.

The Commissioners having, upon these facts, confirmed the assessment of the appellant to the inhabited house duty in respect of his occupation of the above-mentioned premises, it was, on appeal therefrom,

Held, by Grove and Lopes, JJ. (affirming the finding of the Commissioners), that the case came precisely within the judgment of the Court of Appeal in *Yewens v. Noakes* (44 L. T. Rep. N. S. 128; 6 Q. B. Div. 530; 50 L. J. 132, Q. B., C.P., & Ex.), and that the respondent was liable to the duty to which he had been assessed, and did not come within the exemption in sect. 13, sub-sect. 2, of 41 Vict. c. 15.

In this case, the appellant having appealed against an assessment, for the year ending the 5th April 1880, of 120l. 9d. in the pound, in respect of a house, No. 119, St. Aldate's-street, Oxford, and claimed exemption under sub-sect. 2 of sect. 13 of 41 Vict. c. 15, the commissioners determined the appeal, and confirmed the assessment; but the appellant requiring them so to do, they stated the following case for the opinion of the court:

#### CASE.

1. The appellant is seised in fee of the premises mentioned in the assessment, and carries on

therein the business of a banker and agent of the County Fire Insurance Company.

2. The premises comprise three coal cellars and strong room under ground; a ground floor consisting of a front room, a room behind that, with a kitchen and scullery at the back of that; a first floor consisting of a front sitting-room and two bedrooms; a second floor consisting of five bedrooms.

3. One coal cellar, the strong room and ground-floor front room, room behind that, and first-floor front sitting-room are used by the appellant for the purposes of his business; the kitchen and scullery, one first-floor bedroom, and two second-floor bedrooms are occupied by Edwin Somerford, who dwells therein for the protection of the bank (two coal cellars, one first-floor bedroom, and three second-floor bedrooms are not used). Besides the said Edwin Somerford, his family, consisting of wife, daughter, and son, both of age (the son being employed in the County Court office), dwell on the premises. Mr. Somerford is in the employ of the appellant as clerk at a salary of 100l. per annum, which includes also the services of himself and family in taking down and putting up the bank shutters, cleaning the offices, lighting fires, and answering the door.

The question for the opinion of the court is, whether the commissioners were right or wrong in confirming the assessment.

*Spokes* for the appellant.—There is one point in the present case which makes it a stronger one in favour of the appellant than the case of *The City Bank v. Last* (post, p. 64), which has just been argued before this court, and that is, that the duties performed by the caretaker in the present case are all entirely of a menial character. His salary or wages as a “clerk” includes the services of himself and family in putting up and taking down the shutters, cleaning and sweeping the offices and rooms, lighting the fires, and answering the door, &c., all of them strictly duties of a menial character. It is customary in banks and such like establishments for the junior clerk, in addition to writing or keeping accounts, &c., to perform several menial functions of the above-named kind. There is no reason why a man may not be a “clerk” and a menial “servant” at the same time. [GROVE, J.—It is not stated that he dwells on the premises merely for the protection of them.] Though not perhaps expressly so stated it comes to the same thing—he is there to protect the bank. In *Rolfe v. Hyde* (44 L. T. Rep. N. S. 775; 6 Q. B. Div. 673; 50 L. J. 481, Q. B.) the servant was a cashier. [LOPES, J.—How is the present case distinguishable from *Yewens v. Noakes*, 44 L. T. Rep. N. S. 128; 6 Q. B. Div. 530; 50 L. J. 132, Q. B. P.] There was no statement that the family in that case were occupied in any duties in relation to the bank; but here they all are. [LOPES, J.—What have these several duties got to do with the protection of the bank?] The whole family to a certain extent are servants, and if they are engaged in menial duties that prevents the occupation being purely residential, and makes it so far servile. Both *Thesiger* and *Baggallay, L.JJ.* were not, apparently, of opinion in *Yewens* case (*ubi sup.*) that the fact of the wife and children being on the premises made any difference. *Thesiger, L.J.* says: “I cannot bring myself to think that the exemption from the

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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inhabited house duty which trade premises enjoy is necessarily lost from the fact that the caretaker is put in possession and occupation of the house with his wife and family." And Baggallay, L.J. expresses himself to the same effect. If it were so, every caretaker must needs be a single man, or at all events have no children. If he be a *bond fide* caretaker his wife and family can make no difference. [Lopes, J.—I do not think this man was a *bond fide* caretaker.] He was left there for the protection which every bank must have.

The Attorney-General, Sir H. James, Q.C. (with whom were the Solicitor-General, Sir F. Herschell, Q.C., and A. L. Smith) was not called on to argue for the respondent.

GROVE, J.—In this case I cannot see any substantial or real distinction between it and the case of *Yewens v. Noakes* (*ubi sup.*) in the Court of Appeal. All the substantial ingredients in the present case, except perhaps the position of the man Somerford, agree with those embraced in the judgments of the Lords Justices of Appeal in *Yewens v. Noakes*. The words of the statute, so far as they apply to the present case, are as follows: "Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof." The case finds that on the premises in question the business of a bank and an insurance agency are carried on, and, after stating generally what the premises consisted of, it proceeds to state how they are occupied, namely: "One coal-cellar, the strong-room, the ground-floor front room, and room behind that, and the first-floor front sitting-room are used by the appellant for the purposes of his business;" and it then goes on to state that which is more material to the determination of the present question, namely: "The kitchen and scullery, one first-floor bedroom and two second-floor bedrooms are occupied by Edwin Somerford, who dwells therein for the protection of the bank." It does not say "merely for the protection of the bank," and it would appear that he dwells there for other purposes besides that, for further on it is said, "Besides the said Edwin Somerford, his family, consisting of wife, daughter, and son, both of age (the son being employed in the County Court office), dwell in the premises." Therefore, not only the man Somerford, but his wife and grown-up daughter and son, also dwell there. The case then proceeds to say, "Mr. Somerford is in the employ of the said appellant as a clerk at a salary of 100*l.* per annum, which includes also the services of himself and family in taking down and putting up the bank shutters, cleaning the offices, lighting the fires, and answering the door." Therefore, although he is called a "clerk," he has duties to perform which are not ordinarily those of a clerk, using the word "clerk" in the old sense of the term, because, though he has to protect the bank, his other occupations are not, I should have thought, quite clerical occupations, namely, taking down and putting up the shutters, cleaning offices, lighting fires, and answering

doors, which it appears he and his family have to do. We have here, therefore, the case of a man who is called a "clerk," but who with his family resides on the premises and occupies five rooms, and who has other duties besides protecting the bank at night, and for which general duties, performed by himself and family, he is paid a salary. It appears to me that this case comes precisely within the case of *Yewens v. Noakes* (*ubi sup.*), and wholly and entirely within the judgment of Bramwell, L.J. in that case, which was concurred in by the other Lords Justices. We are, I think, bound by that judgment, and accordingly our judgment in this case must be for the Crown.

LOPES, J.—I am entirely of the same opinion, the case, according to my view of it, coming precisely within the judgments delivered in the Court of Appeal in the case which has been so often referred to.

*Judgment for the Crown with costs.*

Solicitors for the appellant, *Twisden and Parker*, agents for *Hazel and Baines*, Oxford.

Solicitor for the Crown (respondents), *The Solicitor of Inland Revenue*.

Wednesday, Nov. 23, 1881.

(Before GROVE and LOPES, JJ.)

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*Revenue—Inhabited house duty—Tenement occupied solely for business—"Caretaker"—"Servant or other person"—A "clerk" dwelling in the house for its protection—41 Vict. c. 15, s. 13, sub-sect. 2—Exemption.*

*The appellants, the City Bank, occupied and used as a bank and for the purpose of carrying on their business as bankers therein, the ground floor and basement of a building, which had a separate entrance from the street, and no internal communication with the rest of the building, from which it was structurally separated. The only persons dwelling on the premises at night were two persons, namely, a porter, in the service of the appellants, and a man named Smith, a clerk in their employ, who dwelt therein for the protection of the property. There were also two watchmen employed to patrol the premises at night, but who had no room there. The custody of the keys of the premises was committed by the appellants to Smith, whose duty it was to see that the premises were safely locked up and secured every night, he occupying one small room only, and such residence being merely for the protection of the bank.*

*Upon these facts, the Commissioners having held the appellants liable to inhabited house duty upon the above premises, it was, on appeal therefrom, Held, by Grove and Lopes, JJ. (setting aside the ruling of the Commissioners) that the man Smith, though called a "clerk," dwelt on the premises as a caretaker only and solely for the purpose of protecting the same, and therefore the case fell within the exemption contained in sub-sect. 2 of sect. 13 of 41 & 42 Vict. c. 15, and the appellants were not liable to the duty.*

*Yewens v. Noakes, in the Court of Appeal (ubi infra), discussed and distinguished.*

THIS was a case stated by the Commissioners for

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General Purposes, &c., for the city of London, for the opinion of the Exchequer Division of the High Court of Justice, and the facts as stated in the case were as follows :

1. The bank by its agent appealed against an assessment to the inhabited house duties for the year ending 5th April 1879, of 2895*l.* at 9*d.* in the pound, upon and being the full value of the whole of the premises Nos. 5 and 20, Threadneedle-street, in the city of London, and claimed exemption in respect of the said premises under sect. 13 of the 41 Vict. c. 15.

2. The premises constituting Nos. 5 and 20, Threadneedle-street, consist of a basement, ground, and upper floors, with two separate main entrances from the street.

3. The ground floor and basement of the building, with a separate entrance, are in the occupation of the appellants, and are used by them as a bank for the purpose of carrying on their business as bankers, and have no internal communication whatever with the rest of the building, being structurally separated therefrom; no persons dwelling therein at night times excepting Thomas Gladding, a porter, and William Stewart Smith, a clerk (both in the employ of the appellants), who dwell therein for the protection of the property; and John Palmer and Edward Hatherway, who are employed as night watchers. The custody of the keys of the premises is committed by the appellants to Smith, and it is his duty to see that the premises are safely locked up and secured every night; he occupies one small room only, and such residence upon the premises is merely for the protection thereof.

4. The remaining rooms, numbered respectively 1 to 26, form a distinct building, with a separate staircase and main entrance from the street, and are let to and occupied by traders and others for the purpose of profit, no person dwelling therein except a housekeeper, who occupies her rooms for the protection of the premises.

5. The respondent Last, on behalf of the Crown, contended, as regards that portion of the property in the occupation of the appellants, that the room occupied by Smith was used by him as a residence, and not solely for the protection of the premises, and that his employment as a clerk to the appellants, the City Bank, gave him a quality not within the meaning of the expression "servant or other person" contained in sect. 13 of the Act; and further, that the above-named porter and night watchmen were the persons dwelling therein for the protection of the premises, but that the remaining portion of the property not in the occupation of the appellants, being solely occupied for trade purposes, excepting an ordinary "caretaker," came within the exemption referred to.

6. The commissioners were of opinion that the premises, as divided, were so structurally severed as to form two distinct buildings; that the building or tenement in the occupation of the City Bank was liable to the inhabited house duty; that the other building came within the statute 41 Vict. c. 15, s. 13, sub-sect. 2, and they reduced the assessment to the sum of 1700*l.*, being the annual value of the tenement occupied by the appellants; whereupon this case was stated and signed by the commissioners for the opinion of the High Court of Justice.

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*H. Matthews*, Q.C. (with him was *H. D. Greene*), for the appellant bank, argued that on the facts as stated the commissioners were bound and ought to have exempted these premises. The watchmen merely patrolled at night, but had no room there. The Crown contends that there is something in the position of a "clerk" that takes a person who is so called out of the category of "a servant or other person." More than one person in the present case had the care of these premises; and the number necessary for purposes of protection must depend upon the kind of premises, the nature of the business carried on, and the value of the stock and property kept there. In a bank, full of valuable securities and money, precautions against fire as well as against thieves are required, and a messenger who could leave the spot to raise an alarm is a necessity. The question is whether the quality as "clerk" destroys the exemption. If a bank clerk is not a servant of the bank employing him, who is a servant? The case is concluded by the recent authority of *Rolfe v. Hyde* (44 L. T. Rep. N. S. 775; 6 Q. B. Div. 673; 50 L. J. 481, Q. B.), where it was held that the fact of a man occupying some other position in the employ of a bank (in that case he was a cashier, with 200*l.* a year salary) did not take him out of the exemption, if it were found as a fact that, although a "clerk," his occupation was of a kind consistent with residence for protection only. The Crown no doubt will rely on the case of *Yewens v. Noakes*, in the Court of Appeal (44 L. T. Rep. N. S. 128; 6 Q. B. Div. 530; 50 L. J. 132, Q. B.), but that was a decision on a different statute, viz., the 31 & 32 Vict. c. 14, s. 11, under which the occupation is a narrower one than that under the statute regulating the present case (41 Vict. c. 15), which comprises a wider class of building. That case of *Yewens v. Noakes* is commented on and explained in *Rolfe v. Hyde*. It has indeed been questioned in *The Chartered Mercantile Bank of India v. Wilson* (38 L. T. Rep. N. S. 254; 47 L. J. 153, Ex.; s. c. *nom. Bank of India v. Wilson*, 3 Ex. Div. 108), and other cases, whether a banking company were within the statute 31 & 32 Vict. at all. The true test I submit is, has the man a larger residence than a "caretaker" requires, and not whether during the day he is a clerk or a policeman. It is not doubted that a policeman may be a "caretaker," yet he is not a "servant," but "another person;" but why is he more *ejusdem generis* with a "servant" than a "clerk" is?

The Attorney-General, Sir H. James, Q.C. (with him were the Solicitor-General, Sir F. Herschell, Q.C., and A. L. Smith) for the Crown (respondents), *contra*.—The case of *Yewens v. Noakes* was determined by the Court of Appeal on the very ground on which the Crown now asks this court to determine the present case. It is true, no doubt, that Bramwell, L.J. rests his judgment there principally on the fact of the man's wife and children having occupation of the premises as well as himself; but Thesiger and Baggallay, L.J.J. decided the case on the very ground contended for by the Crown here, viz., that the term "servant" is used and intended by the Legislature as meaning an ordinary menial or domestic servant, and that "other person" means some one of the same kind and description and standing on the same footing. Putting aside, therefore, the incident of the wife

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and children, there was still, in the opinion of the Lords Justices, a necessity to hold that a "clerk" did not come within the words "servant or other person." He was not *ejundem generis*. The commissioners here, in their discretion, and in order to determine the question of fact, have found that the man Smith was not a servant, &c., or they could not have held the premises to be liable to the duty. In *Bolfe v. Hyde*, relied on by the appellants, the commissioners found the "caretaker" came within these words, and the court would not disturb their finding on a question of fact; and that is what the Crown now asks this court not to do. If in that case the court declined to interfere with the commissioners' decision, who had not followed the opinions expressed by Thesiger and Baggallay, L.JJ. in *Yewens v. Noakes*, why should this court now interfere when the commissioners have followed those opinions? Although Bramwell, L.J. based his judgment there on a different ground, yet, having heard the judgments of his two learned brothers, he expressed no dissent therefrom. That case is conclusive of the present point, that this man does not come within the exemption.

H. Matthews, Q.C. in reply.

GROVE, J.—In this case the claim of exemption is under sub-sect. 2 of sect. 13 of the 41 Vict. c. 15. After stating what the premises consist of, the case goes on: "The ground floor and basement of the building, with a separate entrance, are in the occupation of the appellants, and are used by them as a bank for the purpose of carrying on their business as bankers, and have no internal communication whatever with the rest of the building, being structurally separated therefrom, no person dwelling therein at night time excepting Thomas Gladding, a porter, and William Stewart Smith, a clerk, both in the employ of the appellants, who dwell therein for the protection of the property, and John Palmer and Edward Hatherway, who are employed as night watchmen. The custody of the keys of the premises is committed by the appellants to Smith, and it is his duty to see that the premises are safely locked up and secured every night. He occupies one small room only, and such residence upon the premises is merely for the protection thereof." The case calls Smith a "clerk," but he occupies only one small room, and his residence upon the premises is merely for the protection of them. Now the question arises, is he who is called a "clerk" (and we will assume that he is a "clerk" for some purposes), and who occupies one small room merely for the protection of the bank, within the exemption in sub-sect. 2 of sect. 13, or is he not? Practically it comes to the question whether we are or not bound by the decision of the Court of Appeal in *Yewens v. Noakes* (*ubi sup.*), in which I should of course acquiesce if I considered that it applied to the present case in the sense that we should be bound by it in giving our present judgment; but I do not consider that it does so apply, and for the following reasons: First of all, to note the distinction between the facts in the two cases, in *Yewens v. Noakes*, the person in whose favour the exemption was sought was a clerk in a good position with a salary of 150*l.* a year, in addition to which his wife and family, consisting of four or five children, and a servant, occupied not one

small room only, as is the case here, but several rooms in the house, and upon that the question arose before the court, whether he was within the exemption as being a person dwelling in such house or tenement "for the protection thereof." Now it is, I think, to be derived from the statement in the present case, that the clerk Smith was resident on the premises merely "for the protection thereof," that is, solely and exclusively for the purpose of protecting the bank. It is true there were a porter and two night watchmen; but the argument of the learned Attorney-General, on the part of the Crown, did not seem to rest upon that, and I did not understand it to be denied that those other persons would come within the words "servant or other person," which are the words upon which the case almost wholly depends. The whole strength of the learned Attorney-General's argument rests upon the fact that this man Smith was a "clerk," and that the man as to whom the claim to exemption in *Yewens v. Noakes* arose was also a "clerk." But then there is this distinction in fact—and I will see presently whether the judgment in that case applies to that—that here we know nothing of the character and position of the man Smith further than that he is called a "clerk," and that he occupies one small room only for the protection of the bank. Therefore he is a person to whom the word "clerk" is applied, but whose residence is merely for the protection of the premises. Now there are clerks of various grades and various descriptions. In the case of *Wootton v. Rolfe* (*ante*, p. 63) in which we have just given judgment, the man Somerford was called a "clerk," though he certainly did not appear to perform any of the ordinary duties which we usually find connected with the word "clerk." Here there is no finding that Smith performed any duties other than those of protection. From what appears in the case I should rather take it that he performed none, and that he resided there merely for protection, though he may have had some other duties unconnected with his residence. The question therefore arises, does he inhabit the house in any other sense than for the purpose of protection? It does not appear to me that he does. In *Yewens v. Noakes* the "clerk," it appears, did inhabit the house *ultra* a mere inhabiting for the purpose of protection, and, as I read the judgment of Bramwell, L.J., that learned judge dwells very much upon that matter, for he says: "It may be said, are married men not to be caretakers? I do not say that they are not to be, but what I say is, that the houses which they take care of must not be the dwellings of themselves and their families, and that if they are made the dwellings of themselves and their families the case is not within the exemption which supposes an exemption in the case of a caretaker only." Further on the Lord Justice says: "Here are a man and his wife and children, having a servant, residing within this building, which, as far as they are concerned, is as much an occupied dwelling to the extent to which they occupy it as a part of a house can be; and it is impossible to say that this person is not residing, or having the benefit of a residence, with his family in the house. I think therefore that, whether we look at these general principles to which I have adverted, or to the circumstances of this particular case, it is not within the statute." Both Thesiger and Baggallay,

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L.J.J. agree with that judgment, but they add other grounds for their agreement with it. I do not know that there is anything more difficult in some cases than for a court which is bound by the decision of another court, whether a Court of Appeal or of co-ordinate jurisdiction, to be quite certain as to how far the opinions expressed in the judgment of such other court are to be taken as a necessary part of the judgment of such court. The general rule I believe to be that the court, to whose attention a judgment of a Court of Appeal or of co-ordinate jurisdiction is called, is bound really by that judgment only so far as it applies to the facts of the case then before such court; and though the utmost deference is of course to be paid to any opinion expressed by any Court of Appeal, or even by a court of co-ordinate jurisdiction, still the court is not bound by anything which may be said by such other court beyond what is plainly necessary to constitute the judgment of the court, having regard to the facts before it. Now in *Yewens v. Noakes* (*ubi sup.*) Thesiger, L.J. gives another reason for coming to the conclusion that the appeal should be allowed. He says, "What is the meaning of the words 'other person'?" Now definitions are proverbially dangerous, and I do not propose to define exactly what the words 'other person' may mean, but this, I think, is obvious, that by the words 'other person' is intended some person of the same kind and description as a servant, standing somewhat on the same footing, and subject to the same conditions." I may remark here that the term "servant" is one open to considerable latitude of meaning, because a different servant would be required for the protection of a bank, or (putting a bank out of the question) of a very large and important commercial business concern, from that which would be required in the case of an ordinary shop. A person required as a "servant or other person" to protect a large commercial establishment, might vary very much from a servant required to protect a small insignificant shop consisting of a room and a little cell behind it, where, probably, the only servant kept, as a maid of all work, might be quite sufficient for the protection of apples and oranges, and things of that sort. Then Thesiger, L.J. having given that definition, says: "I think a very good illustration was given by the Solicitor-General where he referred to the not uncommon case of a policeman being put into an unoccupied house or trade premises for the purpose of watching and guarding them"—I apprehend that the Lord Justice meant that he would come within the definition of "other person"—"but," his Lordship goes on to say, "if that be the proper meaning, as I think it is, of the words 'servant or other person,' then it is obvious that a clerk with a salary of 150*l.* a year does not come within such words. If he did, where is the construction to stop? The manager of a bank, a foreman with high wages, persons in the position almost of gentlemen, might be put in to take care of premises." The Lord Justice gives judgment in favour of the Crown, first of all, on the ground that, even if the man had not been a clerk, he was not within the exemption—not putting his judgment upon the actual word "clerk"—because he was on the premises with his wife and family and a servant; and secondly, upon the ground that, being a clerk with a salary of 150*l.* a year, he was not in the position of a "servant or

other person" contemplated by the Act. Thus Thesiger, L.J. in effect, says: "First, I agree with Bramwell, L.J. that this man, inhabiting, with his wife and several children, and a servant, several rooms in the house, does not come within the position of a mere caretaker of property inhabited for no other purpose, and only inhabited to an extent sufficient to give him a sleeping place or a place in the house enabling him to act as a caretaker; and, secondly, I do not think this person was in the position of a servant, being a clerk with a salary of 150*l.* a year." The present case clearly does not come within the judgment of Bramwell, L.J., and therefore it does not come within the first ground of Thesiger, L.J.'s judgment, and I do not think it comes within the second ground of the same last-mentioned judgment either, because all that I find in the case here is, that the man is merely called a "clerk," and if we were to give judgment for the respondent in the present case, we should go the length of saying that a person called a "clerk" could not be a "servant or other person" within the meaning of sub-sect. 2 of sect. 12 of the Act of Parliament. I feel that we should be straining the law if we were to say that. Even taking that part of the judgment of Thesiger, L.J. in which he comes to the decision that the appeal should be allowed, on the ground that the man in that case was a clerk with a salary of 150*l.* a year, and was therefore not a "servant or other person" contemplated by the statute, the facts here are not *ad idem* with those in that case. I should give the utmost deference to the whole of the judgment pronounced by a judge of the Court of Appeal, but, where there is amply sufficient in the case to satisfy, if I may use the expression, the requisites of the judgment without certain extra reasons given in the judgment, I do not think that, sitting here, we are bound by all those extra reasons. I endeavour to avoid (without pretending to say that there may not be cases where I have not avoided) the strengthening my judgment by reasons which are not essential for the decision of the particular case. Speaking for myself, I have thought it desirable, as much as possible, not to give reasons which may involve anything not necessarily involved in the facts of the case upon which I am giving my judgment. Therefore I do not think I am bound by that portion of the judgment not necessarily applying to the case before the court, because I see enough in the case to support the judgment of the Lords Justices upon the other portions of the judgment. But, even if I did consider myself bound by that portion of the judgment to which I have referred, I do not think that this case comes within it. There is only one other point to which I need refer. It is said, on the part of the respondent, that here the commissioners must have assumed by their judgment that Smith was not "a servant or other person" within the meaning of the statute, and that they having so found, we are bound by that finding; and the case of *Bolfe v. Hyde* (*ubi sup.*) (which was decided by the Court of Appeal subsequently to their judgment in *Yewens v. Noakes*) was referred to, in which Lindley, L.J. comments upon the judgment in *Yewens v. Noakes*, and says that a portion of that judgment was "extra-judicial," by which I understand him to mean that it was unnecessary to the decision of the case before the

court. It is also said, on the part of the respondent here, that *Rolfe v. Hyde* is distinguishable from the present case on the ground that there the commissioners found, as the court found, that the "cashier" was a "servant or other person" who dwelt on the premises only for the purpose of protection. Here the commissioners do not expressly find that this man Smith was "a servant or other person" within the meaning of the statute. Possibly they thought it was an arguable case, and, in order to enable the case to be appealed, they must find one way or the other. It may be assumed that they thought he was so, but they thought also that it was a fair case for appeal, and they have given those other findings, one of which I have very much relied on, viz., that this man occupied one small room only, and merely for the protection of the bank. Having given these facts the commissioners leave it to the court. In *Yewens v. Noakes* Thesiger, L.J. says (and I fully agree with what he says upon that subject): "If in this case the commissioners had distinctly found as a fact that the caretaker in this particular instance was simply the caretaker, and even a 'servant or other person' within the Act, although we may think the decision was erroneous, I do not think that we should be justified in interfering with it; but, in this case, under the terms of the special case, the object of the commissioners appears to be to submit to the court the very question; and that being so, we are justified, notwithstanding their belief that this was the case of a caretaker, in deciding in the way in which we have done." In the present case, as in that case, the commissioners have not found distinctly, or in terms, that this man was "a servant or other person," but they have given a decision upon the case referring it to us for our judgment. Therefore we are not bound by the finding of the commissioners. The facts here are very different from those in *Yewens v. Noakes*, and the case does not come at all within what I may call the main part of the judgment in that case, that is to say, the judgment of Bramwell, L.J.; nor do I think it comes within the other part of the judgment of Thesiger and Baggally, L.J.J. For these reasons I am of opinion that the appellants here are entitled to our judgment, which must therefore be given for them and against the Crown.

LOPES, J.—I am of the same opinion. The question raised in the case is this: Is the man Smith "a servant or other person" dwelling in the building in question for the protection thereof? Now there is nothing in the finding of the commissioners as to whether he is "a servant or other person" or not; but they find this, that he occupies one small room only, and that such residence upon the premises is merely for the protection thereof, and having found that, they leave it to the court to say whether that finding sufficiently justifies them in arriving at the conclusion, which beyond doubt they must have arrived at to have decided as they did, that that does not bring him within the exemption mentioned in the Act. The commissioners seem to have thought that the employment of Smith as a "clerk" gave him a quality not within the meaning of the words "servant or other person;" in point of fact they state that that was the ground of their decision. It appears to me that, if we were to decide in favour of the Crown in this case,

we should have to go the length of holding that no person who is a "clerk," whatever his salary or his position might be, could be "a servant or other person" within the meaning of the statutory exemption referred to, or, in other words, could be a "caretaker." I cannot think that the mere quality of "clerk" can destroy the exemption. I think what we are bound to look at in every case is the character of the evidence; and looking at the character of the evidence in this case, and the finding of the commissioners with regard to it, I think that this man Smith is a "servant," or at any rate "another person," within the meaning of the Act of Parliament. I do not mean to say that I have not felt some difficulty during the argument of the case, but that difficulty has entirely arisen from the judgment of the majority of the Court of Appeal in the case of *Yewens v. Noakes* (*ubi sup.*), I mean the language of Thesiger and Baggally, L.J.J. I did at first think that the words used by those learned judges amounted to a judicial interpretation of the words "servant or other person;" but, on careful consideration, I adopt the view expressed by my learned brother Grove, that in reading those judgments, we are bound to look to the facts which were being dealt with in that particular case. I mean, that the words of the learned Lords Justices must be interpreted by the light of the matter and the facts then before them. I think those learned judges, when they used the expressions which they did, must have had before their minds the facts concerning the "clerk" in the particular case with which they were dealing, and I cannot think that they meant to say that no "clerk" could be within the exemption, whatever his position might be. On these grounds I think that our judgment ought to be in favour of the appellants.

*Judgment for the appellants with costs.*

Solicitors for the Bank (apps.), *Ingle, Cooper, and Holmes.*

Solicitor for the Crown (resp.), *The Solicitor of Inland Revenue.*

*Friday, June 3, 1882.*

(Before FIELD and CAVE, JJ.)

THE GUARDIANS OF THE POOR OF THE MADELEY UNION (apps.) v. THE GUARDIANS OF THE POOR OF THE BRIDGNORTH UNION (resps.). (a)

*Poor law—Derivative settlement—Birth settlement—Wife, and children under sixteen—Father having acquired no settlement—The Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 35.*

*E. H. and her three children were the wife and children of W. H., who was the son of J. H., and had become chargeable to the respondents' union.*

*J. H. was born in the parish of Madeley in the appellants' union, but had acquired no settlement in his own right.*

*W. H. was not born in the parish of Madeley, and had also acquired no settlement in his own right.*

*Held, that the Court of Quarter Sessions were right in quashing an order of two justices for the removal of the paupers E. H. and her three children from the respondents' union to the appellants' union.*

*That, although the Divided Parishes and Poor Law*

(a) Reported by H. D. BONSET, Esq., Barrister-at-Law.

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*Amendment Act 1876 (39 & 40 Vict. c. 61) (a) abolished derivative settlements, it excepted the wife and left the law as it was before upon that head, and therefore she takes the settlement of her husband whether acquired or derivative.*

*That a legitimate child will in no case take any derivative settlement acquired by the widowed mother by a second marriage, or any derivative settlement acquired by either parent by parentage; and an illegitimate child will in no case take any derivative settlement acquired by the mother by parentage or marriage; and as the parents in this case had none but derivative settlements the children would not take the settlement of either father or mother, but their birth settlement.*

SPECIAL case stated by the Court of Quarter Sessions of the Peace for the Borough of Bridgnorth.

On the 9th Jan. 1882 two justices for the borough of Bridgnorth made an order for the removal of Ellen Hughes and her three children, aged respectively five, three, and one year, from the Bridgnorth Poor Law Union to the Madeley Poor Law Union.

Upon appeal by the Madeley Union to the Court of Quarter Sessions for the borough of Bridgnorth the order of the justices was quashed, subject to a special case to be stated for the opinion of the High Court of Justice.

The material part of the case is as follows:—

The grounds of removal alleged that the settlement of the paupers, and of William Hughes, the husband of the said Ellen Hughes, was the birth settlement of John Hughes, the father of William Hughes. No other settlement of John Hughes or of William Hughes was set up affirmatively by the appellants in their grounds of appeal, nor did they therein allege that the said John Hughes had derived a settlement from his father or had acquired any other settlement than such birth settlement as aforesaid before his son the said William Hughes had attained the age of sixteen; but they allege that the said William Hughes was not born nor ever legally settled in the parish of Madeley, and in their fourth ground of appeal they maintained "that the alleged settlement (if any) of the said William Hughes would be a derivative settlement, and as such is abolished by Act of Parliament."

The Court held that upon the reasonable construction of the grounds of appeal the respondents were not bound to prove more than the birth of the said John Hughes in the parish of Madeley, and that upon such proof the question of law in-

(a) 39 & 40 Vict. c. 61, s. 85: No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother as the case may be, up to that age, and shall retain the settlement so taken until it shall require another.

An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

tended to be raised by the appellants would properly arise.

It was proved or admitted that John Hughes was born in the parish of Madeley, in the appellants' union, in or about the year 1822, and acquired no settlement in his own right; that William Hughes was the lawful son of the said John Hughes, and also had acquired no settlement in his own right; and that the paupers Ellen Hughes and her three children were the lawful wife and children of the said William Hughes, and had become chargeable to the respondents' union.

The appellants called no evidence at the close of the respondents' case, but submitted as matter of law that it was not sufficient for the respondents to prove the place of birth of John Hughes; but that, unless they could show affirmatively a legal settlement of the said John Hughes at Madeley—not derived from the fact of his birth there—his son William Hughes must be held to be settled in the place in which the said William Hughes was born.

The Court quashed the order on the ground that it was in law insufficient to make out a *prima facie* birth settlement for John Hughes; and that as the respondents had not established a settlement in the parish of Madeley for John Hughes, other than a *prima facie* birth settlement, William Hughes must be held to be settled in the parish of his birth by virtue of the Divided Parishes Act 1876 (39 & 40 Vict. c. 61). If the court shall be of opinion that the facts admitted and proved established a settlement for the said William Hughes in the parish of Madeley, then the said order of removal shall stand confirmed, and the order of sessions quashing the same shall be quashed.

*Bosanquet and Kenyon* for the appellants.

*Jelf, Q.C. and Archibald (Spearman with them)* for the respondents.

*Our. adv. vult.*

Aug. 3.—FIELD, J.—This was a special case stated by the Quarter Sessions of the Peace for the Borough of Bridgnorth Union upon an appeal by the Union of Madeley, against an order by which two justices had, upon the 9th Jan. 1882, adjudged the last place of settlement of Ellen the wife of William Hughes and three children, aged five, three, and one year, to be in the parish of Madeley. The Madeley Union or parish appealed against that order and the court of quarter sessions quashed it subject to a case. Now, the question turns upon the construction of 39 & 40 Vict. c. 61. The facts to which the statute has to be applied are these: The paupers, the wife and three children, were the wife and children of William Hughes. The birthplace of William Hughes was not proved, and was taken not to be in Madeley Union, but his father John was born in Madeley, and the justices below held that the settlement of John the grandfather ought to be considered the settlement of the father, and upon that ground they made the order. Now, the matter has been under discussion in various cases, and I have before, in one or two cases, expressed my views of the construction of the statute. Upon those occasions I had not taken time to consider, but I gave the construction which appeared to my mind, in the course of the arguments, to be the true one. Since these cases others have been



argued, and, in the very able argument that has been addressed to us in this case by Mr. Bosanquet, these cases have been fully brought before us. I thought it right therefore, *ab initio*, to go back through the whole thing and see whether or not the view I before expressed was correct and sound, or whether an examination of the statute and authorities tended to remove any doubt there might be in my mind, and would enable me to acquiesce in Mr. Bosanquet's view. Now, for that purpose I have gone further back than the statute in order to see as far as I can what has been the policy of the Legislature. There is, first of all, no doubt to be entertained that by law every person unable from poverty to maintain himself is entitled to be maintained at the expense of the inhabitants of some parish or place which has the duty thrown upon it of maintaining its own poor, and that place so charged with the liability—and indeed every other place in which a person is found who is likely to become chargeable to the funds for the relief of the poor in it—has a right given to it of causing the removal of the person likely to become chargeable to what is popularly known as the place of settlement of the pauper. That right of removal of poor persons was in existence before the pauper settlement laws came into existence at all. It was in existence as far back as the reign of Richard II. and also Henry VII., in which years various Acts of Parliament were passed which insisted or asserted that poor persons and persons of certain descriptions should resort to certain places; and it is remarkable, in regarding the modern legislation upon the subject, how much that modern legislation agrees with the first legislation, because the whole spirit of the Acts of Henry VII. and Richard II. was that persons of certain descriptions were to resort to certain places where, in the language of the Act, they had become conversant, or had dwelt, or had abided. Therefore the policy in those days, if you found a vagrant or a person not having means of support, was to hold that the proper place for that person to resort to was a place where he was conversant and where he would find friends or persons likely to support him, or associate with him. That continued the state of the law until the time of Charles II. when the Act was passed which defines the law of settlement until recent changes have been effected by this Act, and in one instance by the Poor Law Act of 4 & 5 Will. 4. Now the of state things, therefore, which ultimately became settled, was that which came into existence by the statute of 13 & 14 Car. 2, which fixed the right of removal of persons likely to become chargeable, and consequently their place of settlement was deemed to be in the place where the paupers were last legally settled. Every word is important. "Last legally settled"—he might have been settled in a dozen places, but the place where he was last legally settled was asserted to be the one to which he was to be removed, and therefore it became technically known as "the place of settlement." Now the persons we have to deal with here who are to be removed, consist of a married woman and three children, all the children being under the age of sixteen, and of course unemancipated. If a question had arisen about the removal of these four persons before the statute which we have to construe, viz., 39 & 40 Vict. c. 61, s. 35,

the state of things would have been this: The wife might have been removed to the place of her husband's settlement, because she derived that settlement from her husband. That would have been the state of things before 39 & 40 Vict., and is the state of things still, because, although that Act intended to abolish and did abolish derivative settlement in general, it excepted the wife from it, and therefore left the law as it was before upon that head. Therefore whatever construction you may put upon the Act the wife must be removed to the place of her husband's settlement. It seems to me that the policy of the Legislature was very clear, namely, that it would be very undesirable to separate husband and wife; and if you abolished her derivative settlement by marriage she would have had to go to her place of birth, because women, as a rule, very rarely have acquired any settlement of their own, and the probability is that a very large percentage of married women have no other than the derivative settlement of their husbands or birth settlement. In a great majority of cases if you were to send the wife to her birth settlement it would be a very different place from the husband's settlement, and the effect would be at once to separate them. It is most important to observe that the tendency of all modern legislation has been to increase the facility of gaining a settlement. In this very Act that we have to construe the Legislature has shown its intention of reducing irremovability as much as possible, and fixing the settlement as much as possible at the last place where the pauper had been conversant, by converting the status of irremovability of three years into a settlement, and since then, if I remember rightly, that term has been reduced to one year. So the effect is that any man having lived for a year in a place (that of course is not a very long time) has acquired a settlement in his own right, and therefore the wife presumably would go to the place where she had been recently dwelling, and therefore it would be a place possibly much better for her to be removed to than to the place of her birth, which she may have left for many years, and where, possibly, all her friends may be dead and gone. That is the matter as it stands with regard to the wife. By the old law, as well as by the new law, she has the same settlement as she had before, namely, the settlement of her husband. Then, with regard to the children, the case before the statute stood thus: They are legitimate children, and under the age of sixteen and unemancipated, and, consequently, before the statute, they would have derived their settlement from the father or mother, or would have been settled where they were born; but the foundation of all this is that birth is only a *prima facie* settlement, it does not become a conclusive settlement except in those cases where the derivative settlement is not known. I have said that these are legitimate children—and we have upon the present occasion, of course, nothing to do with bastard children, except by way of illustration—and in that view it is important to look at the legislation with reference to bastard children for the purpose of ascertaining the policy of the Legislature on the enactment now before us. Originally bastard children were in a different position to legitimate children; they were the children of nobody, and could derive nothing from anybody; they could not derive a settlement, and consequently of



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necessity were always removed to the place of their birth, with one exception, and which exception shows the anxiety on the part of the Legislature not to separate people who cannot take care of themselves. There was an exception in the case of nurslings who up to a certain tender age could not be separated from the mother. The law as to bastards was altered by 4 & 5 Will. 4, c. 76, s. 71, which made a bastard child follow the settlement of the mother until the age of sixteen, or until it had acquired a settlement in its own right. I have adverted to that for the sake of pointing out by way of illustration the policy of the Legislature in regard to the removal to one and the same place of the mother and the child. The legitimate children were first of all benefited by the Act we have to deal with. Before the passing of that Act these three children now in question would have had the last settlement of their father, and it may be that that would have the effect of separating them from their mother; but the statute in question not only excepts the mother from the abolition of derivative settlement, but also excepts the children. Sect. 35 says: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise" (I have endeavoured to find out how it is that the word estate has crept in there, and I think it must be by accident that the word has crept in) "except in the case of a wife from her husband and in the case of a child under the age of sixteen." Therefore, a child under sixteen is excepted and may still derive a settlement by parentage. What is the settlement which it is to derive from parentage? It is to be the settlement of its father or its widowed mother, as the case may be, up to the age of sixteen. Then the section goes on: "Which child may take the settlement of its father or its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." Therefore, again, the Legislature fixes the child's settlement at that of the parent up to a particular age, and it prevents what was previously the state of things, namely, the applicability of the removal of the child to any subsequent settlement acquired by the father. It therefore fixes the child's settlement at that place where it was most likely the child would be conversant, that is to say, the most recent place of the father's settlement; and, inasmuch as that is reduced now to one year, it would most probably be a settlement of recent date. So far as possible it seems that the Legislature says: "Let the child go to its parent and with its parent," but then there was this further to be provided for: if the section had stopped there, the child being excepted from the abolition of derivative settlement, and still deriving its settlement by this very Act with its parent, it might turn out that the parent's settlement was a derivative settlement at a period prior to the abolition of derivative settlement, and might still therefore be the settlement of the child. That would be doing the very thing which the Legislature seemed to desire not to do, and that is to go back to a derivative settlement acquired, perhaps, from a grandfather no one knows when. Therefore, if the section stopped there, the effect would have been still that you might have to send the child a long way from where the child was conversant and abided, and that it

appears to me the Legislature intended not to do, and it proceeded to legislate in regard to it, and provided: "If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband" (let me pause here to say I am unable at present to concur in the construction which has been put upon the words "any child" there, for reasons that my brother Cave will state), "and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." Therefore, it being the intention to abolish derivative settlement, it would seem that the Legislature thought, in that particular event, it would be better for a child to be sent to its place of birth rather than any other place. Whether that is a wise policy, whether it was exactly right, and whether it has secured the very object the Legislature intended, I am not prepared to say, but, I may say generally it seems to me to have been wise and prudent, though no doubt it is open to the observation made by Mr. Bosanquet to the effect that some cases may arise where it will work the very mischief which the general policy of the Act intended to prevent. I cannot help thinking that in the great majority of cases the policy is not only sound and good, but, in my opinion, according to the plain meaning of the Legislature. I am glad to find that my brother Cave concurs in the views I have expressed, but, although we have arrived at the same conclusion, our grounds are quite independent of each other. I entertain the same view as I have before expressed, and therefore I now hold that in my opinion the order of the quarter sessions is quite right, and must be affirmed.

CAVE, J.—The question in this case is, what construction is to be placed on the 39 & 40 Vict. c. 61, s. 35—a question not free from difficulty owing partly to the language of the section and partly to the interpretation which appears to have been placed upon it by judicial decisions. The section first enacts that "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise." Now, stopping there for a moment, it may be observed that there are only two species of derivative settlements, viz., settlement by marriage and settlement by parentage. By the former, if a woman married a man who had a known settlement, she acquired the husband's settlement, and she took every subsequent settlement which he might obtain until his death. If the husband had no settlement, then the prior settlement of the wife continued. By the latter, legitimate children took the settlement of their father, and they took successively any settlement which the father might from time to time acquire before their emancipation. If the father had not a settlement acquired by his own act, they took the settlement he derived from his parents till it could be traced no further, and recourse was then had to the maiden settlement of the mother. If neither father nor mother had a known settlement acquired or derivative, the children were settled in the place of their birth until they acquired another settlement by their own act. The case of an illegitimate child differed. Previous to the Poor Law Amendment Act 1834 the settlement

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arising from the place of birth of a bastard was in general only superseded by a settlement subsequently acquired by the bastard in his own behalf; but by sect. 71 of that Act it was enacted that "every child born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen or shall acquire a settlement in its own right." In *Reg v. St. Mary Newington* (4 Q. B. Rep. 581) it was held that by virtue of this section illegitimate children (differing in this respect from legitimate children) followed the mother's settlement acquired by marriage after their birth and while they were under sixteen years of age; and in *Bodenham v. St. Andrews* (1 Ell. & Bl. 465) it was held that illegitimate children followed the mother's settlement only until they were sixteen, and that a bastard who had attained that age without having acquired any settlement of its own was settled in the place of its birth, though the mother was settled elsewhere. Now, applying so much of the 39 & 40 Vict. c. 61, s. 35, as has been already cited to the previous law, a wife could no longer have taken the settlement of her husband, nor a legitimate child that of its parents or a bastard that of its mother. The section, however, proceeds to make the following exceptions from the generality of this first part: "Except in the case of wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." Now, the exception in the case of a wife has been held entirely to exclude derivative settlement by marriage out of the operation of the first part of the section, so that a wife will take the settlement the husband has at the time of the marriage, whether acquired or derivative, and every subsequent settlement which he may obtain until his death: (*Great Yarmouth v. City of London*, 37 L. T. Rep. N. S. 712; 3 Q. B. Div. 232.) The subsequent exception seems to exclude derivative settlement by parentage out of the operation of the first part of the section to this extent, that a child will take the settlement of its father so long as he lives, and the subsequently-acquired settlement of its widowed mother only up to the age of sixteen, and not up to emancipation as before. The latter part of this exception seems intended to preclude the interpretation which was put on sect. 71 of the Poor Law Amendment Act 1834 in *Bodenham v. St. Andrews* (*ubi sup.*) since it goes on to provide that the child shall retain the settlement so taken (that is, the settlement of its father or widowed mother which it actually has at the age of sixteen) until it shall acquire another. The next part of the section, "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement," seems obviously intended to abrogate the rule laid down as to illegitimate children in *Bodenham v. St. Andrews*. Had the section stopped here a doubt might have arisen whether the settlement of its father or of its widowed mother which the legitimate child was to take and retain, or the settlement of its mother which the bastard was to retain, included not only their birth settlements or settlements acquired in their own right, but also, in the case of the father, a settlement derived

by parentage, or, in the case of the mother, a settlement derived by parentage or marriage. The section accordingly goes on to provide as follows: "If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born," or, in other words, a legitimate child will, up to the age of sixteen, take the last settlement which the widowed mother may have acquired in her own right after the death of its father, or, failing that, it will take the last settlement the father shall have acquired in his own right, or, in the absence of any such settlement, it will take the father's birth settlement, and it will retain the settlement which it had at the age of sixteen until it had acquired another in its own right, but it will in no case take any derivative settlement acquired by the widowed mother by a second marriage (*Keynsham Union v. Bedminster Union*, 3 Q. B. Div. 344), or any derivative settlement acquired by either parent by parentage; while an illegitimate child up to the age of sixteen will take the last settlement, which the mother may have acquired in her own right, and, in the absence of any such settlement, it will take her birth settlement, and will retain the settlement which it had at the age of sixteen until it has acquired another in its own right, but will in no case take any derivative settlement acquired by the mother by parentage or (abrogating *Bodenham v. St. Andrews*) by marriage. This being, as it seems to me, the natural construction to put on the section in question, I am next led to inquire whether any other construction has been put upon the section by any previous case. The first case to which we were referred is that of *Westbury-on-Severn v. Barrow-in-Furness* (38 L. T. Rep. N. S. 315; 3 Ex. Div. 88). In that case the pauper, who was more than sixteen at the time of the passing of the 39 & 40 Vict. c. 61, had acquired no settlement of his own, but before he had attained the age of sixteen his father had acquired a settlement in his own right by estate. The appellants contended that the first two lines of the 35th section were retrospective so as to take away the derivative settlement the pauper would otherwise have gained, but that the exception in the same clause of the Act was not retrospective and consequently that the pauper had lost the old derivative settlement, and had not acquired the new modified. It is not surprising that this contention was unsuccessful, but the decision (with which I entirely agree) in no respect conflicts with the view which I have taken above of the construction of the section. Indeed, the observation at page 94 of the judgment directly supports that view. It is there said that "If, in order to prove the place of settlement of the pauper, as derived from the father, it had been necessary to prove the derivative settlement of the father, then, by the direct enactment of the 35th section, the pauper would be deemed to be settled in the parish where he was born." The next case which was cited to us was *Great Yarmouth v. The City of London* (37 L. T. Rep. N. S. 712; 3 Q. B. Div. 232), in which it was held that the wife of a man

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who had while under the age of sixteen derived a settlement from his father took this derivative settlement of her husband, and not his birth settlement. There is no doubt that in that case the husband, being within the clear language of the Act, took a derivative settlement from his father, and all that the case decided is that, under those circumstances, the wife takes the derivative settlement of her husband under the exception in the first paragraph of the section, "except in the case of a wife from her husband." For myself, I should not like to express an opinion on this point without further consideration; but, at any rate, this case is no authority for holding that, notwithstanding the third paragraph, the children of the husband would have taken the settlement which their father derived from his parent. The next case in point of time is *Woodstock Union v. St. Pancras* (39 L. T. Rep. N. S. 256; 4 Q. B. Div. 1), in which it was held that a female pauper whose father had never acquired a settlement of his own, did not take the derivative settlement which the father while under sixteen had acquired from his father, but was settled in the place of her birth by virtue of the third paragraph of the section. This decision again is entirely in conformity with the construction I place on the section in question, and I heartily subscribe to the judgment delivered in that case, especially to that of my brother Field. The next case is *Manchester v. St. Pancras* (41 L. T. Rep. N. S. 218; 4 Q. B. Div. 409), in which it was held that an illegitimate child under sixteen is, by the third paragraph of the section, precluded from taking the settlement of its mother where such settlement has been derived from her marriage. In that case the pauper, who was nine years of age, was born three years after his mother, who had since died, had been divorced from her husband, and Lush, J. says that the words in the third paragraph, "Any child in this section mentioned," mean any legitimate or illegitimate child, and that there is nothing to confine the expression "any child" to any particular class of children. The next case is *The Guardians of Hollingbourne v. The Guardians of West Ham* (44 L. T. Rep. N. S. 520; 6 Q. B. Div. 580), and as that case was much pressed upon us, and has caused me to hesitate greatly, it is necessary to examine it somewhat closely. By an order of removal, affirmed at quarter sessions, it was adjudged that the last legal settlement of Sarah Thorndycraft and her four children, who were all under the age of sixteen, was in the parish of Sutton Valence. John Thorndycraft the younger, husband of Sarah, was born in Hackney, but acquired no settlement in his own right. John Thorndycraft senior, the father of the husband, was born in Sutton Valence in 1804, but lived and was married in the parish of Hackney, and never acquired any settlement in his own right. It was admitted that Sarah Thorndycraft was legally settled in the parish of Sutton Valence, I presume on the ground that she took the derivative settlement of her husband, and not his birth settlement, and in deference to the authority of *Great Yarmouth v. The City of London* (*ubi sup.*). The question for the court was what settlement the children took, and it was held that they took the settlement of the mother, although that settlement would only be arrived at by inquiring

into her derivative settlement. Looking at the judgment, the court there seems to have held that the first paragraph referred only to children who had a father or widowed mother alive, the second to illegitimate children of any age, and the third to legitimate children who had not a father or mother alive, and to illegitimate children of any age. I find myself unable to assent to this division. By the first paragraph, as I read it, children on their birth take their father's settlement, as they would have done before the Act, except that they take no settlement he may acquire after they have attained the age of sixteen years. If that is so, they take on their birth the settlement their father then has, and they continue to follow each successive settlement acquired by him in his own right (*Cumner v. Milton*, 2 Salk. 528) until they attain sixteen, when they no longer take any future settlement he may acquire, but retain that they had at sixteen until they acquire another in their own right. If the father dies before they are sixteen, they retain the settlement they had at his death, unless the widowed mother subsequently acquires one in her own right, in which case they take each successive settlement she may so acquire in her own right up to the time of their attaining the age of sixteen, when they retain the settlement last acquired from her until they acquire another in their own right. The assumption that they only take the father or widowed mother's settlement so long as he or she is living, is, it seems to me, inconsistent with the provision at the end of the first paragraph that the child shall take the settlement of the father, &c., up to sixteen, and shall retain the settlement so taken until it shall acquire another. To my mind the words "in the case of a child under the age of sixteen" include all legitimate children, whether the parents are alive or dead. I am also unable to assent to the proposition that the second paragraph includes legitimate children of any age. As I have shown above, under the Act of 1834 illegitimate children took the settlement of their mother only up to the age of sixteen, and on arriving at that age lost her settlement, and took their birth settlement only. The second paragraph of the section in question does not say that illegitimate children shall take any settlement acquired by their mother after they have attained the age of sixteen, but only that they shall retain the settlement of the mother which by the previous law they took only up to that age until they have acquired another settlement. This construction put an illegitimate child on the same footing with reference to a settlement derived from its mother as a legitimate child is with reference to a settlement derived from its father, or after his death from its widowed mother, except that, had the section stopped there, an illegitimate child would have taken the settlement acquired by its mother by marriage subsequently to its birth, while a legitimate child would not have done so: (*Keynsham Union v. Bedminster Union* (*ubi sup.*)). I am also unable to accede to the view that the third paragraph applies to legitimate children under sixteen not having a father or mother alive, and also to illegitimate children, whether under or over sixteen. The words are "any child in this section mentioned" which to my thinking must include both the legitimate children mentioned in the first paragraph, and the illegitimate children men-

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tioned in the second, and cannot refer to any children not included in one or other of those paragraphs. If I am right, the effect of the third paragraph is to cut down both the first and second so as to prevent children, whether legitimate or illegitimate, taking any derivative settlement of their parents, and also, again, to put legitimate and illegitimate children on the same footing by preventing the latter from taking the settlement of the mother acquired by subsequent marriage; while, if *Guardians of Hollingbourne v. Guardians of West Ham* is right, a distinction is introduced between legitimate children under sixteen who have a parent alive and those who have not, and also between legitimate children under sixteen and illegitimate children of the same age in respect of the settlement they take from their respective mothers. Although, however, I am unable to agree with the decision of the court in this case, I should probably have felt myself bound by it had it not been, as it seems to me, inconsistent with the principles laid down in *Manchester v. St Pancras* (*ubi sup.*). Both cases were before the court which decided the still later case of *Reg. v. Guardians of Portsea* (7 Q. B. Div. 384); and, although the two cases were alleged in the argument to be inconsistent, the court there followed the case of *Manchester v. St. Pancras* without attempting to distinguish it from the later case. I think, therefore, that I am free in this conflict of authority to follow that which approves itself to my judgment. Applying the principles I have referred to to the present case, I am of opinion that the children in this case come within the first paragraph, and would have taken the settlement of their father William, or, failing that, the settlement of their mother, had they not also fallen within the third paragraph which precludes their taking the settlement of either, because neither father nor mother had any but a derivative settlement. As to the argument drawn from the supposed policy of the law against separating the children from their parents, I am, I confess, unable to discover what that policy is. It is true that if a father has none but a derivative settlement, on my interpretation of the section, he will be separated from his children if all become chargeable together; but that, as it seems to me, will also be the case if the widowed mother marries again. Looking, however, at the facility given for acquiring a settlement by sect. 34 of the Act of 1876 it seems probable that questions as to derivative settlement will not be very frequent in future.

Solicitors for the appellants, *C. B. and H. Cuff*, agents for *G. Burd*, Ironbridge.

Solicitors for the respondents, *Sole, Turner, and Knight*, agents for *Cooper and Haslewood*, Bridgnorth.

Tuesday, Nov. 14, 1882.

(Before FIELD and STEPHEN, JJ.)

THE OXENHOPE DISTRICT LOCAL BOARD (apps.) v. THE MAYOR, ALDERMEN, AND BURGESSES OF BRADFORD (resps.). (a)

*Public Health Act 1875* (39 & 39 Vict. c. 55), ss. 207, 210, 211, 216—*Highway rate—Public works of paving.*

*By sect. 216, sub-sect. 3. of the Public Health Act*

(a) Reported by H. D. BONSEY, Esq., Barrister-at-Law.

1875 it is provided that "where no public works of paving, water supply, and sewerage are established in the district, the cost of repair of highways in the district shall be defrayed out of a highway rate to be levied throughout the whole district by the urban authority as surveyor of highways."

The appellants, a local district board, made a general district rate, and a highway rate, and demanded the same from the respondents, who had constructed two compensation reservoirs in connection with the supply of water for the town of B.

The respondents contended that the local board had no power to levy a highway rate, because in 1880 they laid down in their district a curbstone (about 300 yards long) as a coping to a cinder pathway of a carriage road.

Held, that putting down the curbstone did not constitute the establishment of public works of paving within the meaning of sect. 216, sub-sect. 3 of the *Public Health Act 1875*, and therefore the appellants were entitled to levy a highway rate.

#### SPECIAL CASE.

This is a case stated by us, the undersigned four of Her Majesty's justices of the peace, in and for the West Riding of the county of York, under the 33rd section of the Summary Jurisdiction Act 1879, for the purpose of obtaining the opinion of the court on questions of law which arose before us as hereinafter stated:

1. At a petty sessional court, holden at the sessions-house in Keighley, in and for the petty sessional division of Keighley, in the said riding, on the 5th day of May 1882, we heard and determined a summons, of which the following is a copy:

Between the Oxenhope District Local Board, by Joseph Heap, of Oxenhope, their clerk, plaintiffs, and the Mayor, Aldermen, and Burgesses of the Borough of Bradford, defendants.—To the above-named defendants.—You are hereby summoned to appear before the court of summary jurisdiction sitting at the sessions-house, in Keighley, in the West Riding of the county of York, on Friday, the fourteenth day of April 1882, at the hour of ten o'clock in the forenoon, to answer the plaintiffs to a claim, the particulars of which are hereunto annexed.

2. The following is a copy of the particulars annexed to the said summons:

To the Bradford Corporation. W. T. McGowen, Esq., Town Clerk.—Gentlemen,—I have to demand payment to the Oxenhope District Local Board of the sum of 203l. 8s. 2d., being as to 36l. 19s. 8d., part thereof, for a general district rate at fourpence in the pound made on the 14th Oct. 1881, on the reservoir and water conduits at Leesham, Oxenhope, the rateable value of which is 915s., and on the reservoir and conduits at Leeming, Oxenhope, the rateable value of which is 1304s., and as to 166l. 8s. 6d., the remainder thereof, for a highway rate at 1s. 6d. in the pound, made the 14th of October 1881, on the above-mentioned property. Also a sum of 1s. 5d., being for a general district rate at fourpence in the pound, made on the 14th of October 1881, on a cottage at Scar Hall, Oxenhope, in the occupation of John Stansfield, the rateable value of which is 4s. 5s., and 6s. 4d. for a highway rate at 1s. 6d. in the pound, made on the 14th of October 1881, on the same property.—Yours truly, JOSEPH HEAP, Clerk.—March 17th, 1882.

3. Upon such hearing the appellants produced their rate book, from which it appears that the respondents were not rated therein for the said cottage at Scar Hall, Oxenhope, in the occupation of John Stansfield, in respect of which the said sums of 1s. 5d. and 6s. 4d. were claimed; but that the occupier of the same cottage was therein rated in respect thereof. The appellants there-

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upon abandoned their claim for 1s. 5d. and 6s. 4d., but proceeded with their claim for 36l. 19s. 8d. for a general district rate, and 166l. 8s. 6d. for a highway rate, and, after fully hearing all parties, we made an order adjudging that the appellants should recover against the respondents the said sum of 36l. 19s. 8d. for debt, and 1l. 1s. for costs, and that the respondents should pay the same forthwith, and that judgment be entered for the respondents in respect of the said sums of 166l. 8s. 6d. and 6s. 4d.

4. The appellants being as to the said sum of 166l. 8s. 6d. dissatisfied with our determination upon the hearing of the said summons, as being erroneous in point of law, and in excess of jurisdiction, have, pursuant to sect. 33 of the Summary Jurisdiction Act 1879, duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this court, and have duly entered into a recognisance as required by the statute in that behalf.

5. Now, therefore, we the said justices, in compliance with the said application, and in obedience to the provisions of the 33rd section of the Summary Jurisdiction Act 1879, do hereby state and sign the following case:

6. Upon the hearing of the said information the following facts were proved:—(a) That the said rates (which appeared to us to be good on the face of them) were made and duly demanded in writing. (b) That the respondents have established works of water supply in the appellants' district, but that no part of such district is or ever has been rated for such works, and that no public works of water supply are or ever have been established by the appellants in such district. (c) That there are in the appellants' district several sewers constructed by the owners, lessees, and occupiers of the property connected therewith, and that the appellants, under the powers contained in sect. 150 of the Public Health Act 1875, have constructed a sewer in their district, the cost whereof has been paid by the owners or occupiers of property liable thereto. That no part of the appellants' district is or ever has been rated for the sewers aforesaid or any of them, and that except as aforesaid no public or other works of sewerage are or ever have been established in such district. (d) That the appellants, in the year 1880, laid down in their district a curbstone (about 300 yards long) as an edging for a cinder pathway of a carriage road, and that unless the laying of such curbstone is a public work of paving no public works of paving are or ever have been established in the appellants' district.

7. On the part of the respondents it was contended before us that public works of paving, water supply, and sewerage, or for some of those purposes, had been established in the appellants' district, therefore, under the Public Health Act 1875, the appellants had no right, regard being had to the above circumstances, to levy a highway rate as well as the general district rate in their district, but were bound under sect. 210 of the last-mentioned Act to levy the moneys they required for their district under their general district rate, and thus let the respondents have the benefit conferred by sub-sect. B. of sect. 211 of the said last-mentioned Act, and that the rate in question was contrary to law and void.

8. On behalf of the appellants it was contended before us that, inasmuch as the highway rate in question was good upon the face of it, we were bound to enforce it, and that the point raised by the respondents could only be raised on an appeal against the rate at the Court of Quarter Sessions, and we had no right to enter upon it.

9. And on behalf of the appellants it was further contended that the laying of the said curbstone was not a public work of paving, and in that case no public works of paving, water supply, or sewerage were or ever had been established in the district, and that if the laying of the said curbstone was a work of public paving the appellants' district was not, at the time of the laying of the said rates, rated for works of paving, water supply, or sewerage, and that therefore the appellants had power under the 216th section of the Public Health Act 1875 to levy a highway rate, and the highway rate in question was good and valid accordingly.

10. We being of opinion that we had the right, and in fact were bound, to inquire whether or not the rate in question was authorised by sub-sect. 3 of sect. 216 of the Public Health Act 1875, and being also of opinion that the works of water supply and sewerage aforesaid are not works within the meaning of the said sect. 216, but that the said curbstone is a public work of paving within the meaning of such section, gave our determination, and made an order in the manner hereinbefore stated.

11. The questions of law arising in the above statement for the opinion of this court therefore are: (1) Whether, seeing that the highway rate in question was good upon the face of it, we were bound to enforce it, or it was our right and duty to ascertain and inquire whether or not such rate was authorised by sub-sect. 3 of sect. 216 of the Public Health Act 1875 if the whole or any part of the appellants' district is rated for works of paving, water supply, or sewerage, or any public works of paving, water supply, or sewerage are established in such district. (2) Whether, under the circumstances hereinbefore stated, the appellants had or had not the right to lay the highway rate in question.

Wills, Q.C. (*Tindal Atkinson* with him) for the appellants.

Forbes, Q.C. (*Lockwood* with him) for the respondents.

FIELD, J.—The question we are asked is, whether under the circumstances stated the appellants had or had not the right to lay the highway rate. That point turns entirely (as Mr. Forbes just now said) upon the true construction of the 216th section under which the urban authority of Oxenhope claim to lay this rate upon the Bradford corporation, and to levy it from them. Of course it is for them to make out that they have that right. Now they are overseers of the highways, therefore, *prima facie*, unless otherwise controlled, they would have the ordinary power of levying the highway rate. That would follow. But then Mr. Forbes says their right as overseers of the highways is limited (and Mr. Wills does not deny it) by the 207th, 211th, and 216th sections of this Act. No doubt by the 207th section it is said, "All expenses incurred by an urban authority in the execution of this Act," that is, whether on highways or not, "and not otherwise provided

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for, shall be charged on and defrayed out of the district fund and general district rate." Therefore, no doubt, there is a statutory enactment that, unless otherwise provided for, the expenses attending highways are to come out of the district rate. Then there comes the district rate definition clause (211), and that draws a marked distinction between the classes of property which are liable to be charged to a district rate, and I quite agree with what Mr. Forbes has said, that that section does point to a distinction between land which does not derive the full benefit from the various matters that the local board are able to carry out in the shape of sewers, gaslight, paving, and all those other delicacies and pleasures which we in town enjoy, and which the country people cannot have. Those are things which are not capable of being enjoyed by occupiers of land, such as arable, meadow, pasture, or wood land, to the same extent and proportion as by the inhabitants of houses and things of that kind, and it was intended that for various purposes strictly urban purposes, the agricultural portions of the parish were not to bear the same proportion of expense as houses and things of that sort, which are likely to be more fully benefited by the execution of the works. That being the state of things, comes sect. 216, which is headed "Highway Rate," and that, therefore, is the code of law which is to effect the mode by which the costs of repairs of highways are to be borne. Now that makes no difference in the highway rate; they are to levy that with its ordinary incidents, namely, the net annual value the same as the poor rate. Then it goes on to say in certain cases, "the expenses of a roadway or highway shall not be levied by a highway rate, but shall come out of the district fund," or out of the district rate for which sect. 211 has already provided, and if it does come out of that the corporation of Bradford will succeed in paying one-fourth instead of four-fourths which they ought to pay. What does the law say then about the case of repairs of highways? In the case which it is admitted this case falls within "the cost of the repair of highways shall be defrayed as follows." Therefore there is a manner which is now provided, which, if it is within sect. 207, takes it out of that fund, and does not fall within it. First of all, if the whole district is rated for works of paving, water supply, and sewerage, or for works for such of these purposes as are provided for in the district, the cost of repairs of highways shall be defrayed "out of the general district rate." Now Mr. Forbes says (if I follow his argument rightly), that that means that, if at any time heretofore since the constitution of the urban authority it has ever spent a single pound in paving or doing anything in the nature of paving, that at once brings into operation sub-sect. 1. Does it do so? I cannot come to that conclusion. First of all what are the words? "Where the whole of the district is rated." Who can say that the whole of this district is rated "for works of paving, or works of water supply?" I take the case of paving alone, because there is no pretence for saying that there is any water supply. Who can say that this is rated for paving? There was no doubt in 1880 one small thing done in the shape of edging a cinder footway, the expense of which I agree came out of the rate, but is that enough to complement and fill up these words, "where the whole of the

district is rated for works of paving?" I think it means actual and effective paving. Sub-sect. 2 says, "Where parts of the district are not rated for works of paving, water supply, and sewerage, or for such of these purposes as are provided for in the district, the cost of repair of highways in those parts shall be defrayed out of a highway rate to be separately assessed and levied in those parts by the urban authority as surveyor of highways, and the cost of such repair in the residue of the district shall be defrayed out of the general district rate." Then in sub-sect. 3 the words are slightly altered, "Where no public works of paving, water supply, and sewerage are established in the district, the cost of repair of highways in the district shall be defrayed out of a highway rate to be levied throughout the whole district by the urban authority as surveyor of highways." It is not true to say that public works of paving are established in the district. What is the meaning of those words? What does "established" mean? One knows perfectly well that it does not mean one single act. If a man on one particular day sells a particular class of goods, he does not thereby establish a business for the sale of those goods. I cannot think that the word "established" in this section was ever intended to mean that a single act of that kind was to be construed as being public works established in the district. In my judgment, this evidence is entirely insufficient to comply with the section, and therefore I think the magistrates were wrong, and that their decision must be reversed.

STEPHEN, J.—I am of the same opinion, and for the same reasons. The whole question really is, whether the putting down some curbstones in the road is establishing public works of paving in the district. I am clearly of opinion that it is not.

*Case remitted accordingly. Leave to appeal refused.*

Solicitors for the appellants, *Richard Smith and Wilmer*, agents for *Spencer and Clarkson*, Keighley.

Solicitors for the respondents, *Cann and Son*.

Friday, Nov. 24, 1882.

(Before FIELD and STEPHEN, JJ.)

KAY (app.) v. OVER DARWEN JUSTICES (resps.). (a)

*Beer licence—Consumption off the premises—Ground of refusal to renew—Discretion of justices—1 Will. 4, c. 64—45 & 46 Vict. c. 34.*

*The appellant, the occupier of a grocer's shop, had for several years past received a certificate authorising him to hold, and he still held, a licence for the sale by retail of beer not to be consumed on his premises, in pursuance of 1 Will. 4, c. 64, and the Acts amending the same; it was admitted that he was a person of good character, that his shop was duly qualified by law, and that his application to justices at a general annual licensing meeting for the renewal of his certificate was duly made. He was duly served with notice of objection to his application on the ground that such a licence was not required in his district, and the justices refused to renew his certificate on this ground only.*

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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*Held, upon a case stated by quarter sessions, after appeal thereto, that the refusal of the justices was justified by the Beer Dealers' Retail Licences (Amendment) Act 1882.*

THIS was a case stated by W. H. Higgin, Q.C., and others his fellow-justices for the county of Lancaster, assembled at the General Quarter Sessions of the peace holden at Preston by adjournment on the 18th Oct. 1882, for the purpose of obtaining the opinion of the court on the question of law which arose upon the following facts:—

1. The appellant, Alexander Kay, is the owner and occupier of a grocer's shop, No. 334, Bolton-road, Over Darwen, in Lancashire. Since 1875 he had been the holder in each year of a certificate authorising him to apply for and hold a licence for the sale by retail of beer not to be consumed on the said premises, in pursuance of the Act 1 Will. 4, c. 64, and the Acts amending the same; and the last of the said licences was in force in September 1882.

3. At the general annual licensing meeting held by adjournment for the said borough of Over Darwen (which borough has upwards of ten justices acting in and for the same), on the 14th Sept. 1882, an application of the said Alexander Kay for a similar certificate in respect of the same shop came on to be finally heard and determined.

3. It was admitted on the hearing of such application that the said Alexander Kay was a person of good character, that his shop was duly qualified, as by law is required, for the holding of such a certificate, that the said application was duly made, and that notice of objection to the said application, on the ground that the licence was not required in the district in which the said premises are situate, had been duly given to the said Alexander Kay.

4. The justices assembled at the said last-mentioned meeting refused the said certificate on the ground that, having regard to the neighbourhood of the said shop, and its wants and requirements, it was not expedient that the same should be granted.

5. The appellant duly appealed to quarter sessions, and the said appeal came before the said justices for hearing on the 20th Oct. 1882. It was then objected that the discretion given by the Beer Dealers' Retail (Amendment) Act 1882, is limited to applications for certificates in respect of new licences, and does not extend to grants of certificates for the licensing of premises which had been similarly licensed prior to and at the passing of the said Act.

The justices at quarter sessions overruled the said objection, and after hearing evidence in support of the decision of the licensing justices as to the nature of the neighbourhood and its requirements, confirmed the same and dismissed the appeal with costs, subject to the opinion of the Queen's Bench Division as to the validity in law of the said objection.

The question of law for the determination of the court was the following: "Is the discretion given by sect. 1 of the said Beer Dealers' Retail Licences (Amendment) Act 1882 limited to applications for certificates in respect of premises not theretofore similarly licensed?"

If so, the appeal was to be allowed, otherwise to stand dismissed.

By the Excise Licences Act 1825 (6 Geo. 4, c. 81), s. 2, certain annual duties of excise are imposed, amongst others:

Every person not being a brewer of beer, who shall sell strong beer only in casks containing not less than four and a half gallons, imperial standard gallon measure, or in not less than two dozen reputed quart bottles at one time, to be drunk or consumed elsewhere than on his, her, or their premises, 3l. 3s.

By the Licensing Act 1828 (9 Geo. 4, c. 61), s. 1, it is enacted that in every county and borough

There shall be annually holden a special session of the justices of the peace (to be called the general annual licensing meeting) for the purpose of granting licences to persons keeping, or being about to keep, inns, ale-houses, and victualling houses, to sell excisable liquors by retail to be drunk or consumed on the premises therein specified.

By the Beer and Cider Excise Licence Act 1830 (1 Will. 4, c. 64), s. 2,

It shall be lawful for every and any person, being a householder (other than and except such persons as are hereinafter specially excepted), who shall be desirous of selling beer, ale, and porter [also by sect. 30 cider or perry], by retail under the provisions of this Act, to apply for and to obtain an excise licence for that purpose.

By the Beer and Cider Act 1834 (4 & 5 Will. 4, c. 85), s. 1, the excise licence, authorised by the above Act of 1830, "shall not authorise the person obtaining it to sell beer or cider to be drunk or consumed in the house or on the premises specified in the same licence, unless the same be granted upon the certificate [of good character] hereinafter required."

By sect. 19:

Every sale of any beer or of any cider or perry in any less quantity than four gallons and a half shall be deemed and taken to be a selling by retail.

By the Inland Revenue Act 1863 (26 & 27 Vict. c. 33), s. 1:

Any person who, in England or Ireland, shall have taken out an excise licence to sell strong beer in casks containing not less than four and a half gallons, or in not less than two dozen reputed quart bottles at one time to be drunk or consumed elsewhere than on his premises, may take out an additional licence on payment of the excise duty of one pound one shilling and five per cent. thereon; and the same shall authorise such persons to sell beer in any less quantity and in any other manner than as aforesaid, but not to be drunk or consumed on the premises where sold and such additional licence shall be granted without the production of any certificate or the possession of any other qualification than the licence herein first mentioned.

By the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27), s. 4:

No licence or renewal of a licence for the sale by retail of beer, cider or wine, or any of such articles under the provisions of any of the said recited Acts [amongst others the above Acts of 1830, 1834, and 1863], shall (save as in this Act otherwise provided) be granted except upon the production and in pursuance of the authority of a certificate granted under this Act.

By sect. 5:

Certificates under this Act shall be granted by the justices assembled at the general annual licensing meeting held in pursuance of [the above Act of 1828]. . . . Provided that certificates for licences under [amongst others the above Act of 1863]. . . . may be granted by justices at the special sessions for transferring licences.

By sect. 8:

All the provisions of the said Act [of 1828] as to the terms upon which, and the manner in which, and the persons to whom grants of licences are to be made by the justices at the said general annual licensing meeting,



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and as to appeal from any act of any justice, shall so far as may be have effect with regard to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises shall be refused, except upon one or more of [the four grounds therein stated].

By the Licensing Act 1872 (35 & 36 Vict. c. 94), s. 37:

In counties a grant of a new licence shall not be valid unless it is confirmed by a standing committee of the county justices, in this Act called the county licensing committee [to be appointed by the justices at quarter sessions].

By sect. 38 a similar provision is made for boroughs having ten justices or upwards.

By sect. 40 notices are required for new licences and transfers of licences.

By sect. 42, "where a licensed person applies for the renewal of his licence," he need not attend in person, and the justices shall not entertain any objection without notice, nor receive any evidence which is not given on oath.

By sect. 74:

"Licence" is defined to mean "a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquors Licensing Act 1828, including a certificate of justices granted under the Wine and Beerhouse Acts."

"A new licence" means a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors.

"The renewal of a licence" means a licence granted at a general annual licensing meeting by way of renewal.

"Licensing justices" means the justices having jurisdiction in respect of the grant of new licences in a licensing district under the last-mentioned Act [of 1828] as amended by this Act.

By the Beer Dealers' Retail Licences Act 1880 (43 Vict. c. 6) the preamble is

Whereas by the enactments described in the schedule to this Act (viz., the above Acts of 1863, 1869, and 1874) provision is now made for the holder of a strong beer dealer's wholesale excise licence obtaining, on a certificate granted by justices, an additional licence for sale of beer by retail for consumption off the premises, and it is expedient that justices should be at liberty to exercise their discretion respecting the grant of such certificates, as they are in respect of their certificates for licences for sale of beer to be consumed on the premises, and that such certificates should be granted at the general annual licensing meeting of justices, and not at any other time

And it is enacted as follows by sect. 1:

Sect. 8 of the Wine and Beerhouse Act 1869 is hereby repealed so far as the qualification therein contained relates to grants of certificates for such additional licences as aforesaid; and the licensing justices shall be at liberty either to refuse such certificate as aforesaid on any ground appearing to them in the exercise of their discretion sufficient, or to grant the same to such persons as they in the execution of their statutory powers, and in the exercise of their discretion, deem fit and proper.

By the Beer Dealers' Retail Licences (Amendment) Act 1882 (45 & 46 Vict. c. 34), after reciting that "it is expedient to extend the provisions of the said Act" [of 1880] "to the granting of certificates for all licences for sale of beer by retail for consumption off the premises," it is enacted as follows:

By sect. 1:

Notwithstanding anything in sect. 8 of the Wine and Beerhouse Act 1869, or in any other Act now in force, the licensing justices shall be at liberty, in their free and unqualified discretion, either to refuse a certificate for any licence for sale of beer by retail to be consumed off the premises on any grounds appearing to them suffi-

cient, or to grant the same to such persons as they in the execution of their statutory powers, and in the exercise of their discretion deem fit and proper.

By sect. 2:

Certificates for any such licences as aforesaid shall, notwithstanding anything in any Act now in force, be granted at general annual licensing meetings, and not at any other time.

By sect. 3:

This Act may be cited as the Beer Dealers' Retail Licences (Amendment) Act 1882, and shall not extend to Scotland, and words therein have the same meaning as in the Licensing Act 1872.

*Addison, Q.C.* for respondents.—The words used in the first section of the Act of 1882 are very wide in the discretion they give to justices, and there is nothing in that or any other Act to limit the application of this discretion to new licences. [Stopped by the Court.]

*Henn Collins* for appellant.—Throughout the Licensing Acts the Legislature has recognised the distinction between a renewal of an existing licence and a new licence, and the courts will hesitate to extend restrictive limits to powers of refusing licences in cases of vested interest:

*Reg. v. Vine*, 31 L. T. Rep. N. S. 842.

Here, moreover, the enactment is by its words necessarily limited to new licences, for the words licensing justices by the definition in sect. 74 of the Act of 1872 (incorporated into the Act of 1882 by sect. 3) mean the justices having jurisdiction in respect of the grant of new licences. [FIELD, J.—Have not the justices the same jurisdiction over both?] No, for new licences have to be confirmed by a committee. [FIELD, J.—But the justices having jurisdiction in respect of the grant of new licences have also jurisdiction in respect of renewals.] The procedure is different, and the words used imply a reference to new licences only.

*Addison, Q.C.* in reply.

FIELD, J.—I think this is a very clear point, and the justices were well warranted in putting the construction they have upon the words of the statute. The facts are clearly stated in the case, and the only question for us is whether the statute applies only to new licences or includes renewals. The justices have refused a renewal of this licence, although they admit that the ground for their doing so is not contained amongst the four recognised by sect. 8 of the Act of 1869. It appears, however, that due notice of objection was given to the applicant, and the justices seem to have duly adopted the procedure required by sect. 42 of the Act of 1872, modified by the subsequent Act of 1874. We can but interpret the words of the statute in their ordinary meaning, if that meaning be clear. If we entertain any doubt of the meaning of the words used, we are of course bound to consider the policy of the legislation, and give effect as far as we can to the claims of vested interests. Here the definitions contained in the Act of 1872 are expressly adopted, and we find that the words licensing justices must be read as if the Act referred only to the justices having jurisdiction in respect of the grant of new licences in a licensing district as provided by the Act of 1872. Now, although the justices at a general annual licensing meeting are the justices having jurisdiction over new licences, no doubt those new licences, to be valid,



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must be confirmed by a committee; but the very same justices at a general annual licensing meeting have jurisdiction over renewals generally, and by sect. 2 of the Act of 1882 they are expressly directed to have jurisdiction over these certificates. I see nothing in the statute to deprive such justices of the very ample discretion expressly given them, and the words seem to me to apply equally to renewals and to new licences. If it had been intended to enable the justices to refuse a certificate for any licence only when such certificate was first asked for, it would have been easy to have so limited their discretion. In my opinion this Act of 1882 applies to all certificates for any licence, whether new or a renewal for the sale of beer by retail to be consumed off the licensed premises.

STEPHEN, J.—I am of the same opinion.

*Judgment for the respondents.*

Solicitors for the appellant, *Pritchard, Englefield, and Co.*, for *Charles Costeker*, Darwen.

Solicitor for respondents, *F. G. Hindle*, Over Darwen.

### CROWN CASES RESERVED.

*Saturday, Nov. 25, 1882.*

(Before Lord COLERIDGE, C.J., POLLOCK, B., LOPES, STEPHEN, and WILLIAMS, J.J.)

REG. v. JOSIAH RATCLIFFE. (a)

*Rape—Child between twelve and thirteen years old—38 & 39 Vict. c. 94, s. 4.*

*The 38 & 39 Vict. c. 94, s. 4, which enacts that whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve and under the age of thirteen years, whether with or without her consent, shall be guilty of a misdemeanour, does not repeal the old law which made the offence of rape a felony.*

*Reg. v. Dicken (14 Cox C. O. 8) affirmed.*

CASE reserved for the opinion of this Court by Fry, J.

At the Winter Assize for the county of Chester in Oct. 1882, Josiah Ratcliffe was tried and found guilty upon two indictments.

The first indictment charged—

For that Josiah Ratcliffe, on the 7th day of Aug. in the year of our Lord 1882, with force and arms, in and upon one Ellen Ratcliffe, violently and feloniously did make an assault, and her the said Ellen Ratcliffe then violently and against her will feloniously did ravish and carnally know, against the form of the statute in such case made and provided and against the peace, &c.

The second indictment charged—

For that Josiah Ratcliffe, on the 7th day of Aug. in the year of our Lord 1882, unlawfully did assault one Ellen Ratcliffe, a girl above the age of twelve years and under the age of thirteen years, to wit of the age of twelve years, and her the said Ellen Ratcliffe did unlawfully and carnally know and abuse, against the form of the statute in such case made and provided and against the peace, &c.

2nd count. For that the said Josiah Ratcliffe on the day and year aforesaid unlawfully and indecently did assault the said Ellen Ratcliffe, and her the said Ellen Ratcliffe then did beat and ill-treat, against the form of the statute in such case made and provided, and against the peace of of said Lady, &c.

It was proved that Josiah Ratcliffe violated his own daughter, a girl named Ellen Ratcliffe, she

being at the time above the age of twelve and under the age of thirteen years.

The jury found the prisoner guilty on both indictments, and separate verdicts were returned upon them.

By 38 & 39 Vict. c. 94, s. 4, it is enacted as follows:

Whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years and under the age of thirteen, whether with or without her consent, shall be guilty of a misdemeanour.

This enactment was a repetition of the 51st section of the statute 24 & 25 Vict. c. 100, with two variations: (1) that the ages of twelve and thirteen were respectively substituted for those of ten and twelve years; and (2) that the words "whether with or without her consent" were introduced.

In the case of *Reg. v. Dicken* (14 Cox C. O. 8) Mellor, J. held that, notwithstanding the words of this section, the violation of a girl between the age of twelve and thirteen without her consent was rape and felony.

The prisoner was undefended, but I felt so much doubt as to the validity of a conviction for felony under the circumstances that I postponed sentence till the next assizes, and state the question for the opinion of the Court of Appeal in Criminal Cases.

I doubted (1) whether the clause referred to does not plainly declare that the violation of a girl of the specified age without her consent is a misdemeanour; (2) whether the selfsame offence could at the same time be a misdemeanour and a felony; and (3) whether any real distinction could be drawn between violently and against her will carnally knowing a girl and carnally knowing a girl without her consent.

I beg to refer to the note on this point in Mr. Justice Stephen's Digest of the Criminal Law, p. 173, edit. 1877.

The question reserved for the opinion of the Court is, whether sentence can be passed for felony on the prisoner.

EDW. FRY, J.

No counsel appeared to argue on either side.

Lord COLERIDGE, C.J. — We have considered this case, and we are all of opinion that the law is correctly stated by Mellor, J. in *Reg. v. Dicken* (*ubi sup.*), and in accordance with his view we give judgment in this case.

*Conviction affirmed.*

*Saturday, Nov. 25, 1882.*

(Before Lord COLERIDGE, C.J., POLLOCK, B., LOPES, STEPHEN, and WILLIAMS, J.J.)

REG. v. CARR AND WILSON. (a)

*Felonious receiving—Bonds stolen from a British ship in a foreign river—Admiralty jurisdiction.*

*Egyptian and other bonds were put on board a British ship lying in the river, and moored to the shore, at Rotterdam, for conveyance to England. The bonds were stolen, and the prisoners, British subjects, were found dealing with them in England, and were tried at the Central Criminal Court, and found guilty of feloniously receiving the same, well knowing them to have been stolen.*

*Held, assuming the bonds to have been stolen by a*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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foreigner, or other person not being one of the crew, from the ship at Rotterdam, whilst so moored in the river, that the admiral had jurisdiction over the offence, and that the prisoners were properly tried at the Central Criminal Court.

CASE reserved for the opinion of this court by North, J.

The prisoners were tried before me at the Old Bailey, at the session of the Central Criminal Court, on the 13th Sept. last, for felony in respect of twenty-five bonds (20*l.* each) of Egyptian Preference Stock, two bonds of 1000 dollars (ten shares), and 500 dollars (five shares) respectively of the Illinois Railway, and thirty other bonds of Egyptian Unified Stock.

The first count charged the prisoners with stealing these securities upon the high seas within the jurisdiction of the Admiralty of England; the second count charged that they being British subjects within the jurisdiction of the Admiralty of England, upon the British ship *Avalon*, then being in a certain foreign port, to wit, the port of Rotterdam, stole the same securities; the third count charged them with larceny of those securities within the jurisdiction of the Central Criminal Court; the fourth count charged them with receiving the same securities within the jurisdiction of that court, well knowing them to have been stolen; and the fifth and sixth counts respectively charged them with having been accessories after the fact to the theft and the receiving respectively of the same securities by persons unknown.

A copy of the abstract of the indictment will be found in the schedule to this case, and the indictment may be referred to as a part thereof.

I was asked by the counsel for the prisoner Wilson to quash the second count of the indictment; but it was suggested by Sir H. Giffard, who appeared for the prisoner Carr, that the better course would be that the prisoners should refuse to plead, and I should direct pleas of not guilty to be entered, and this was accordingly done.

The material facts proved were as follows:—

1. On the 12th July last the above-mentioned Egyptian Preference Stock and Illinois Bonds were made up by Messrs. Kelker and Co., bankers at Amsterdamsdam, into a parcel which was marked outside "value 50*l.*," and was addressed to Messrs. Mercia, Backhouse, and Co., in London. The Unified Stock was made up into another parcel similar to the first, except that it was marked outside as "value 100*l.*" These parcels were of a class known as "valued parcels." They were traced clearly from Amsterdam to Rotterdam, to the office of Messrs. Pieters and Co., the agents there of the Great Eastern Railway Company, on whose behalf they were received.

2. There was evidence that these two parcels were (with two others) taken from Pieters and Co.'s office by a man employed by them for that purpose, and placed by him on board the steamship *Avalon* about half-past five p.m. on the same 12th July.

3. The *Avalon* is a British vessel, registered at Harwich, and sailing under the British flag. She is about 240 feet in length, with a gross tonnage of 670 tons; and draws about ten feet six inches of water when loaded. She is the property of the Great Eastern Railway Company, and is regularly employed by them in their trade between

Harwich and Rotterdam. On the evening in question she was lying in the river Maas, at Rotterdam, about twenty or thirty feet (the captain also described it as "about the breadth of the Court") from the quay, and against a "dolphin," a structure of piles for the use of the company's ships only, projecting from the quay for the purpose of keeping vessels off the quay. She was moored to the quay in the usual manner.

4. The place where the *Avalon* was lying was in the open river, sixteen or eighteen miles from the sea. There is not any bridge across the river between that point and the sea. The tide ebbs and flows there, and for many miles further up the river. The place where the *Avalon* was lying at the dolphin is never dry, and that vessel would not touch the ground there at low water. The Admiralty chart showing the river Maas from Rotterdam to the sea was put in evidence at the suggestion of the counsel for the prisoners, and was proved by the captain of the *Avalon* to be correct. It is marked J.T.H. 1.

5. While the *Avalon* was lying at the dolphin, as above described, persons were allowed to pass backwards and forwards between her and the shore without hindrance.

6. The *Avalon* sailed for England the same evening, about six o'clock, and arrived at Harwich the following morning. Upon her arrival the two valued parcels above-mentioned (and one of the other parcels) were at once missed, and upon inquiry it was found that they had been stolen. The parcel containing the Unified Stock and the third parcel have never since been traced; but the parcel containing the Egyptian Preference Stock and the Illinois bonds was found in the prisoners' possession on the 1st Aug.

7. The prisoners are British subjects.

8. It was contended for the prisoners that there was no evidence upon which the jury could find them guilty upon the counts charging them with stealing the securities. I was of that opinion, and so directed the jury, and the prisoners were accordingly acquitted upon those counts.

9. It was also contended for the prisoners that unless the jury found that the securities had been stolen from on board the *Avalon* the prisoners must be acquitted, as, if they had been stolen after leaving Pieters and Co.'s office, and before reaching the ship, the offence of stealing them was one which this court had not jurisdiction to try, and therefore the prisoners could not be tried here for receiving, according to the case of *Reg. v. John Carr* (one of these prisoners), reported in vol. lxxxvii., p. 46, of the Sessions Papers at the Central Criminal Court, and the cases there cited. I took this view and directed the jury, that unless they were satisfied that the securities had been taken from the *Avalon*, they must acquit the prisoners. They found both the prisoners guilty.

10. I was not asked to leave, and did not leave, any question to the jury whether the securities were stolen before or after the *Avalon* commenced her voyage from Rotterdam. There was no evidence upon which the jury could have found that the theft occurred after the voyage began; the evidence rather pointed to its having occurred before she sailed.

11. It was further argued on the prisoners' behalf that even if the securities had been stolen

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from the *Avalon*, there was nothing to show that they had been taken from a British subject, and, therefore, the case did not come within the Acts 17 & 18 Vict. c. 104, s. 267, 18 & 19 Vict. c. 91, s. 21, or 30 & 31 Vic. c. 124, s. 11, and the thief was amenable to the law in Holland only; and, further, that the case of *Reg. v. Anderson* (L. Rep. 1 Cr. Cas. Res. 161; 11 Cox C. C. 198) was no authority to the contrary, inasmuch as the prisoner in that case, though a foreigner, was one of the crew of a British vessel, and therefore owed allegiance to the law of England, and upon that ground could be tried here. The counsel of the Crown did not dispute that the offender might be tried in Holland, but insisted that he might be tried here also.

12. I expressed my opinion that if the *Avalon* had, at the time when the securities were stolen, been sailing up or down the river Maas, the person who took them, whether an Englishman or a foreigner, could clearly have been tried here, upon the authority of *Reg. v. Anderson*; that the law is the same, whether the ship be anchored or sailing, as appears from the cases of *Reg. v. Jemot* and *Reg. v. Allen* (7 Car. & P. 664; 1 Moody's Cr. Cas. 494), where the vessels were lying in port, and which cases are referred to by Lord Blackburn with approval in *Reg. v. Anderson*; and that it could not make any legal difference whether the vessel was made fast to the bottom of the river by anchor and cable, or to the side of the river by ropes from the quay. I also expressed my opinion that, although the fact that the prisoner in *Reg. v. Anderson* was one of the crew was referred to more than once in the judgment of Bovill, C.J., it was not mentioned by any of the other judges, and was not the ground of the decision; and that it made no difference in the present case whether the securities stolen from the *Avalon* were taken by one of the crew or passengers, or by a stranger from the shore.

13. I directed the jury accordingly, telling them that if they came to the conclusion that the securities were taken from the ship, the taking them was an offence which could be tried here; and that, if so, the prisoners could now be tried here for receiving, and could be found guilty of that offence, if the jury thought the facts proved warranted such a finding. I stated at the same time that I should, if necessary, reserve the point for the consideration of this court.

14. With respect to the receiving, no difficulty of law arose, and no point was reserved.

15. The jury found both prisoners guilty upon the fourth count. I postponed passing sentence until the opinion of the court is given; and the prisoners remain in custody.

The question upon which I desire the opinion of this court is, whether, under these circumstances, there was any jurisdiction to try the prisoners at the Old Bailey for the offence of which they have been found guilty. If answered in the affirmative, the conviction is to stand. If otherwise, the conviction is to be quashed; but the prisoners are to remain in custody to be tried upon another indictment, on which a true bill against them has been found by the grand jury.

FORD NORTH.

Sir H. Giffard, Q.C. (*Tickell* with him) for the prisoner Carr, and E. Clarke Q.C. (*Grain* with him) for the prisoner Wilson. — The Central Criminal Court had no jurisdiction to try the

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prisoners, the offence not having been committed within the Admiralty jurisdiction. It is immaterial that the prisoners were British subjects, as jurisdiction over the offence is not given by the nationality of the prisoners, but must exist independently thereof. The prisoners were convicted of receiving stolen bonds, and without the court had jurisdiction over the thief it has none over the receiver. There is no evidence as to the person who stole the bonds, and it is consistent with the facts that the thief may have been a Dutchman. On the case as stated it must be taken that the bonds were stolen from the vessel while it was moored to the wharf at Rotterdam. The question is whether the Dutch courts had not exclusive jurisdiction to try the prisoners? It is submitted that they alone had jurisdiction. The ship was attached to the shore by ropes, and became, as it were, part of the shore of the country to which it was attached. When the ship was moored to the quay the English flag was lowered, and the law then governing the ship was the law of Holland. There is no authority that decides that a foreigner on board a vessel at such a place and not being one of the crew and not claiming the protection of the flag of the vessel subjects himself to the jurisdiction of the country to which the vessel belongs. In *Reg. v. Anderson* (L. Rep. 1 Cr. Cas. Res. 161; 11 Cox C. C. 198), Bovill, C.J., Channell, B., and Blackburn, J. seem to place reliance on the fact that the prisoner was one of the crew of the vessel. This is a new point not hitherto decided. What is the condition of a vessel in a river in a foreign country moored to the shore? It is submitted that the local and municipal authorities have exclusive jurisdiction over offences committed upon it whilst so moored.

*Poland* (*Goodrich* with him) for the prosecution.

—It is submitted that the prisoners were properly tried and convicted. The question depends not on the character of the person committing the offence, but on the character of the ship. At the time the bonds were stolen the ship was within the Admiralty jurisdiction. It was a vessel trading from Harwich to Rotterdam, and when the theft was committed was lying in a tidal river where great ships go, and was in every sense floating within a place where the admiral had jurisdiction:

*The United States v. Hamilton*, 1 Mason (Amer. Rep.) 152.

Even if the theft was committed by a Dutchman, the admiral had jurisdiction over it. There can be no distinction between a seaman, one of the crew, and a stranger who goes on board to do a criminal act; being on board an English vessel he puts himself within the jurisdiction of the English law, the ship being considered, as it were, part of the English territory. The test of the admiral's jurisdiction has always been whether the ship was upon the high seas or lying in a river where the tide ebbs and flows and where great ships go. The American reports of *Thomas v. Lane* (2 Sumner 1), and *The United States v. Coombes* (12 Peters 71) were then referred to. In *Reg. v. Allen* (1 Moo. C. C. 494) it was held that the Admiralty had jurisdiction over a larceny in a vessel lying in a Chinese river, although there was no evidence as to the tide flowing where the vessel lay. In *Reg. v. Jemot* (MSS. 1812), as appears from the report in the *Times* newspaper (29th Feb. 1812), it

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was held that the Admiral had jurisdiction over a larceny of 40,000 dollars from a British ship while lying in the harbour of St. Jago, in Cuba. The prisoner was convicted and sentenced to death. The case of *Reg. v. Keane* (2 Ex. Div. 92) was then cited. The principle on which *Reg. v. Anderson* (*ubi sup.*) was decided is applicable to this case, and supports the conviction. The theft in this case was committed on board a vessel sailing under the British flag, and being at the time floating in a tidal river where ships used for commerce go, and therefore it is submitted the admiral had jurisdiction over the offence.

Sir H. Giffard and E. Clarke were heard in reply.—The case of *Reg. v. Leslie* (Bell C. C. 220; 8 Cox C. C. 269) was referred to.

COLERIDGE C.J.—This case has been argued at some length, and the question raised by it is no doubt of considerable importance. The facts are these. The bonds which the prisoners have been convicted of feloniously receiving were on board an English ship, in the river Maas, off Rotterdam, in front of a "dolphin," and was moored by ropes to the land of Holland. The tide ebbs and flows in the river, and at the place where she was lying in front of the "dolphin" there is always enough water to float ships of her class. There was no actual proof when, or by whom the bonds were stolen. The case states, "There was no evidence upon which the jury could have found that the theft occurred after the voyage began; the evidence rather pointed to its having occurred before she sailed." Whether the bonds were carried off the ship on to the shore, and sent by some conveyance to the prisoners in England, or whether they were brought by the prisoners to England, does not appear. The prisoners were acquitted of stealing the bonds and found guilty of receiving them with guilty knowledge that they had been stolen. It is obvious that the prisoners could not be convicted of feloniously receiving the bonds unless they were stolen within the same jurisdiction where the receiving took place, and therefore it becomes material to inquire whether the jurisdiction of the Admiralty attached so that the prisoners could be tried at the Old Bailey. It is admitted that the exact point raised in this case has never arisen for decision in our courts before. There appear but two points for us to decide. 1. Was the ship within the jurisdiction of the Admiralty so as to make offences committed upon it triable according to the English law? 2. If that point is answered in the affirmative, were the prisoners, according to the decisions, liable to be tried in the English courts? First, as to the place. The place appears to me to come within the old definition of the Admiralty jurisdiction. The ship was at a part of the river which is never dry, and where it would not touch the ground at low water, and the tide ebbs and flows in the river, and great ships do lie and hover there. That is sufficient to bring this ship within the Admiralty jurisdiction. Without saying that the reports of the cases of *Rex v. Jemot* and *Rex v. Allen* (*ubi sup.*) are as full as could be desired, it seems very difficult to draw any tangible distinction between them and the present case. This case also falls within the decision of *Reg. v. Anderson* (*ubi sup.*), where the ship was half-way up the river Garonne, in France, and at the time of the offence

about 300 yards from the nearest shore, and this court held, the prisoner having been convicted of manslaughter, that the offence had been committed within the jurisdiction of the Admiralty, and that the Central Criminal Court had jurisdiction to try the prisoner. I am unable to distinguish this case from that, but if anything *Reg. v. Anderson* seems an *a fortiori* case. Then, as to the second point, whether there is anything in the personality of the prisoners which would make them not liable by the law of England. It is true that some of the Judges in *Reg. v. Anderson* (*ubi sup.*) place reliance upon the fact that the prisoners formed part of the crew of the vessel, but Bovill, C.J. in his judgment points out that England has always insisted on her right to legislate for persons on board her vessels in foreign ports. None of the judges suggested that their judgments would have been in any way altered if the prisoners had not in those cases formed part of the crew. I think it makes no difference whether a person is a British subject or not who comes on board a British ship where the British law reigns, and places himself under the protection which that flag confers; if he is entitled to the privileges and protection of the British ship he is liable to the disabilities which it creates for him. I am unable, therefore, to make a distinction between a passenger or stranger on board a ship and one of the crew, and it makes no difference in my mind whether the person is on board voluntarily or involuntarily; if while on board he is entitled to the protection of its flag, he is also bound by the obligations imposed by the law governing that ship. The utmost that can be said as regards the theft in this case is that the bonds may have been stolen by someone who came on board casually; it may be a foreigner who took them off the vessel at Rotterdam. Suppose the thief had not been able to get off the ship, and had been captured and brought here, could he have been tried here? In my opinion he could, for if while he was on board the ship he was entitled to the protection of the British flag, he was at the same time equally liable to the disabilities of the criminal law of this country. It appears to me that the evidence shows that the bonds were stolen within the jurisdiction of the English law, and I am of opinion that the prisoners therefore were triable at the Central Criminal Court for receiving them well knowing them to have been stolen. I think that the conviction should be affirmed.

POLLOCK, B.—I am of opinion that the conviction should be affirmed. The prisoners were convicted of the offence of feloniously receiving stolen goods, and the question is, were the prisoners within the jurisdiction of the Central Criminal Court for all purposes? The general rule of law is that a person on board an English ship is to be treated as within the dominion of the English Crown; and it is admitted that if the ship had been on the high seas, or had been moored in the middle of the river, this rule would have applied to the case. Then what distinction can there be because the ship was tethered by ropes to the shore? I think there is no distinction. She was a large ship carrying passengers and goods from Harwich to Rotterdam, and was in a tidal river at Rotterdam at a spot where great ships go. She was there for the purpose of unloading, and when unloaded would

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return to Harwich. I think, therefore, the conviction was right.

LOPES, J.—I think, also, that the conviction should be affirmed. As to the question of the thief not being one of the crew of the vessel, I do not think that that matters. The thief was on board an English ship at the time the bonds were stolen, and therefore came within the English law.

STEPHEN, J.—Since the time of Richard II. the jurisdiction of the Admiralty has been extended to waters where great ships go. There are many statutes which gave jurisdiction to particular courts in particular cases. But the jurisdiction of the Admiralty itself has never been defined in any other way than as laid down in the reported cases. The case of *Rees v. Jemot* bears on the question of local jurisdiction, and decided that the Admiralty had jurisdiction over a theft on board an English vessel in a Spanish port, and shows that the jurisdiction of the admiral was not confined to the waters outside creeks, ports, harbours, &c. *Rees v. Allen* (*ubi sup.*) is to the same effect. *Reg. v. Anderson* (*ubi sup.*) goes further, and affects both the questions of place and person, the place being in a foreign river, and the person being an American subject, who had committed manslaughter on board an English ship. No doubt the prisoner was one of the crew of that ship, but it seems to me that we cannot lay down the rule in narrower terms than that the jurisdiction of the admiral extends to all tidal waters where great ships go, and to all persons on board of them whether foreigners or not. There is no reason which should induce us to lay down restrictions to the extent which has been contended by the prisoners' counsel, that the Admiralty jurisdiction extends only when the British flag is flying, and not when it is lowered. It seems to me that the protection of the British flag and the English jurisdiction are co-extensive, and that protection and obedience must co-exist. I think, therefore, that the thief in this case, if he had been captured, might have been tried at the Old Bailey.

WILLIAMS, J.—I concur.

Conviction affirmed.

## Supreme Court of Judicature.

### COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Aug. 4 and 7, 1892.

(Before JESSEL, M.R., BRETT and COTTON, L.JJ.)

ROBINSON v. THE LOCAL BOARD FOR THE DISTRICT OF BARTON, ECCLES, WINTON, AND MONTON. (a)

Powers of local board—"New streets"—Bringing forward buildings—Public Health Act 1848 (11 & 12 Vict. c. 63), s. 2—Local Government Act 1858 (21 & 22 Vict. c. 98), s. 34—Local Government Act 1861 (24 & 25 Vict. c. 61), s. 28—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 4, 156, 157.

The words "new streets" in the 34th section of the

(a) Reported by W. O. BISS, Esq., Barrister-at-Law.

Local Government Act 1858, and in sect. 157 of the Public Health Act 1875, apply not only to a street which is constructed for the first time out of a field, but also to an old country road in the neighbourhood of a town, which, by the building of houses on each side, has gradually become a street; and the local board has power to restrain the owner of property adjoining such street from erecting new buildings within a prescribed distance from the middle of such street.

Decision of Fry, J. (12 Mag. Cas. 611; 46 L. T. Rep. N. S. 193) reversed.

THIS was an appeal from a decision of Fry, J. on a special case, the question being whether a road called New-lane, near Manchester, was a "new street" within the meaning of sect. 34 of the Local Government Act 1858 and the Public Health Act 1875.

The case is reported before Fry, J. in vol. 12 Mag. Cas. p. 611; and 46 L. T. Rep. N. S. 193, where the facts are fully stated. His Lordship held that it was not a "new street" within the meaning of the Acts. The defendants appealed.

Bigby, Q.C. and Buckley for the appellants.—This is a new street within sect. 157 of the Public Health Act 1875. It has long been a public highway, but was not a street until lately, when houses were built along it, and therefore it is a "new street" within the section of the Act:

*Pound v. Plumstead Board of Works*, 25 L. T. Rep. N. S. 461; L. Rep. 7 Q. B. 183;

*Dryden v. Overseers of Putney*, 34 L. T. Rep. N. S. 69; L. Rep. 1 Ex. Div. 223;

*Baker v. Corporation of Portsmouth*, 37 L. T. Rep. N. S. 381, 322; L. Rep. 3 Ex. Div. 4, 157.

Cookson, Q.C. and Byrne for the respondent.—This is not a new street within the meaning of sect. 157 of the Public Health Act 1875, or the Local Government Act 1858, sect. 34. This is an old road, and the plaintiff is only erecting houses on one side of it. *Reg. v. Fullford* (10 L. T. Rep. N. S. 346; L. & C. 403; 33 L. J. 122, M. C.) shows that, in order to constitute a street, there must be a row of houses sufficiently continuous and sufficiently proximate to one another, and here the houses are neither continuous nor proximate. This has been a street within the interpretation clause of the Public Health Act of 1848 for a very long time, and therefore it cannot now be a new street. Besides, the court below has decided as a matter of fact that the houses are too scattered along the road to make it a street, and the court will be slow to entertain such an appeal.

Bigby, Q.C. in reply.

JESSEL, M.R.—I think this a very difficult case, and one as to which opinions may fairly differ without the person holding one opinion being entitled to say that the person who holds the other is wrong. But, in construing this Act of Parliament, I think we ought to look to what must be presumed to be the intention of the Legislature. Now, the general intent was evidently this, to give in every district to some local authority the power of regulating the mode of laying out and building new streets, a power to be exercised for the public benefit, and of course imposing a restriction on the ordinary rights of proprietorship. We have then to consider what the meaning of a "new street" is. I should say that laying out a new street means making a street where there was no street before, and the

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term "street" is *prima facie* to be understood in its ordinary meaning. If we wanted authority there is authority for saying that that is the proper mode of reading this Act of Parliament, though the definition clause makes the word in certain cases include more than what would popularly be called a street. Now, there are two ways in which a street may come into existence where there was no street before. A person may take a grass field or a country lane (for, in my opinion, it makes no difference whether or not there was a public highway, a lane, or a footpath existing before which is thrown into the street, and is utilised, or whether there was nothing but a mere plot of grass land out of which a new roadway is made), he may take it and build continuous lines of houses so as to form what is commonly known as a street. When I say continuous lines, I do not mean that there are to be no breaks or intervals, but there must be a certain degree of continuity. A new street may arise in another way, and that is where it is not from the first laid out as a street in a formal manner, but may be considered to grow up, so to say, of itself. This often happens where there is an existing highway and people build houses along the sides of that highway so that, without any intention of laying out a street, the street grows. When does it become a street? This question cannot be answered until you know the locality. It must be a question in each particular case when the road becomes a street. At some time or other it becomes a street, and as soon as it does so it is a new street, and not the less a new street because some of the houses were built before it was a street. That being so, let us look at the terms of the Act of Parliament (Public Health Act 1875, sect. 157): "Every urban authority may make bye-laws with respect to the following matters, that is to say: with respect to the level, width, and construction of new streets and provisions for the sewerage thereof." That plainly enables them to make bye-laws before the street is made at all. They may make general bye-laws. They may say, "Every street in this district shall be sixty feet wide; every street in this district shall have a main sewer running through the middle of it, or two sewers one on each side of it." They may make general bye-laws, and the moment a street comes under the definition of "new street," it then becomes subject to the bye-laws. That being so, we have to consider whether that which is before us is a new street, and I think on the special case there can be no doubt whatever that it is a new street, and indeed a very new street. [His Lordship here read the 4th and 6th paragraphs of the special case.] When you come to look at the plan referred to in the special case, and look at the place opposite the plaintiff's land, you find a continuous line of houses; in fact, there are two continuous lines, they are separated by a roadway, and they both extend beyond the boundary of the plaintiff's land; there is a continuous line of houses more than double the width of the plaintiff's land and which extends beyond each side of it, and the houses are thrown back from the lane so that the lane is widened on the easterly side, which is a matter of considerable importance. I have no doubt that this is a new street. Now what do the defendants ask the plaintiff to do? They have asked him to throw back

his buildings to a building line so as to widen the lane on the westerly side. If it is a new street—and I think it is—they have a right to define the width, for the first bye-law is this, "Every new street shall be laid out and formed of such width and at such level as the board shall in each case determine." That must refer to width at the place, because a new street may be wider at one part than at another. If then the board determine that the street shall be bounded on one side by this building line which they have marked out, the boundary on the other side being already defined by houses already erected, their marking out the building line defines the width of the street. I think, therefore, that in substance they are calling upon the plaintiff to build a street of a certain width. He is building his line of houses on the other side of the new street, he is laying out a new street by building a continuous line of houses, and I am satisfied that the defendants, having called for a block plan showing the position of the buildings and the width and level of the street which they are to approve, do, by stating their building line on one side, the buildings being up on the other, show the width of the street, and I think that the plaintiff is not entitled to build so as to make it of less width than the width upon which they have determined.

BRETT, L.J.—No doubt the construction of this Act of Parliament and the bye-laws under it and the application of either of them to particular cases is a matter of extreme difficulty, and it is difficult to express oneself in terms which will not invite criticism hereafter. I think that the first remark to be made on the Act of Parliament is that it certainly deals with at least two different kinds of streets. One is a street which nobody in ordinary language, without the help of an Act of Parliament, would have called a street; and the other is a street which everybody without the aid of an Act of Parliament would have called a street. The interpretation clause includes under the word "street" things which no one in ordinary parlance would call streets; as, for instance, a highway which has not a house on either side of it. But where there are a certain number of houses on each side of a thoroughfare or a roadway, whichever you please to call it, everybody, without the assistance of any Act of Parliament, would call that thing a street, and call it nothing else. Therefore there are two totally different kinds of streets mentioned in the Act. Now can you, by altering a street of one of these two kinds into a street of the other kind, make a new street? In my opinion you can. You make it into something which is absolutely different from what it was before. That which no one would ever have called a street is made into that which everybody would call a street, and after that transformation is it new or is it old? I should say it is certainly new. But further, I cannot help thinking that something which everybody would have called a street may be made into a new street within the meaning of the Act. Take the case of a street in York. There are a great many of them which are highly picturesque, but so narrow that you might knock your head on either side if you did not walk very straight. When the whole street is pulled down, and upon that very same line and preserving the same name a handsome street is erected with buildings of a very different class, and instead of being eight feet wide it is made

sixty feet wide, would anybody doubt that in ordinary language that would be called a new street? Certainly not, and I cannot help thinking that a local board would have jurisdiction over it as a new street. The first question of fact in this case must be, Is this a street at all? It is a street without the help of the definition. It is that which would be called a street in ordinary language without any interpretation clause. The other question is, whether the bye-laws apply to it, which depends on the question whether it is a new street. It was suggested that it was not a new street, because by the interpretation clause it has been a street ever since the original Act of Parliament was passed, and that therefore it is not new. But I say, if you alter it from its original state into another wholly different kind of street, that new kind of street is a new street at some time or other. This street certainly has been altered into the new kind of street. Has that been done at such a time as to make it a new street? I cannot help thinking that the term "new street" in the Act of Parliament must have a very elastic meaning, and that when you find that a street is in gradual course of completion, and is not yet finished, the time when the change was begun may be put very far off without its being called an old street. But let us look at this a little further. It is often a difficult thing to say when a street begins to be a new street—that is, when it begins to alter its character. New streets may be made under different circumstances. The whole land on both sides may belong to one owner. Then, suppose he conceives a design of making a new street and has a plan drawn, to my mind that does not begin the laying out the street within the meaning of the Act of Parliament. The Act of Parliament is not concerned with what people do upon paper, but with what they do in point of fact and upon the land. When would such an owner begin to lay out and form a street? To my mind he would do so when he built his first house, having the intention to go on to make a street. He would then have begun to lay out and to form a street, and it would from that moment begin to be a street. But streets may be formed in another way. Supposing that along the line of that which would eventually be considered a street there are a great many owners, no one of them could make a plan for the whole; but it may be clear that all of them are intending to build with regard to and so as to utilise an existing roadway. How then, will those people lay out and form a street? Each of them, by what he does on his own land, would be taking part in laying out and forming a street. Which of them begins? I should say the one who first begins to build begins to form a street; and if you find that there are several proprietors along a line, each of whom acts so that the tribunal comes to the conclusion that all of them intend to build in the same direction, then the tribunal would have the right to say that there is a common intention amongst all these people to build in a particular course which will produce a street, and, therefore, the first of them who in virtue of that common idea begins to build, is beginning to form and lay out a street, and he and all others are subject to the jurisdiction of the board. There is another case to which my Lord has alluded, where there are several proprietors along a long line, but no

tribunal could say that there ever was at the same time an intention amongst them all to build. One man at the end of the street may have begun to build, but the others have not built nor laid out their land as building land, nor advertised it as building land, nor done anything to show an intention to build. Then the street really forms itself, as it were, by gradual accretion without any common intent. In such a case you have to wait until you can see by the course of building that there is a common intent to build. The moment you see that, you come to the conclusion that a street has begun to be formed. Now when did this street begin to be formed? It is obvious from the plan that the landowners are intent on building along this line. Many of them have already put buildings there, having regard to this roadway. This is, in my opinion, a street begun not so long ago as to prevent its being a new street, for it is not yet finished. Therefore I take it to be a new street. Now, if the street is a new street, it is subject to the bye-laws of the board so far as they are applicable. It is contended that these bye-laws do not affect the line of street. Now take the first bye-law, which provides that "Every new street shall be laid out and formed of such width as the board shall in each case determine." Supposing that that bye-law had been, "Every new street shall be formed of the width of sixty feet," then it would have been obviously applicable to this street, and nobody would have denied it. But that would have been a very foolish bye-law, because it would not be desirable to have all the streets in the district of the same width. Therefore they do not specify the width, but reserve a power of determining the width in each particular case. That bye-law gives power to the board to deal with the width of this very street. Now how are they to deal with it? Is there anything in the bye-law which enables them to deal with it at once and once only; or may they deal with it from time to time? The bye-law does not say that it shall be laid out on a plan, and, as I said before, the laying out on a plan is utterly immaterial. A plan laid out may show an intent to do a thing, but the laying out in this bye-law does not mean laying out on paper; it means laying out on the land. It is laying out and forming it. How are the board to determine the width? I cannot see that they are prevented, in the case of each house to be built in the street, from saying that they will determine as to that house how it shall form the width of the street, or, in other words, how far that house shall be set backwards or set forwards. It may be objected that, if that be so, they reserve to themselves the right of saying that one house shall be up to the line of the old road and another shall be twenty feet back and another ten feet. Well it may be so, but, unless you say that they are bound to make the street of the same width throughout its whole length—which can hardly be contended—you must take the other alternative, which is, in other words, that they have the power of acting capriciously. I suppose that everybody who lives in this great city or town, or what you please to call it, knows that the boards have the power of acting capriciously, and that many of them very often exercise it. But the Legislature intends to give them that power. If they put some houses forward and others back



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without any method, they certainly would be acting with such caprice that there might be sufficient ground for holding that it was a dishonest caprice, and then I have no doubt that the law would be strong enough to control them. But, as long as they act honestly in the exercise of their power, it seems to me to be no valid objection to say that they are exercising their power by determining what the width of the street shall be at each point of it at the time when a person is about to form the width of that street by building a house at that point. I think, therefore, that in this case the board had the power to make a bye-law which would enable them to interfere with regard to this particular building as to its relation to the street, that they did make a bye-law which gave them the power to deal with it, and that they had that power. And in that view it seems to me that it makes no difference whether that which the plaintiff intended to build was a line of buildings, or only one building. It seems to me that the board were acting within their power, and have not improperly exercised it.

COTTON, L.J.—I must confess that to my mind this Act of Parliament as well as the bye-laws have caused very considerable doubt; but I have arrived at an opinion in accordance with that entertained by the rest of the court. The question to be considered really is this: First, whether under the Acts of Parliament the local board had power to make bye-laws enabling them to interfere as to the construction of these houses in the way in which they purport to control the operation of the building owner; and in the second place whether in fact they had passed any such bye-laws. The first point to be considered is, whether this is a new street within the Public Health Act 1875, sect. 157, sub-sect. 1. In my opinion, it can be called a new street independently of any interpretation clause in the Act. A short time ago undoubtedly it could not in ordinary parlance be called a street; but now, if we look at the facts stated and at the plan, I think that one cannot possibly come to any other conclusion than that this has now in ordinary parlance become a street, and it is equally clear that a few years ago, possibly even within the last four or five years, it was in no way a street, but a lane or country road. It is a street, and therefore, in my opinion, in ordinary parlance it is a new street. But the difficulty which was raised is this, that there is an interpretation clause under which this, although it was only a country lane or road, was, within the meaning of the Act of Parliament, a street unless the context prevented it. But, although there is that interpretation clause, in my opinion it does not prevent us from saying that a street is a new street when in ordinary parlance and not under the interpretation clauses of the Act of Parliament it is now a street, whereas within a short period of time it was not in ordinary parlance a street at all. Then comes a question of greater doubt, whether, having regard to the remainder of sub-sect. 1, it can be said that this is a new street within this provision of the Act of Parliament, so that any bye-laws "with respect to the level, width, and construction of new streets" could be made to apply to it. A great difficulty arises from this, that the Act of Parliament does not explain how the matters which come within this section are to be dealt with. This section applies to intended new streets. Now, where there is

no street or road at all, but the owner or owners intend to construct a street over vacant land, no one would doubt that the urban authority had, under the Act, power to make bye-laws as to how it was to be laid out. But the clause must also apply, in my opinion, to that, which originally was not in ordinary parlance a street, but has become such so as to be a new street in the sense to which I have referred. Then how is such a street to be dealt with? How can bye-laws be made with reference to the level, width, and construction of these highways, which, although not streets before, in ordinary parlance have become such? In my opinion in such a case the bye-laws do not direct what is to be done in alteration of that which already exists, but give directions controlling the way in which matters which are to be done shall be done. If a house is to be built, then the bye-laws can prevent that house from being built contrary to the bye-laws; if an alteration is to be made in the level or width of the street, then the bye-laws will prevent the alteration being made otherwise than as allowed by the bye-laws; and if a street is to be laid out as a new street over vacant ground, then of course the bye-laws will apply, and will prevent the making of it except in the way authorised by the bye-laws. The difficulty which I at first entertained vanishes when one considers that the bye-laws are preventive, and framed to prevent persons from doing anything contrary to the rules and regulations laid down by the board under the authority of the Act of Parliament. Therefore, in my opinion, under this section it is within the power of the local board to lay down bye-laws which would affect this street. Then comes the question whether they have done so. The case of *Reg v. Fullford* (10 L. T. Rep. N. S. 346; Leigh & Cave 403; 33 L. J. 122, M. C.) certainly decides that a new street includes not only the carriageway and footway, but also the houses, and that therefore bye-laws can be laid down under the authority of this section with reference not only to the way, but also to the houses. If that is so, then the board may lay down directions not only as to the roadway, but also as to the houses, and that being so, they may direct how with reference to the required width of the street the houses are to be constructed. Have they done so in the present case? I think they have, because, when they require that a ground plan shall be made and laid before them, showing where the house is to be placed, reserving to themselves the right as to approving or not approving of the intended position of the house as well as the other structures, they do in fact say that in new streets to which the bye-law is to apply, any house which is built is to be put down in a position which they sanction and approve. I doubted for some time whether this was the proper way to make a bye-law, and whether they ought not to say that in such and such a part of the street it shall be of a certain width, but I think on the whole that they are at liberty (and of course the Legislature would give a public body the credit of supposing that they would exercise their powers in a reasonable way) in each case to say, "Show me where you wish to put your house, and we will decide whether that is a proper position, having regard to the required width of the street at that place." That view is somewhat supported by sect. 155, which empowers the board in the case of old streets not to lay down a general line, but

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when any house is to be rebuilt to say where that house is to be rebuilt, and how far, if at all, it is to be thrown back from its old position, the power being given in terms as to any one single house. I think it is not unreasonable, therefore, that, in the bye-laws to be made under sect. 157 as to new streets, they should make the building line by requiring in each case the position of any new house to be laid before them for their approval, so that they may require the street to be made of sufficient width.

The Court decided that question 1 must be answered by declaring that the part of New-lane where the plaintiff proposed to build, was a new street within the meaning of the term as used in sect. 157 of the Public Health Act 1875; that questions 2 and 3 must be answered in the affirmative; and that as to No. 4 the plaintiff must pay the costs both below and in the Court of Appeal.

Solicitors for the plaintiff, *Byrne and Lucas*, agents for *Taylor, Kirkman, and Colley*, Manchester.

Solicitors for the defendants, *Le Biche and Son*, agents for *Cobbett, Wheeler, and Cobbett*, Manchester.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

Saturday, Dec. 16, 1882.

(Before HAWKINS and WATKIN WILLIAMS, JJ.)

RES. on the Prosecution of SIR HENRY TYLER, M.P. v. BRADLAUGH AND OTHERS. (a)

*Criminal law — Libel — Newspaper — Charge of libel not contained in original summons withdrawn before police magistrate — Counts subsequently added to indictment containing charge of libel so withdrawn — Consent of court — Vexatious Indictments Amendment Act 1867, and Newspaper Libel Act 1881 — 22 & 23 Vict. c. 17, s. 1 — 30 & 31 Vict. c. 35, s. 1 — 44 & 45 Vict. c. 60, ss. 3, 6.*

The defendant B., with others, was charged with having published alleged blasphemous libels on certain dates, in the F. newspaper. The fiat of the Director of Criminal Prosecutions had been obtained authorising the prosecution. The summons on which the defendants were charged specified the particular dates of the libels on which the prosecution relied. At the first hearing before the magistrates the alleged libels were not read out in court, but the counsel for the prosecution gave an undertaking to furnish both to the court and the defendants particulars of the numbers of the newspaper and articles prosecuted. At the adjourned hearing the defendant B. called the attention of the court to the fact that the particulars furnished in pursuance of the undertaking contained a reference to an alleged libel published in an earlier number of the same newspaper, but not included in the summons. The counsel for the prosecution then withdrew the number as not being in the summons. The defendants were committed for trial. The counsel for the prosecution subsequently applied *ex parte* to the Recorder of London under 30 & 31 Vict. c. 35, s. 1, to add two counts to the indictment based upon the alleged libel contained

in the number withdrawn before the police magistrate; the counsel for the prosecution did not state in his application that he had so withdrawn the said number of the newspaper. The Recorder granted leave; the two counts were added, and the indictment sent up to the grand jury, who found a true bill against the defendants in respect of the whole indictment. The indictment was removed by certiorari from the Central Criminal Court into the Queen's Bench Division of the High Court. The defendants then obtained a rule nisi, calling upon the prosecution to show cause why the two additional counts should not be quashed.

Held, on argument of the rule, that the counts must be quashed on the ground that the leave of the court to add them was obtained on materials insufficient for the exercise of its discretion; and that the obtaining of such leave in cases under the Vexatious Indictments Act, and Acts amending it, is not a mere formality, but must conform to the spirit and intention of those Acts.

THIS was a rule, obtained by the defendant, Charles Bradlaugh, calling upon the prosecution to show cause why the fifteenth and sixteenth counts of the indictment preferred and found against him should not be quashed.

The facts were as follows:—

The defendant was charged, with others, at the Mansion House Police Court, before the Lord Mayor of London, with having published alleged blasphemous libels in a newspaper called *The Freethinker*.

The fiat of the Director of Criminal Prosecutions had been obtained in accordance with the provisions of the Newspaper Libel Act 1881, authorising the prosecution to prosecute the defendants.

The summons issued against the defendant charged him with having published the alleged blasphemous libels in *The Freethinker* newspaper in the following numbers and dates: Vol. 2, No. 15, April 9, 1882; No. 16, April 16; No. 17, April 23; No. 18, April 30; No. 19, May 7; No. 20, May 16; No. 21, May 21; No. 22, May 28; No. 23, June 4; No. 25, June 11; and No. 26, June 18.

On the 17th July the parties appeared before the Lord Mayor at the Mansion House Police Court. At this hearing the different alleged libels were not read, but Mr. Moloney, who appeared as counsel for the prosecution, gave an undertaking that he would furnish to the court and the defendants the particulars of the libels on which he relied. Such particulars were so furnished.

At the next hearing of the case on the 21st July the defendant, Charles Bradlaugh, called the attention of the court to the fact that the particulars of the alleged libels contained a reference to an alleged libel in the number of *The Freethinker* newspaper dated the 29th Jan. 1882, a date not included in the summons. Mr. Moloney then stated that he withdrew any charge for the libels set out under that date; and the defendant Bradlaugh thereupon applied to the Lord Mayor that the prosecution should strike out from the particulars the charges so abandoned. With the assent of the Lord Mayor, the new charges were formally struck out from the list of particulars.

The defendants were committed for trial.

(a) Reported by W. P. EVERSLY, Esq., Barrister-at-Law.

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On the 31st July the Recorder of London charged the grand jury at some length on the indictment which would be sent up to them in the case of the defendants, Charles Bradlaugh and others.

After the charge was finished, an *ex parte* application was made to the Recorder by the counsel for the prosecution for leave to add two additional counts (Nos. 15 and 16) to the indictment; but the counsel applying did not state that the two new counts were based upon the alleged libel which he had withdrawn when before the police magistrate.

The Recorder consented to the two new counts being added; it was stated on affidavit that he intimated his opinion that his consent was unnecessary.

The following order embodying the consent was drawn up and signed by the Clerk of the Central Criminal Court:

Upon the application of Mr. Moloney, of counsel for the prosecution, the consent of the court is given for the addition to the indictment of counts charging other libels besides those upon which the defendants were committed for trial.

(Signed) EDWARD JAS. READ,  
Clerk of the said Court.

The grand jury returned a true bill against the defendants in respect of the whole indictment.

This indictment was removed by *certiorari* into the Queen's Bench Division.

The defendant Bradlaugh then moved for a rule *nisi* calling upon the prosecution to show cause why the two added counts of the indictment should not be quashed as against himself on the ground that there had been a deception (not intentional) practised on the court, granting the leave to add the two new counts. A rule *nisi* was granted.

By 22 & 23 Vict. c. 17, s. 1:

After the first day of September one thousand eight hundred and fifty-nine, no bill of indictment for any of the offences following, viz., perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling house, keeping a disorderly house, and any indecent assault, shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be presented against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the Superior Courts of law at Westminster, or of Her Majesty's Attorney-General or Solicitor-General for England. . . .

By 30 & 31 Vict. c. 35, s. 1:

That the said provisions of the said first section of the said Act (22 & 23 Vict. c. 17) shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the said count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law; and nothing in the said Act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the court in or before which the same may be preferred.

By 44 & 45 Vict. c. 60, s. 3:

No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England . . . being first had and obtained.

By sect. 6:

Every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within and subject to the provisions of the Act of the Session of the twenty-second and twenty-third years of the reign of Her present Majesty, chapter seventeen, intitled "An Act to prevent vexatious indictments for certain misdemeanours."

Moloney, for the prosecution, showed cause.—I quite admit that the fifteenth and sixteenth counts were based upon the libel contained in the newspaper, dated the 29th Jan., which I withdrew at the Mansion House Police Court, and that I omitted in so many words to inform the Recorder when making my application to add these two counts, that they were so based upon the withdrawn newspaper; but I submit that, under the 1st section of the Vexatious Indictments Act 1867, I did what was sufficient. [HAWKINS, J.—It strikes me as odd that you should go behind the defendant's back, and prefer before the Recorder *ex parte* these additional charges which you had so abandoned.] It is the ordinary practice to apply *ex parte* to add fresh counts; the Recorder was aware of the facts charged against the defendants. [WATKIN WILLIAMS, J.—If you had prosecuted the charge based on the paper of the 29th Jan. *non constat* but that the Lord Mayor might have dismissed it.] But this charge was never before the Lord Mayor, and so could not have been withdrawn. [WATKIN WILLIAMS, J.—In a sense you did make the charge, but had to retreat from it.] Only because it was not in the summons. [HAWKINS, J.—Did you ever give the defendant notice that this charge was going to be prosecuted against him?] No. [HAWKINS, J.—How came the Recorder to make the order adding this charge?] I made my application in court. [HAWKINS, J.—After the Recorder had charged the grand jury with no other materials but the depositions which contained no reference to this particular charge, you as a favour, get his leave to add these counts.] He knew the general character of the charge, which is connected with those on the depositions, for the fiat of the Public Prosecutor covered this date of the 29th Jan. of which he was aware. The Vexatious Indictments Amendment Act of 1867 authorises this leave on order of the Recorder, for it provides that it should not prevent the addition of counts containing any offences which might lawfully be joined. [WATKIN WILLIAMS, J.—If founded on facts and evidence disclosed before the committing magistrate.] Yes; without leave in such a case, but in a case like the present, the judge may exercise his discretion whether to give leave or not; here the Recorder, in the exercise of his discretion, did give leave. [HAWKINS, J.—What is it worth? He exercised no discretion; he had no materials on which to do so. WATKIN WILLIAMS, J.—You have got this leave without having informed the court of all the facts of the case. You are here trying to substantiate absolutely new charges; whereas in ordinary cases the application to add new counts is almost formal. If this leave or order was granted,

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it was granted improvidently.] Even so; he exercised his discretion; he had the materials before him in the shape of a file of all the prosecuted papers, and the fiat of the Public Prosecutor covering the date in dispute. This is the first application of its kind that has ever been made; and the defendant has made it on the ground that the court was deceived (not intentionally, he admits), but there is no real ground for it. It is a common occurrence for a magistrate at the hearing of a charge on which he is determined to commit, to say: "There is no use in entering into further charges, as they can be added to the indictment upon leave." It is a bold thing to ask this court to inquire on what grounds the recorder here exercised his discretion. In the case of false pretences, this course is constantly followed. It was intended by the Act of 1867 to avoid the waste of time in beginning *de novo* in respect of similar offences to those already charged in the indictment. The defendant is not prejudiced, for he has not yet pleaded. My second point is, that this court has no jurisdiction to quash these counts. It is true that the indictment has been removed into this court, but only for the purposes of the trial. These counts are in the indictment by leave of the Recorder, and it is only where there has been no leave given can they be quashed. [HAWKINS, J.—I have read this order, and I think it makes your case very bad. Under it you may claim anything; and it leaves it quite uncertain what charges the Recorder intended to be allowed to be added.] It is not a formal order; it is a mere note by the officer of the court of the leave given by the Recorder. [HAWKINS, J.—Be it so; at all events, it was only a general leave to add other counts for other libels.] Leave was granted to add these new counts. [WATKIN WILLIAMS, J.—On an *ex parte* application, without information to the judge; according to this argument the provisions of the Vexatious Indictments Act might be evaded, and its object defeated.] There was no intention to deceive the judge or evade the statute.

Mr. Bradlaugh, in person, supported the rule.—With regard to the question of the jurisdiction of this court to quash these counts, I will cite only two cases to show that counts might be struck out under circumstances like the present:

*Reg. v. Fridge*, 9 L. T. Rep. N. S. 777; 9 Cox C. C. 430;

*Reg. v. Knowlden and others*, 10 L. T. Rep. N. S. 691; 9 Cox C. C. 483; 33 L. J. 224, M. C.

On page 224 of the Law Journal report of the case of *Reg. v. Knowlden*, Cockburn, C.J. says: "If a prosecution is improperly instituted, or if any deception has been practised on the court . . . there can be no doubt that relief can be had in some way, whether by application to the judge before trial to quash the indictment, or whether when it comes to the parties' knowledge at some later period, it is not necessary now to decide. It is enough to say that redress can be obtained in some way." I apply here to quash these counts, first, because no leave to add them was ever granted; this order or memorandum is too general; secondly, because, if any leave or consent was given, it was improperly obtained, and without anything on which the court could exercise its discretion. I do not say that the court acted improvidently, but that it had not submitted to it the proper materials. The counsel

for the prosecution ought to have disclosed everything necessary to the application for the addition of the new charges; but facts were withheld which ought to have been brought to the attention of the court.

HAWKINS, J.—This is an application to quash the fifteenth and sixteenth counts of the indictment found by the grand jury at the Central Criminal Court against the defendants, and brought into this court by writ of *certiorari*. These two counts were founded on an alleged blasphemous libel in *The Freethinker* newspaper of the 29th Jan. 1882; and the ground of the application to quash these counts was that the proper proceedings under the Vexatious Indictments Acts had not been taken. The defendant Bradlaugh was never called upon to answer this charge, or committed by the magistrate to take his trial upon it. It has been said in argument that, even if these counts might have been added by the judge at the Central Criminal Court, and what was granted might be said to be a leave, it is altogether inoperative for the purpose; and on two grounds: (1) that leave given on improper materials is no leave; (2) and that no means were given to the judge at the Central Criminal Court to enable him to exercise his discretion, for all that was done was to refer to the fiat of the public prosecutor under the Act of 1881. I am of opinion that this rule should be made absolute, and these counts quashed. It is necessary to refer to sect. 2 of 22 & 23 Vict. c. 17, which provides that indictments in certain offences should not be preferred unless the prosecutor had been bound over to prosecute, or the accused committed to take his trial. Now by the Newspaper Libel Act 1881 (sect. 6), libel has been added to the offences within the Vexatious Indictments Act. It is perfectly obvious, looking at this indictment, we must treat each separate count or libel as a separate offence, and that being so, we are quite assured that the prosecutor has given no recognisance in respect of the alleged libel of Jan. 29, 1882. I now refer to the other statute (30 & 31 Vict. c. 35), sect. 1. [His Lordship here read it.] With reference to the provision that the Act should not prevent the addition of any counts to an indictment if founded, in the opinion of the court before which the indictment is preferred, on the facts disclosed in the evidence taken in the depositions, and leave be obtained, it is conceded by the counsel for the prosecution that the counts sought to be added are not counts which could in the opinion of any court be said to be founded on the facts disclosed before the Lord Mayor, for the January number of this newspaper was not in the depositions. Though the paper had been mentioned to the Lord Mayor, it is alleged, and there is no doubt about the fact, that this date was purposely struck out, and the defendant expressly led to believe that it would not form the matter of an indictment. The defendants having been committed, and held to bail in respect of the other libels, an application on the part of the prosecution was made to the learned Recorder of the City of London for leave to add counts in respect of the charge abandoned before the Lord Mayor. On a mere suggestion the Recorder seems to have made this order, or rather to have given the leave applied for, viz., leave to add counts on other libels. Two objections have been taken to

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this order: first, that it does not specify in what newspaper the libel was published, the leave to add which was to be obtained, in other words, that it was too general in its terms. I think it is a general leave justifying the insertion of any other charge of libel, and is bad for generality, for under it ten or a hundred fresh counts might be added. Secondly, that there were no materials upon which the Recorder could have exercised his discretion in granting this leave or order. There was no statement of the circumstances which had occurred before the Lord Mayor; there was no proof or even suggestion of any blasphemous statement in the particular newspaper. He was simply asked to add counts for libel without even seeing the alleged libel. If this application had been made to the Recorder, and the indictment had not been removed into this court, I think it probable that he would have reversed his own decision on the ground that he had acted *improvidently*. If the Recorder had really had the opportunity of forming a judgment upon the application, and the means of exercising his discretion upon it, this court would not have interfered. But the question here is whether he had those materials or that opportunity. I think he had nothing upon which to exercise his discretion except the application of counsel; in fact, that he did not exercise any discretion at all. We have jurisdiction in this matter, and following the course adopted in the case of *Reg. v. Fudge (ubi sup.)* this court can quash these two counts. I think they ought to be quashed on both grounds.

WATKIN WILLIAMS, J.—I am of the same opinion, but will shortly state my reasons. These counts ought to be quashed on the ground that the course adopted to obtain them was an evasion of the provisions of the Vexatious Indictments Act; and unless such counts as these were quashed, the protection of that Act over certain persons would be taken away and rendered futile. This application is in no sense an appeal from the Recorder, or a review of his discretion; but the application to him was made *ex parte*, and on insufficient materials on which he could not and did not exercise any discretion. The Vexatious Indictments Act of 1859 was passed with the intention of protecting persons charged with certain classes of offences before magistrates; so that, if the justices declined to commit on the charge preferred, the prosecutor might take the case before the grand jury only on certain conditions. Then the Act of 1867 was passed to amend the earlier Act in certain particulars; and it provided that it should not operate to prevent the addition of counts that might be added with the consent of the court. Now, if that consent is to be taken as a mere matter of course, why ask for it at all, and on an application which is purely formal? The Recorder must here have assumed, and was allowed to assume, that the counts asked to be added were founded on the depositions; he so thought and acted. It seems to me that they were obtained and granted *improvidently*; that is, without that knowledge of the facts necessary to have been brought before the court; and that, if the facts before us had been brought before the Recorder, he would not have been induced to give leave to add these counts.

Rule absolute.

Solicitors for the prosecution, J. B. Batten and Co.

## COURT OF APPEAL.

## SITTINGS AT WESTMINSTER.

Dec. 9 and 14, 1882.

(Before Lord COLERIDGE, C.J., BAGGALLAY and LINDLEY, L.JJ.)

DOBBS v. THE GRAND JUNCTION WATERWORKS COMPANY. (a)

Water rate—Basis of assessment—Rent—Annual value—Gross value—Rateable value—7 Geo. 4 c. cxl. s. 27—15 & 16 Vict. c. clvii. s. 46.

Sect. 27 of the Grand Junction Waterworks Company's special Act (7 Geo. 4, c. cxl.) obliged the company to supply water at a scale of rates graduated to the rent of the houses supplied. Such rate was to be payable according to the actual amount of the rent, where the same could be ascertained, and where the same could not be ascertained, according to the actual amount or annual value upon which the assessment to the poor rate was computed in the district where the houses were situated.

Sect. 46 of a later special Act of the said company (15 & 16 Vict. c. clvii.) obliged the company to furnish water at the following rates: "where the annual value of the dwelling-house . . . shall not exceed 200l. at a rate per cent. per annum on such value not exceeding 4l.; and where such annual value shall exceed 200l. at a rate per cent. per annum not exceeding 3l." D. occupied a house, the rent of which could not be ascertained, as he held it on a lease for a long term of years, at a small ground rent. He was rated by the company at the gross annual value of his hereditament as appearing in the valuation list for the time being in force under the Valuation (Metropolis) Act 1869. He contended that he was liable to be rated only on the rateable value of his hereditament, and refused to pay the larger sum demanded. The dispute came before a police magistrate, who decided in favour of the company, but stated a case for the consideration of the Superior Court.

Held, that the magistrate was right, and that the proper basis of chargeability under the statutes was not the "rateable value" as appearing from the poor rate assessment, but the "gross estimated rental" of the hereditament.

The judgment of Field and Bowen, JJ. reversed.

THIS was an appeal by the Grand Junction Waterworks Company from a judgment of Field and Bowen, JJ. The case is fully reported in the court below, where the facts and the material parts of the special case are set out (*ante*, p. 28; 46 L. T. Rep. N. S. 817; 9 Q. B. Div. 151).

Sir F. Herschell, S.G. and J. F. Clerk (with them C. Russell, Q.C.) for the appellant company.

Sutton and Poley (with them Webster, Q.C.), for the respondents.

The arguments used in the court below were repeated.

LORD COLERIDGE, C.J.—In this case an important question is raised before us upon the true construction of two Acts of Parliament referring to the Grand Junction Waterworks Company, viz., 7 Geo. 4, c. cxl., and 15 & 16 Vict. c. clvii.; and the question is upon what footing the water rate, which the Grand Junction Waterworks Company

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

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have a right to take in return for water supplied by them to houses within the ambit of their Acts, is to be calculated. On the one side it has been said that the footing upon which it is to be calculated is not the gross annual value of each house (I abstain for the moment from saying what "annual value" means for this purpose), but the gross annual value subject to those deductions which are familiar to us all, and which are made under an assessment to the poor rate. On the other side it is said that the words of the Act of Parliament are express, and that the earlier Act of Geo. 4, according to its true construction, manifestly intends that the rate shall be calculated upon the gross value, year by year, of the houses and tenements, without any such deductions. There is, however, another important question to be considered in this case, viz., whether the two Acts of Parliament, 7 Geo. 4, c. cxi., and 15 & 16 Vict. c. clvii., are both existing Acts, or rather, to put it more correctly, whether sect. 27 of the earlier Act and sect. 46 of the later Act are co-existing sections. It has been strongly urged by the Solicitor-General that they are not co-existing sections, but that, if they are, then the larger view, which I last referred to, of the sum upon which the rate is to be calculated, is to prevail. Now, I am of opinion that both these sections exist, and that sect. 46 of the later Act has not repealed sect. 27 of the earlier Act. The later Act, by sect. 57, expressly preserves all that is not expressly repealed by that Act. [His Lordship read 15 & 16 Vict. c. clvii. s. 57, and continued:] The Act of Geo. 4, which was one of the recited Acts, was in force at the commencement of the Act, and therefore the section, unless it is expressly repealed by the later Act, remains in force. Now I quite agree that if there were any sections in the later Act which, though not in terms expressly repealing the former, were in terms absolutely inconsistent with the former, then, according to well-known principles of interpretation, they would be held to repeal the former by necessary intendment; but I do not think that 15 & 16 Vict. c. clvii. s. 46, is such a section with regard to 7 Geo. 4, c. cxi. s. 27. It appears to me that sect. 27 of the earlier Act may well stand with sect. 46 of the later Act, and that sect. 46 of the later Act may well be limited to this operation—that whereas the earlier Act had provided a certain rate per cent., and had laid down certain terms of supply, the rate per cent., and the levels of supply, are distinctly and expressly altered by the provisions of the later Act. Of course, so far as the provisions are altered with regard to the rate per cent. and levels of supply, the two Acts cannot be read together; and therefore, so far, the later Act has superseded the former; but it seems to me that except so far the earlier Act remains, and that Act not only fixes certain rates per cent., but fixes also the mode in which those rates per cent., which I have already said are now altered, are to be calculated. The provision in the earlier Act is this: "Every such rate shall be payable according to the actual amount of the rent, where the same can be ascertained; and where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor rate is computed in the parish or district where the house is situated." Now, I construe that section to mean this: that there is to be a fixed rate per

cent. upon rent; rent being used there in the ordinary meaning of the word, as the rent paid to the landlord by the tenant for the occupation of the dwelling-house, which is, ordinarily speaking, a rack rent, and which, according to the primary intention of this section, must, I think, mean the rack rent to be paid by the tenant to the landlord. Where the amount of that rent can be ascertained, then the rate is to be payable according to it. I would say that cases of ground rent and cases of private arrangement, where the rent is not rack rent, do not come within the meaning of the words "the amount of rent where the same can be ascertained," unless the rack rent, in addition to the ground rent, or unless the premium (which was one illustration put by Mr. Sutton) can be ascertained, and some person competent to make the computation can allocate to each year what is the fair proportion of the ground rent, if it be ground rent, or of the premium, if it be premium, or whatever other arrangement may have been made between the landlord on the one hand and the tenant on the other, so as to define what is the true amount which, year by year, the tenant is paying to the landlord for his occupation. Where that can be ascertained, then the rate is to be paid according to the actual amount; where it cannot be ascertained, which is no doubt the case in many cases, then it is to be according to the actual amount or annual value upon which the assessment to the poor rate is computed. Now, it seems to me that these words, taken together with the rest of the section, really are reasonably clear, and that they mean the full amount at which the house to be rated would have been taken, at the time of the 7 Geo. 4, by the persons who were to rate it, before those various heads of allowance, with which we are all familiar, had been deducted by the overseers, and before the actual assessment was made upon any individual; because the actual amount upon which the assessment is computed seems to me to be an entirely different thing from the actual amount of the assessment itself. If the statute had meant to say that the rate should be paid upon the poor rate book, what so easy as to say it? What so easy as to say the rent where the rent can be ascertained, the poor rate valuation where that can be ascertained? But the words are different; they are, the actual amount upon which the poor rate is, in fact, computed. We know historically, and we know by common knowledge, that at that time the general value of the house or premises was ascertained, and the occupier was rated in respect, not of that full value, but of that full value subject to certain deductions, which were always made, even before the Parochial Assessment Act of Will. 4. It is to be observed, and of course everyone acquainted with the subject knows perfectly well, that the poor rate is not a rate, strictly speaking, upon houses, or upon lands, or upon property. Of course, roughly speaking, and for the purposes of general conversation, it is rightly enough described as a charge upon property; but according to the statute of Elizabeth, which never has been altered, it is a charge upon persons, and it is a personal charge to be paid by persons according to, if I recollect the words correctly, their ability, and the way of getting at their ability is to see what they occupy, and what is the value of their occupation. Therefore, this seems to me to show that the words "actual amount upon which the



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assessment to the poor rate is computed" must have, in law, a well-understood meaning; and that they mean the value of the occupation. I think, therefore, that according to the true construction of 7 Geo. 4, c. cxi. s. 27, which, for the reasons that I have given, appears to me to be a still operative section, the rate which the Grand Junction Waterworks Company are entitled to levy is to be upon the actual amount of the rent; that is, the full amount which the tenant pays, where it can be ascertained, but where it cannot be ascertained, the whole and full amount of the property in the hands of the owner before any deductions are made therefrom. This appears to me to be the true view of these two sections: that they now co-exist, that the section in the earlier Act is still operative, and that the true construction of it is what I have said. That being so, it will follow that we are unable to come to the same conclusion at which the court below arrived; and we think the assessment ought to have been made on the sum of 140*l.* a year, and not on the sum of 118*l.* We have not heard an argument at length as to what is the real meaning of the words "annual value," in 15 & 16 Vict. c. clvii. s. 46. Supposing we had come to an opposite conclusion, and had thought that the earlier section was a repealed section, we might have been driven to consider simply the meaning of the words "annual value" in the later section. We have not heard that argument, and therefore, of course, not having heard that argument, any opinion I pronounce must be considered to be pronounced subject to the disadvantage of not having had the thing fully argued out before us; but I think I may go so far as to say this, that the strong inclination of my opinion is that it makes no difference, and that "annual value" in the second section means the same thing as "actual amount or annual value," in the former Act. I think there are various reasons for this. First of all, there is analogy in favour of this view; and further, as sect. 27 of the Act of Geo. 4 is an existing section, and as the very same words are used in two Acts of Parliament *in pari materia*, they are to be construed together; therefore the reasons which have convinced me that "annual value" means one thing in the earlier Act, convince me also that it means the same thing in the second Act. Although I have not heard the point fully argued, yet the strong inclination of my opinion is, that it really does not signify for the decision of this case whether we consider the first Act of Parliament or not, because I should come to the same conclusion upon the words "annual value" in the second Act as I have come to upon the former Act. I therefore think, for all these various reasons, that the judgment of the court below cannot be supported, and that this appeal must be allowed.

BAGGALLAY, L.J.—I am of the same opinion, and I have very little to add. The first question is to what extent the 27th section of 7 Geo. 4, c. cxi. is repealed; it is clearly repealed to some extent by the Act of Victoria, but to what extent? It seems to me that, reading the two sections together, it is abundantly clear that, so far as the percentage rate framed in the former Act is concerned, so far also as special arrangements are made for baths, etc., so far as arrangements are made for high level service, and in any other respect in which there may be a difference between the two Acts,

the former Act is repealed by the later; but except so far as the former Act is repealed by reason of there being express provisions in the later Act directed to the very same subject-matter as the former Act, it appears to me that the Act of Geo. 4 must remain. That drives us to consider what is the true interpretation to be given to these words which have been so much the subject of discussion on the present occasion. Now, the test in the Act of Geo. 4 is rent, and the Act goes on to provide in what way the amount of rent is to be ascertained. "Every such rate shall be payable according to the actual amount of the rent, where the same can be ascertained, and where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor rate is computed in the parish or district where the house is situated." The mode in which the assessment to the poor rate was computed at the time when this Act was passed was well known. The case to which Mr. Sutton drew our attention, following other cases prior to the passing of the Parochial Assessment Act, showed how the assessment was computed to the poor rate, where you had the actual rack rent known, or where you had that rent subject to certain deductions; then on that basis the assessment to the poor rate was computed. In the same way, if there was no actual rack rent known or to be determined upon, then an estimated annual value was put upon the premises by the district, probably not very accurately, but still it was assumed that that was the estimated value or estimated rent, and from that, in a like manner, similar deductions were made as in the case where the rent was known. That was the process by which the assessment to the poor rate was computed at the time when the Act of Geo. 4 was passed, and remained in force up to the time when the Parochial Assessment Act was passed. Now it seems to me that the words of the Act of Geo. 4 are exactly met by the state of circumstances which then existed, and that the words "annual value" mean, not the annual value at which the house is assessed to the poor rate, but the annual value upon which the assessment to the poor rate is computed. It appears to me, therefore, that in this view of the case, and if I am right in my view, which I entertain very strongly, that sect. 27 of the Act of Geo. 4 is not repealed by sect. 46 of the Act of Victoria, the assessment is clearly to be made on the basis to which I have referred, and not upon the basis adopted in the court from which this appeal has been brought. So far as regards the other questions, it appears to me that, if we were to treat this portion of the particular section as repealed, you have still got this circumstance. Bearing in mind the provisions of sect. 57 in the later Act, you still have the words "annual value" used in sect. 46, and under these circumstances it appears to me that it would be impossible to give a meaning to those words in the Act of Victoria different to that which we have given to them in the Act of Geo. 4. For these reasons I think that the appeal must be allowed.

LINDLEY, L.J.—I also think this appeal ought to be allowed. The question which we have to solve, broadly stated, is this: how we are to ascertain the price which a consumer of water is to pay for it? The Acts of Parliament do not say that he is to pay by measure or meter; they put



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it, as it seems to me, upon a different scheme, namely, that he is to pay according to the class of house he occupies, and the class of house he occupies is to be ascertained by a method which is specified by the Act. In the Act of Geo. 4, the rent he pays is made the test or standard of the class of house, and the rent he pays is neither more nor less than the purchase money, payable by instalments. The rent he pays, I apprehend, would include the premium or bonus—that is how I construe the word “rent.” Then it is necessary to ascertain what is to be done where there is no rent payable in that sense, and the Act of Geo. 4 tells us what is to be done then. It is important to examine closely the exact words of the statute; they are: “and where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor rate is computed.” Upon that, what strikes me at first sight is that there is nothing said about “nett annual value;” it is the “actual amount or annual value,” nett being left out. Neither does it say “rateable value;” if it meant that, I suppose it would have said so; but at all events it does not say so. It does not say, “upon which the assessment is made,” but the language is, “actual amount or annual value upon which the assessment to the poor rate is computed.” Now, in order to understand that, we must look, I think, a little at the state of the law at the time this Act of Parliament was passed; both sides agree as to that state of the law, each invoking it on his own behalf. But I confess, having studied with care the case of *Rees v. Adams*, which shows the principle upon which property was rated to the poor rate, it strikes me as almost a *reductio ad absurdum* to say that the price of water is to vary with or to depend upon the rateable value, when you once understand that according to the old law rateable value was or might be a mere proportion; it does strike me as almost ridiculous to suppose that the Act of Parliament could have intended to place in the hands of the overseers the power of fixing the price of water to the occupiers of the houses. I confess this seems to me a formidable difficulty, and a difficulty which cannot be got over except by words which are perfectly unmistakable. Bearing this in mind, I quite feel the force of Mr. Sutton’s observation that apparently the object was to enable the parties to appeal to some kind of standard which was ascertainable, and that rateable value has that advantage; but it appears to me that the alternative construction is the preferable one. The section then becomes intelligible, though I admit that sometimes a practical difficulty in finding out the rent may occur. It comes, then, to this—you are to take the rent when you can find it, and you must take what the house would let for when you cannot. That appears to me to be the real meaning of those words. Now I pass on to the second Act of Parliament; whether it repeals this section or not is not very clear—I do not think it does, quite; but the real truth is, the greater part of the section of Geo. 4 has become obsolete, if not repealed by this second Act of Parliament. Without scanning that Act through from end to end, it would be difficult to say how much of this section is obsolete, and how much is not; it is obvious enough that a great deal of it is, but I do not think it is wholly repealed. It appears to me, therefore,

having regard to this section in the Act of Geo. 4, that we have a clue to the meaning of the words “annual value,” and that those words in the Act of Victoria must be construed with reference to the same meaning in the Act of Geo. 4, and in either case, I think, the real meaning is, whether the house is let or not, what it would let for. If it should be held that the Act of Geo. 4 is wholly repealed by the Act of Victoria, then we come to the question what “annual value” in that later Act means. We have not heard that point discussed, therefore I say no more about it, except that, so far as I can make out, the words “annual value” in the Act of Victoria have the same meaning as in the earlier Act, and therefore I think the construction contended for by the appellants is made out. It appears to me, for these reasons, that the judgment of the court below is wrong, and must be reversed.

*Appeal allowed.*

Solicitors for the appellant company, *Bircham and Co.*

Solicitors for the respondent, *Hollingsworth, Tyerman, and Andrewes.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Nov. 15, 20, 21, and 22, 1882.

(Before FRY, J.)

THE ATTORNEY-GENERAL AND THE METROPOLITAN BOARD OF WORKS v. THE ACTON LOCAL BOARD. (a)

*Injunction—Sewers—Metropolitan Main Drainage—Adjoining local sewer—Urban Sanitary Authority—Increase of sewage—Metropolitan Management Act 1855 (18 & 19 Vict. c. 120), s. 135—Public Health Acts 1848 & 1875 (11 & 12 Vict. c. 63; 38 & 39 Vict. c. 55).*

*Stamford Brook was originally a natural water-course draining the districts of Acton and Hammersmith. It was formed in its upper portion of two streams known as West Branch and East Branch, the greater portion of West Branch being entirely within the parish of Acton, which is itself outside the metropolitan area. The point of junction between East Branch and West Branch, and East Branch itself, and the united streams below the point of junction, were all within the local area which by the Metropolitan Management Act 1855 passed, with the sewers comprised in it, into the jurisdiction of the Metropolitan Board of Works. The Metropolitan Board of Works, in pursuance of their statutory duties, intercepted the united streams by a main sewer which carried the flow to a pumping station, instead of to its former natural outfall into the river Thames.*

*The defendants, as the urban sanitary authority for the parish of Acton, under the provisions of the Public Health Acts 1848 and 1875, had authorised and carried out a system of drainage under which the sewers of new houses constructed in their district were connected with the west branch as the main sewer, and the amount of sewage which the plaintiff board had to dispose of was thus greatly increased.*

*Held, that the plaintiffs were under no obligation to dispose of the extra drainage, and were entitled to an injunction to restrain the defendants from*

(a) Reported by J. F. WAGERT, Esq., Barrister-at-Law.

*causing or authorising any sewage to be discharged through the west branch, or otherwise into the plaintiffs' main drainage system, other than sewage discharged by drains in respect of which a prescriptive right existed.*

*Quære, Whether a local sanitary authority has power to stop up or disconnect a drain which it has once authorised to be made.*

THIS was an action brought by the Attorney-General, at the relation of the Metropolitan Board of Works, who were also plaintiffs, against the Local Board of Acton, acting as the Urban Sanitary Authority for the district of Acton. The plaintiffs claimed an injunction to restrain the defendants, their servants and agents, from causing, or permitting, or authorising any sewage, or drainage, or foul or excrementitious matter, to flow or pass, or be poured or discharged, into Stamford Brook, West Branch, or any other stream, ditch, or watercourse, running into or communicating therewith, or otherwise directly in any way to cause a nuisance or be offensive or injurious to health or to the public. They also claimed an injunction to restrain the defendants, &c., from permitting, or causing, or authorising any sewage, or drainage, or foul or excrementitious matter to flow or pass, or be poured or discharged by or through the said Stamford Brook, West Branch, or otherwise, either directly or indirectly, into the metropolitan main drainage system, or any other sewer vested in the plaintiffs. Damages were also claimed for injury and expenses incurred.

The plaintiffs' case was as follows:—

The Metropolitan Board of Works were incorporated by the Metropolitan Management Act 1855, and, by sect. 135 of that Act, the main sewers then vested in the Commissioners of Sewers, and specified in a schedule to the Act, were vested in the board, and they were empowered to make such sewers and works as they might think necessary for preventing the sewage within the metropolis from flowing into the river Thames, and all such other sewers as they might think necessary for the effectual drainage of the metropolis. Provision was made by the same section for the board to cause the sewers vested in them to be arranged and kept so as not to be a nuisance or injurious to health or property. The same Act defined the area of the metropolis, in which, however, the parish of Acton was not included. One of the sewers mentioned in the schedule to the Act, and therefore vested in the plaintiff board, and improved and altered by them, was Stamford Brook, East Branch, and another was Stamford Brook, part of West Branch. The upper part of West Branch was in the parish of Acton. West Branch sewer commenced in the parish of Acton and joined East Branch sewer, which commences outside the parish of Acton, and within the metropolitan area, at a point within the metropolitan area. The united streams discharged into a sewer which carried its contents through an intercepting sewer, constructed by and belonging to the plaintiff board, to a pumping station at Pimlico.

In the year 1868 the parish of Acton adopted the provisions of the Local Government Act 1858, and the defendant board was constituted under that Act and the Public Health Act 1848, and, under the Public Health Act 1875, they became

the urban sanitary authority for the district of Acton, and had the control and management of the drainage system of the district.

From the year 1861 onwards a large number of houses had from time to time been erected at Acton, and the sewage of those houses had been drained into the upper portion of the West Branch, the consequence being a great increase in the volume of sewage which was discharged into the plaintiffs' sewers, and a consequent overcharging, of their draining and pumping systems.

The alleged nuisance was said to be caused by the fact that parts of the West Branch, both within the plaintiffs' district and within the Acton district, were uncovered sewers, and the increased sewage poured into that sewer under the defendants' system of drainage produced an offensive and dangerous effluvia.

In 1876 the Metropolitan Board formally required the defendants to discontinue the passage of sewage into their main drainage system, calling their attention to the fact that it was not constructed of a capacity to receive sewage from districts other than those comprised in the area under the metropolitan management; but the defendants refused to comply with the notice, and the action was commenced in July 1877.

The defendants' case was, that the East Branch and the West Branch were the old and natural water-shed lines by which the surplus surface water from the parish of Acton passed to the lower lands, and, when united into Stamford Brook, discharged into the river Thames at Hammersmith Creek, and that the inhabitants of Acton had been accustomed from time immemorial to use the West Branch as a sewer, and through it the East Branch also, below the point of junction.

When the Metropolitan Board was constituted and began its sewage operations, namely, in 1856, Acton was already a place of considerable size, and the foul condition of the West Branch had existed for years previously to the constitution of the defendant board, who had expended and charged to the ratepayers a large sum of money in covering over parts of the sewer and otherwise improving their drainage system. They contended that the plaintiff board had acquired their sewers subject to the rights already existing of the parish of Acton; and, further, that anything done by themselves had been in fulfilment of their statutory duties and rights. They claimed, as representing the inhabitants of Acton, the prescriptive right to use the whole of the West Branch as a sewer, and pleaded acquiescence and laches on the part of the plaintiffs, and they put in issue the fact of nuisance. Various expert witnesses were cross-examined upon their affidavits, and in the result the evidence failed to support any case of substantial nuisance caused by the acts or defaults of the defendants, but showed that, if the plaintiffs' pumping system was overtaxed, it was owing to periodical increases in the amount of storm water. Moreover, the counsel for the plaintiffs at the bar abandoned that part of the case which referred to the plaintiffs "permitting" the discharge of sewage, &c.

*Cookson, Q.C. and F. Pownall* for the informant and plaintiffs.—It is admitted that recent cases preclude us from seeking an injunction to restrain the defendants from "permitting":

*Glossop v. The Heston and Isleworth Local Board*, 40 L. T. Rep. N. S. 736; 12 Ch. Div. 102;

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*Attorney-General v. Guardians of the Poor of the Union of Dorking*, 46 L. T. Rep. N. S. 573; 20 Ch. Div. 595.

We have, however, a right to an injunction to restrain the defendants themselves from so managing their drainage system as to throw into Stamford Brook any sewage from new houses at Acton; they cannot increase the burden which the plaintiffs' sewers have to bear by reason of their connection with West Branch:

*Metropolitan Board of Works v. London and North-Western Railway Company*, 42 L. T. Rep. N. S. 830; 44 L. T. Rep. N. S. 270; 14 Ch. Div. 521; 17 Ch. Div. 246.

The defendants are justified by no statutory rights in interfering with the rights of other parties, and they are in this respect in the same position as an individual. Whether or not the injunction will or will not inconvenience the defendants or the inhabitants of their sanitary district is not a matter for consideration for the purpose of deciding the plaintiffs' rights:

*Attorney-General v. The Council of the Borough of Birmingham*, 4 K. & J. 528;

*Attorney-General v. Colney Hatch Lunatic Asylum*, 19 L. T. Rep. N. S. 44; L. Rep. 4 Ch. 147.

In addition to the less extensive injunction which we now ask, the plaintiffs are entitled to damages at least from the date of the commencement of the action. The defendants, in fact, became liable from the date of the notice given by the plaintiff board:

*Smith v. Day*, 13 Ch. Div. 651.

The fact that there has been a gradual increase of sewage, which had by the time the action was commenced become intolerable, is a sufficient answer to the plea of acquiescence. The plea of laches cannot prevail against a public body suing in their corporate capacity:

*Staffordshire and Worcestershire Canal Navigation Company v. Birmingham Navigation Company*, L. Rep. 1 E. & I. App. 254.

*E. K. Karlake, Q.C., W. W. Karlake, Q.C., and Pollard* for the defendants.—The natural drainage of the locality must be provided for by those who have acquired the old water-shed lines. The plaintiff board are, by virtue of the Metropolitan Management Act 1855, obliged to dispose of all the sewage of Stamford Brook, and the defendants have a right by prescription to drain the sewage of the inhabitants of their district into that brook, discharging it into the same between points above the district under the jurisdiction of the plaintiff board. The defendants are entitled without interference to fulfil their duties under the Public Health Acts and the Local Government Acts, by discharging the sewage of their district into the natural drain:

*Newington Local Board v. Cottingham Local Board*, 12 Ch. Div. 725.

If any injunction were granted it could be against future acts only. Where connection between house drainage and the sewer has been already authorised, it is beyond the defendants' power to interfere:

*Attorney-General v. Guardians of the Poor of the Union of Dorking* (*ubi sup.*).

The laches of the plaintiffs and the inevitable public inconvenience that would ensue are a sufficient answer to a case asking for such interference.

*Cookson, Q.C.* replied.

*Fry, J.*, after stating the facts:—The first

inquiry is with regard to nuisance, and with regard to nuisance only. By saying that, I mean that, although the 17th section of the Public Health Act of 1875 has been referred to, it has not been insisted on by the informant, or the plaintiffs, as part of their case. If it had been, of course the injunction would have been quite independent of whether a breach of that clause produced the nuisance or not, whereas the injunction sought is in respect of nuisance. The point has not been urged by the counsel for the plaintiffs, and I refer to it only to make it clear that I am not in any way pronouncing any decision under that section of the Act. It appears to me to be plain from the authorities and from principle, that it is impossible to restrain the defendants from permitting the sewage which existed at the time of their coming into existence from flowing into the brook; in fact, the plaintiffs have not urged that they have such a right. It therefore remains to inquire whether the plaintiffs and informant have shown me that the increment of nuisance, between the year 1866 and the commencement of this action, was such as to create a nuisance. That inquiry must be answered in the negative. There is nothing whatever to show me what that increase was. I can only guess at it from the number of houses which have been built in the parish. I do not know how many of them communicate with the brook. I know nothing of the quantity of sewage which has been cast into it, in addition to what was cast into it when the local board took possession of the Acton district, and I have no evidence before me of any valuable character to show how far the increase, which I have no doubt has existed, is enough to produce a nuisance of itself. The result, therefore, is that the plaintiffs fail, both with regard to the permission and with regard to the creation of a nuisance, and the action must be dismissed, so far as it seeks the relief mentioned in the first paragraph of the statement of claim, with costs to be paid by the relators. The next question arises with regard to the sewers or drains which have been made by the defendant board since they have come into existence. There are admissions contained in the answer, and in the evidence which was given before me, which satisfy me of that which has not been denied, viz., that they, in pursuance of their duty, as they considered, caused, or directed, or authorised the construction of drains, from houses which have been newly erected, into this brook. That they have done so is to be found from, amongst other passages, the 22nd paragraph of their answer. They say that, "in compliance with their duties under the Acts, and with a view to promoting the health of the district, they have caused fresh drains to be connected, as occasion has from time to time arisen, with their main sewer, the West Branch sewer." About that, therefore, there has been very properly no dispute. Further than that, they claimed the right to continue to cause drains to be made to the west branch. They allege, and Mr. Wm. Karlake has argued, that the inhabitants of Acton have a right by prescription to drain into this sewer. It appears to me that such a suggestion would clearly be bad. There is no evidence tendered on which I could come to the conclusion that there is any such prescription. There is no evidence by which I can conclude that there is any legal custom authorising such a drainage. Those persons who have drains made,

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and who have used them for the period of prescription, cannot be interfered with. Other individuals living in Acton, who have no prescriptive right, have done so, according to the evidence before me, not under any prescriptive right or any custom. The local board, therefore, unless restrained, will continue to increase the sewage flowing into the West Branch sewer. Then arises the inquiry, whether the sewage which they have so caused to flow into it, and which they threaten and intend to cause in future to flow into it, is sewage which they are entitled to require the plaintiff board to dispose of. Now it has been argued that, under the Act of 1855, the board was bound to dispose of this sewage. I say nothing with regard to sewage existing in the year 1855. I say nothing with regard to sewage flowing from houses as to which there is any question of prescriptive right; but I am unable to find anything in the statute which casts upon the plaintiffs the burden of disposing of such sewage as the inhabitants of Acton may think fit to create by building houses after the Act of 1855. It is all the more important because the Legislature has thrown upon the plaintiffs the burden of disposing of all the sewage within their district, and of preventing its flowing into the Thames. If, therefore, up to 1855 the defendants had no right to throw their drainage into this sewer, and have the right to do so by force of the Act, the result is that they have the right to put their sewage in the position which casts the burden on the plaintiffs of preventing its going into the Thames. Now what the plaintiffs have done is this: they have, in pursuance of their duty, intercepted the brook in question at two points—it is needless to go into the details and character of the works—but the effect of those interceptions has been to carry, as far as they can, the whole of the sewage of the East and West Branches parallel to the Thames, and to carry all the storm water which they can in the same direction, leaving only the surplus storm water to flow into the Thames. There is plainly, therefore, an increased burden thrown upon the plaintiffs by every increase of sewage passing into this brook. I have already said it appears to me that there is nothing in the statute which throws on the plaintiffs any such increased burden. It has been said that, if the Act of 1855 did not authorise this, the Act of 1848, or the Act of 1858, or the Act of 1875, under which the defendants have been constituted or act, authorises them to do so. In my judgment there is no justification for such a contention. I consider it well established that boards of health are bound to perform their statutory duties without injury to their neighbours. They cannot create a nuisance affecting a neighbour; they cannot, in my judgment, cast upon a neighbour a greater burden than he is bound to bear. I am therefore driven to this inquiry: Irrespective of statute, can the owner of land on the higher part of a stream cast upon the owner of land on the lower part of a stream the burden of disposing of a greater amount of sewage than by prescription has flowed into it? That point appears to me to have been decided by the Lords Justices in the case of the *Metropolitan Board of Works v. The London and North-Western Railway Company* (44 L.T. Rep. N.S. 270; 17 Ch. Div. 246-249). James, L.J. said: "On the facts it is quite clear there were no such prescriptive rights as were alleged. If a man has an artificial drain or sewer by which he drains

anything, either water or sewage, into his neighbour's land, he cannot use that drain so as to drain another close or another house. It seems to me impossible to suppose that there is anything in the English law to say that a man has the right to pour in as much sewage water as can come from anywhere, limited only by the size of the particular drain." Cotton, L.J. expressed the same view. He said: "There is no authority given by the Act to do it"—that is, to increase the sewage—"and according to the general law they have no right to throw any burden on their neighbours, unless by contract, which in this case does not exist, or by long user; that is to say, by prescription, which does not exist here. In my opinion the plaintiffs are right and the appeal must be dismissed." Lush, L.J. entirely agreed with that decision. The plaintiffs, therefore, are right, in my judgment, in saying that they are not liable to any greater burden of sewage than that of those persons who have a prescriptive right to throw it into the brook. But then arises this point: the plaintiffs have not shown to me any substantial damage resulting from an increase of the sewage thrown into the West Brook or the East Brook. According to the evidence of Sir Joseph Bazalgette, the real annoyance and burden of which the plaintiffs complain is that, by reason of the foul state of the brook, they have been bound to cover it over, and that by reason of the storm-water, collected in Acton district, flowing along the intercepted sewer, the plaintiffs' pumping operations are burdened, and at certain times overtaxed. I have, therefore, to inquire whether in this case there has been such substantial damage proved, where the right is involved, that I ought to grant an injunction. In many cases I probably should think myself not bound to grant an injunction; but, in the present case, I confess myself bound to do so, and for this reason—that not only do the defendants insist on their right to maintain the sewer that they have already caused to be constructed, but they insist upon a right in future to construct other drains which they say they are authorised to do by the prescriptive title of the inhabitants of the district over which they preside. It appears to me, therefore, that they insist, not only on maintaining the wrong which they have committed, but they insist on a right to do an increased wrong in future. That is, in my judgment, a circumstance which I must have regard to, and I think that compels me to grant an injunction. I therefore must pronounce an injunction, restraining "the defendants, their servants and agents, from causing or authorising any sewage or drainage, or other foul or excrementitious matter, to flow, or pass, or be poured or discharged by or through Stamford Brook, West Branch, or otherwise either directly or indirectly into the metropolitan main drainage system, or any sewer vested in the plaintiffs." In other words, I grant an injunction according to the second claim, omitting the words "permitting or." The plaintiffs ask for a further injunction. They have asked me to restrain the defendants from permitting sewage to pass into the West Branch, through any sewers or drains constructed or authorised by the defendants after the notice in 1876. In my opinion, I ought not to grant any such injunction. It appears to me that the plaintiffs have not been over diligent or over active in the assertion of their rights. They must

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have known, I think, some time before 1876, that the local board was carrying on operations. They followed up their notice by an action begun some eight months afterwards, and their action, having begun in 1877, has not been brought on for trial until a few days ago. The reason given is, that the plaintiffs preferred to wait the decision of the case pending between themselves and the London and North-Western Railway Company. It is quite true that the defendants might have driven the plaintiffs on. In a general way, the court looks at things as they stood at the date of the writ; but, in the present case, to grant the injunction asked for would have been attended with most serious consequences, because it would require the defendants to stop up all drains or sewers which have been made from houses in Acton ever since Nov. 1876. Those houses, according to the evidence before me, are very numerous, and it appears to me, on the balance of convenience and inconvenience, and bearing in mind that there is no substantial damage shown to have accrued to the plaintiffs, that I should be doing wrong in granting such an injunction. Further than that, I am by no means clear that the defendants have the power to stop up a drain which they have once authorised and directed. I observe that the Master of the Rolls expressed that view in the case of *The Attorney-General v. The Guardians of the Poor of the Union of Dorking* (ubi sup.). Therefore, on that ground also I should hesitate very long before I granted the injunction which is sought on that part of the case. [His Lordship then dealt with the alleged acquiescence on the part of the plaintiffs, holding that the objection failed.]

Solicitor for informant and plaintiffs, *B. Ward*.  
Solicitors for the defendants, *Hemsley and Hemsley*.

## QUEEN'S BENCH DIVISION.

Tuesday, Nov. 28, 1882.

(Before Lord COLERIDGE, C.J. and STEPHEN, J.)

LANGRISH (app.); ARCHER (resp.). (a)

*Vagrant Act Amendment Act 1873—Gaming—Railway carriage—Open place to which public have access.*

*A railway carriage, when being used for the conveyance of passengers on the line, is "an open place to which the public have, or are permitted to have, access" within the meaning of sect. 3 of the Vagrant Act Amendment Act 1873.*

*The respondent and other persons were found playing a game, known as the "three-card trick," in a railway carriage which was conveying passengers on the London and South-Western Railway Company's line.*

*Held (reversing the decision of the magistrate), that the respondent ought to have been convicted.*

*The words "open place to which the public have, or are permitted to have, access," are not confined to those places to which the access is unconditional.*

*This was a case stated by one of the metropolitan police magistrates under sect. 33 of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49).*

*A complaint was preferred at the police-court by the appellant against the respondent, under the*

*5 Geo. 4, c. 83, s. 4, entitled "An Act for the Punishment of Idle and Disorderly Persons and Rogues and Vagabonds." Sect. 4 of that Act provides that*

*Every person . . . playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance . . . shall be deemed a rogue and vagabond within the meaning of the Act . . . and upon conviction shall be liable to be kept to hard labour for any time not exceeding three calendar months.*

*The respondent, Archer, in company with two other men, entered a first-class carriage at the Waterloo Terminus of the London and South-Western Railway Company.*

*The respondent and the two other men, while the train in which they were travelling was on its journey from Waterloo to Sanbury Station, commenced playing a game which is commonly known as the "three-card trick."*

*Two other passengers were travelling in the same compartment, and both were induced to join in the game. One of them lost his money at this game.*

*The respondent was then charged before one of the metropolitan police magistrates with gaming in an open and public place. The magistrate dismissed the charge.*

*The question for the opinion of the court was, whether such railway carriage, being on its journey and then being used for the conveyance of passengers, was or was not an open and public place, or an open place to which the public have, or are permitted to have, access within the meaning of the 36 & 37 Vict. c. 38, s. 3.*

*Sect. 3 provides :*

*Every person playing or betting by way of wagering or gaming, in any street, road, highway, or other open and public place, or in any open place to which the public have, or are permitted to have, access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond within the true intent and meaning of the recited Act, and as such may be convicted and punished under the provisions of that Act, or in the discretion of the justice or justices trying the case, in lieu of such punishment, by a penalty for the first offence not exceeding forty shillings, and for the second and any subsequent offence not exceeding five pounds.*

*Danckwerts, for the appellant.—In the case of Re Freestone, 1 H. & N. 93, which was a conviction under 5 Geo. 4, c. 83, s. 4, for unlawfully playing (at the three-card trick) in a certain open and public place, to wit, in a third-class carriage on the London Brighton and South Coast Railway. Although the conviction was quashed, the learned judges thought that if it had been alleged that the carriage was then and there running and being used for the conveyance of passengers on the line, the conviction would have been good. The Act of Geo. 4 has been extended by the 36 & 37 Vict. c. 38. In Reg. v. Holmes (22 L. J. 122, M. C.) an omnibus, whilst conveying passengers from one place to another, was held to be a public place within the meaning of the statute 14 & 15 Vict. c. 100, and a conviction under that for an indecent exposure of the person was held to be good.*

*Woodgate, for the respondent.—The 36 & 37 Vict. c. 38, s. 3, refers to an open and public place to which the public have, or are permitted to have, access. This, it is contended, must be limited to*

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

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places to which the public have an absolute and unrestricted right of access. Here access to the railway carriage could only be obtained upon payment of the fare demanded by the railway company for travelling on their line.

LORD COLERIDGE, C.J.—I am of opinion that the decision of the magistrate was wrong in law, and that he ought to have convicted the respondent. We have to construe a section of an Act of Parliament that most probably was drawn without this question of a railway carriage being present to the mind of the draughtsman. Now the section provides, that if any person is found playing or betting in any street . . . or other open and public place, or in any open place to which the public have, or are permitted to have, access, with any card . . . he shall be deemed a rogue and vagabond, &c. In this case the respondent, with two other persons, were playing by way of wagering or gaming, in a first-class railway carriage that was travelling on the London and South-Western Railway Company's line. Is a railway carriage, under such circumstances, an "open place" within the meaning of the Act? I am of opinion that it is, and that the words of the section admit of such an interpretation. An omnibus whilst conveying passengers was expressly held by the Court for Consideration of Crown Cases Reserved, in *Reg. v. Holmes* (22 L. J. 122, M. C.) to be a public place within the meaning of the 14 & 15 Vict. c. 100. In *Ex parte Freestone* (1 H. & N. 93) the court seemed to think that if the railway carriage had been in use on the railway the conviction would have been good. That case strongly supports, if indeed it does not directly determine, our decision. The word "open" in the statute means open to the public, and not, of course, open to the sky. Then it was argued, on behalf of the respondent, that it must be a place to which the public have an absolute and unconditional right of access without payment, or other special permission; and hence that a railway carriage cannot be an "open place," as no one can enter it without paying his fare. I confess I cannot assent to that argument. A railway company cannot exclude anyone for whom there is room, and who is willing to pay his fare, though they cannot, of course, take more in one carriage than that is capable of holding. It seems to me, therefore, that a railway carriage while travelling on the line must come within the words "open place to which the public are permitted to have access."

STEPHEN, J.—I am entirely of the same opinion. I do not think Mr. Woodgate dealt with the case of *Ex parte Freestone* at all. Though it may not decide this point, it clearly contains a very strong expression of opinion on it. I fail to find anything in the statute to the effect that the access must be an unconditional access. The magistrate ought certainly to have convicted the respondent.

*Decision reversed.*

Solicitor for the appellant, *Solicitor to the Treasury.*

Solicitor for the respondent, *E. Biale.*

## COURT OF APPEAL.

### SITTINGS AT WESTMINSTER.

April 26, 28, and 29, 1882.

(Before JESSEL, M.R., BRETT and COTTON, L.JJ.)

REG. on the Prosecution of HER MAJESTY'S TREASURY v. THE MAYOR, &C., OF THE BOROUGH OF MAIDENHEAD, AND MORRIS, Treasurer of the Borough. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Corrupt Practices (Municipal Elections) Act 1872* (35 & 36 Vict. c. 60), ss. 14, 19, 20, 22—*Election court—Expenses of court—Court of record—Order as to costs—Liability of borough—Certificate of Commissioners of Treasury—Mandamus.*

By the *Corrupt Practices (Municipal Elections) Act 1872* (35 & 36 Vict. c. 60), s. 14, sub-sect. 1, petitions under the Act shall be tried by a barrister; and by sub-sect. 5 the court has, for the purposes of the trial of a petition, the same powers and privileges as a judge on the trial of an election petition.

By sect. 19 the costs of the petition and proceedings consequent thereon shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine.

By sect. 20 the expenses of the reception and holding of the court upon the trial of a petition are to be paid by the treasurer of the borough out of the borough fund or rate.

By sect. 22 the remuneration and allowances to be paid to the barrister and to any officers, clerks, or shorthand writers employed are to be paid by the Commissioners of the Treasury, and are to be repaid to them on their certificate by the treasurer of the borough; but the court may order that the whole or part of such remuneration and allowances, or the whole or part of the expenses incurred by the town clerk for receiving the court, shall be repaid to the commissioners or to the town clerk by the petitioner, or by the respondent.

On the 11th March 1875, at the hearing of a petition under this Act, the barrister made an order under sect. 19 directing that the costs of the petition and proceedings in court should be paid by the respondents. No order was then made as to the expenses of the court, which are provided for by sect. 22. The Commissioners of the Treasury paid the expenses of the court, and in Aug. 1875 they certified to the treasurer of the borough that such payments had been made, and required him to repay the amount. On the 27th Sept. 1875 the barrister who tried the petition wrote to the Commissioners of the Treasury stating that it was always his intention to visit upon one of the respondents the costs relating and belonging to the inquiry, and that he said so in giving judgment. Thereupon the commissioners withdrew their orders on the treasurer of the borough for payment of the sums which they had advanced. On the 4th Oct. the barrister made an order on the same respondent to pay to the town clerk the expenses incurred by him for receiving the court. The Commissioners of the Treasury having afterwards come to the conclusion that the expenses under sect. 22 must be borne by the

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.

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treasurer of the borough, on the 8th June 1876 they issued a fresh certificate requiring payment within fourteen days, and afterwards obtained a mandamus requiring payment.

Issues were joined on the return to the mandamus, and at the trial the jury found that there was sufficient evidence that the barrister did order the whole of the costs to be paid by the respondent and not by the borough. A verdict having been entered for the prosecution subject to a special case:

*Held, that the court of the barrister who tried the petition was a court of record, and the record was the order drawn up by the registrar and signed by the barrister, and this record could not be amended by the Court of Appeal, and could not be varied by evidence of what the barrister said in giving judgment; that any subsequent orders dealing with costs were invalid, because the barrister was functus officio when they were made, and therefore no valid order had been made that the respondent should pay the expenses provided for by sect. 22, and the treasurer of the borough was liable.*

*Held, also, that the certificate of the Commissioners of the Treasury was not an order or judgment but a ministerial act, and therefore they had power to cancel their first certificate and afterwards issue another, and a mandamus ought to issue.*

*Judgment of the Queen's Bench Division affirmed.*

THIS was an appeal from the judgment of a divisional court on a special case stated under an order made by consent at the trial of issues of fact before Mellor, J. and a special jury.

The question for the opinion of the court was, whether the prosecutors or the defendants, or either of the defendants, were entitled to judgment, and if the prosecutors then for what amount.

The following statement of the facts contained in the special case is taken from the judgment of Pollock, B. in the Divisional Court.

A petition having been presented against the return of three town councillors of the borough of Maidenhead, it was tried before Mr. Coleman, the barrister duly appointed under the provisions of the Corrupt Practices (Municipal Elections) Act 1872, in March 1875. The inquiry lasted for nine days, during which expenses were properly incurred for providing accommodation for holding and receiving the Election Court, and also for the payment of the barrister, his registrar and clerk, a shorthand writer, and for fees due to the master of the Court of Common Pleas. On the 11th March 1875 the barrister made an order under sect. 19 of the said Act, directing that the costs, charges, and expenses of the petition and proceedings in court by the parties thereto should be paid by the respondents in equal shares. With respect, however, to the expenses of the court, which are provided for by sect. 22, and which form the subject-matter of the decision, no order was then made by the barrister, although, as appears by a letter subsequently written by him, it was his intention to visit upon one of the respondents these costs, and he expressed this intention orally in giving judgment upon the case.

The expenses of the court being thus unprovided for, the Commissioners of the Treasury

paid them to the barrister and other persons entitled, and by two certificates dated respectively the 2nd and 25th Aug. 1875, they certified to the defendant Morris, as treasurer of the borough of Maidenhead, that such payments had been made, and required him as such treasurer to repay to them the amount thereof out of the borough fund or rates. At this time the borough fund was overdrawn to a large amount, and no property was then or since available to meet the demand. On the 6th Aug. 1875 a borough rate at 6d. in the pound was made to meet the claim, and this was collected from persons liable to be rated in the borough.

Subsequently to this a correspondence took place between the Commissioners of the Treasury and Mr. Morris, as town clerk, whence it appears that the attention of the Commissioners of the Treasury was called to the judgment delivered by the barrister at the close of the petition, which declared the respondent guilty of personal bribery, and ordered him to pay the costs of the inquiry; and thereupon the commissioners communicated with the barrister, who on the 27th Sept. wrote in reply that it had always been his intention to visit upon Mr. Dawson, the respondent, the costs relating to and belonging to the inquiry, and that he had said so in giving judgment. On receipt of this letter, the commissioners withdrew their two orders upon the defendant for repayment of the sums which they had advanced, and instructed their solicitors to proceed against the respondent Dawson for the amount. Before, however, these proceedings commenced, the commissioners received from the prescribed officer under the Act a copy of an order made by Mr. Coleman, dated the 4th Oct. 1875, in the following terms:

Having upon the hearing of the petition found the respondent William Dawson personally guilty of corrupt practices at the election, I do order that the said respondent William Dawson do pay to the town clerk the expenses incurred by him for receiving the court under the provisions of the above-mentioned Act.

On the 9th Dec. 1875 the commissioners wrote to the defendant Morris calling his attention to the fact that the order related solely to the expenses incurred by the town clerk in receiving the court under sect. 20, and made no mention of the sums advanced by the commissioners under sect. 22, and stating that they were advised that, even if it was the intention of the barrister that the whole costs of the inquiry should be borne by the respondent, it was not then competent to him to make such an order, inasmuch as he was *functus officio*, and that the remuneration and allowances under sect. 22 must be borne by the treasurer of the borough. In reply to this, on the 20th Dec., the town clerk wrote to the commissioners stating that upon the withdrawal of their first order the town council had abandoned the rate, and had ordered the sums collected to be returned to the ratepayers, which had been done. On the 8th June 1876 the Commissioners of the Treasury issued a fresh certificate by which they required the treasurer of the borough to repay out of the borough fund or rates, within fourteen days, the sums advanced by them for the costs in question, and this amount not being paid they applied to the court for a *mandamus* ordering the defendants to pay it forthwith. The defendants in their return to this *mandamus* set forth the above facts,



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and issues both in law and fact having been joined, the case came on for trial before Mellor, J.

At the trial evidence was tendered on behalf of the defendants in addition to the documents, to show that the barrister did in delivering judgment on the 10th March 1875, orally order that the expenses of receiving the court, and also the allowances, remunerations, and expenses to be paid to the barrister for his services in respect of the trial of the said petition, and to the officers and clerks and others employed under the provisions of the Act should be borne and paid by the said William Dawson, and should be repaid to the said Lords Commissioners by him, and not by the defendants. The said evidence was objected to on the part of the prosecution, but was admitted by the learned judge, subject to such objection. Oral evidence was thereupon given both by the prosecutors and by the defendants. The question of the admissibility of this oral evidence was reserved for the opinion of the court.

On behalf of the defendants, it was further sought to put in as evidence a letter written by Mr. Coleman to the commissioners. On objection being made by the prosecution to the reception of the same, the learned judge ruled that it was inadmissible, and it was accordingly excluded. The letter was, however, inserted by consent in the special case, but subject to the question of its admissibility, and if admissible for any purpose it is to be among the facts submitted to the consideration of the court. It is as follows:

Redcar, Yorkshire, 29th Sept. 1875.

Sir,—I have the honour to acknowledge the receipt of your letter 14,422. It was always my intention to visit upon Mr. Dawson the costs relating and belonging to the inquiry. I said so in giving judgment.

Dawson was proved to have been guilty to my satisfaction of personal bribery, and I thought that the rate-payers of Maidenhead ought not to be asked to pay the expenses of an inquiry brought about by reason of his having done so.

Mr. Lush, my registrar, is now in London, and will take any further steps, if any, which may be required in the matter.—I have the honour to remain, Sir, your most obedient servant,

CHARLES J. COLEMAN.

William Law, Esq.

At the conclusion of the trial the learned judge left the following question to the jury: "Was there a direction that those costs which are included in and are incident to the inquiry, namely, the remuneration, costs of the judge, officers, and so on, as well as the town clerk's costs, should be paid by Mr. Dawson?"

To this question the jury returned answer as follows: "The jury is of opinion that there is sufficient evidence that Mr. Coleman did order the whole of the costs to be paid by Mr. Dawson, and not by the borough of Maidenhead."

The learned judge, however, directed that a verdict should be entered for the Crown for damages 376*l.* 18*s.* 10*d.* and 40*s.* costs, subject to the opinion of the court upon a special case, it being agreed that the court should give judgment upon the demurrers raised on the pleadings as well as on the special case.

The Divisional Court were divided in opinion; Lord Coleridge, C.J., and Pollock, B. held that the prosecutors were entitled to succeed, Manisty, J. dissenting.

Judgment was accordingly given for the prosecutors for 376*l.* 18*s.* 10*d.*, and for a peremptory *mandamus*.

From this judgment, which is reported 8 Q. B. Div. 339, the defendants now appealed.

The following are the provisions of the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60), on which the decision mainly turned:

Sect. 22. The remuneration and allowances to be paid to a barrister for his services in respect of the trial of a petition, and to any officers, clerks, or shorthand writers employed under the provisions of this Act, shall be fixed by a scale which shall be made and may be varied from time to time by the election judges on the rota for the trial of election petitions under the provisions of the Parliamentary Elections Act 1868, with the approval of the Commissioners of Her Majesty's Treasury, or any two or more of them, and the amount of any such remuneration and allowances shall be paid by the said commissioners, and shall be repaid to the said commissioners on their certificate, by the treasurer of the borough to which the petition relates, out of the borough fund or rate.

Provided that the court at its discretion may order that the whole or any part of such remuneration and allowances, or the whole or any part of the expenses incurred by a town clerk for receiving the court under the provisions of this Act, shall be repaid to the said commissioners or to the town clerk, as the case may be, in the cases, by the persons, in the manner following, viz.: (a) When in the opinion of the court a petition is frivolous and vexatious, then by the petitioner; (b) When in the opinion of the court a respondent has been personally guilty of corrupt practices at the election, then by such respondent. And any order so made for the repayment of any sum by a petitioner or respondent may be enforced in the same way as an order for payment of costs.

The other provisions of the Act which are material are sufficiently referred to in the head-note.

*H. Mathews, Q.C.* and *H. D. Greene* for the appellants.—It is evident that Mr. Coleman intended that these costs should be paid by the respondent Dawson, who was found guilty of personal bribery. The election court is not a court of record, and therefore there was no necessity for the production of any written order. If this is not so, the record may and ought to be amended. The Commissioners of the Treasury had no power to issue fresh certificates, and the certificates being invalid, the defendants were not liable to pay. Owing to lapse of time, the rate-payers of the borough have changed, and it is unjust that the present ratepayers should now be made to pay. Where there has been such a long delay a *mandamus* ought not, as a matter of discretion, to be granted. The following authorities were referred to in the course of the argument:

*Pare v. Hartshorn*, 23 W. R. 138;

*Harmer v. Bean*, 3 C. & K. 307;

*Dyson v. Wood*, 3 B. & C. 449;

*Williams v. Lord Bagot*, 4 D. & R. 315;

*Mellish v. Richardson*, 7 B. & C. 819;

*Ernest v. Brown*, 4 Bing. N. C. 162;

*Reg. v. Fall*, 1 Q. B. 636;

*Marianski v. Cairns*, 1 Macq. 212, 766;

*Woods v. Reed*, 2 M. & W. 777;

*Reg. v. Garland*, 22 L. T. Rep. N. S. 160; L. Rep. 5

Q. B. 269;

*Reg. v. Churchwardens of Wigan*, 35 L. T. Rep. N. S.

381; 1 App. Cas. 611;

*Worthington v. Hulton*, 13 L. T. Rep. N. S. 463; L.

Rep. 1 Q. B. 63;

*Nicoll v. Allen*, 31 L. J. 283, Q. B.

Sir *H. James* (A. G.) and *A. L. Smith*, for the respondents, were not called on to address the court.

JESSEL, M.R.—I have read twice over, and with great care, the judgment of Pollock, B. in this case, which was agreed to by the Lord Chief

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Justice. The first question we have to decide is an important one, no doubt, not only with reference to this case but to others. It depends on two very short sections of Acts of Parliament, which, I think, are by no means difficult to construe, and in the construction of which I entirely agree with the court below. The question is, is this Commissioners' Court a court of record? That depends entirely on the sections. By sect. 14, sub-sect. 5, of the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60) it is enacted that: "The court shall, for the purposes of the trial of a petition, have all the same powers and privileges which a judge may have on the trial of an election petition under the provisions of the Parliamentary Elections Act 1868." Then, when we turn to that Act (31 & 32 Vict. c. 125), we see, by sect. 29, "on the trial of an election petition under this Act the judge shall, subject to the provisions of this Act, have the same powers, jurisdiction, and authority, as a judge of one of the Superior Courts, and as a judge of assize and Nisi Prius, and the court held by him shall be a court of record." The court, being a court of record, it has all the same powers and privileges. That being so, this municipal election court, having all the privileges of a parliamentary court, which is a court of record, it appears to me to follow, as a matter of clear demonstration, that it is a court of record. We must determine that, therefore, adversely to the appellants. What have we here? We have plainly no record of any order that Mr. Dawson should pay the costs. Then it follows that the Commissioners of the Treasury are entitled to recover. But an issue was directed, and at the trial the jury found a very curious finding. The question was, "Was there a direction that those costs which are included in and are incident to the inquiry, namely, the remuneration, costs of the judge, officers, and so on, as well as the town clerk's costs, should be paid by Mr. Dawson?" The jury answered: "The jury is of opinion that there is sufficient evidence that Mr. Coleman did order the whole of the costs to be paid by Mr. Dawson and not by the borough of Maidenhead." If that verdict is unchallenged, it does appear to me that the jury were of opinion that Mr. Coleman did so order; but why it is put in that form I do not know. That is the substance of it. Then the only question is whether you can take oral evidence that the judge said something more than appears in his order. Of course the oral statement of a judge of a court of record does not make that oral statement an order; indeed, it was not contended before us that you could admit it as regards the entry of the judgment itself. But it was contended that there is power to amend a record in case of mistake. That view was confirmed upon a reference to some very ancient statutes. Then it was urged that the court ceases to exist when the barrister has made his certificate. I do not think that quite concludes the question. It may be that some court has the power to amend. I am by no means prepared to say that, looking to the words of some of the statutes, and looking to the powers conferred on the then Court of Common Pleas, and now transferred to the High Court, that the Common Pleas could not amend the record. It is not absolutely necessary to determine that, according to my opinion. The inclination of my opinion is that it could, considering the wording of the statute.

Considering the fact that the barrister ceases to be the court, which you must always take into consideration, and considering the necessity—not the absolute necessity, but the reasonable necessity—there is that somebody should have power to amend that record, which was erroneous, my impression is (I do not wish finally to decide it) that under the 21st section of the Act (35 & 36 Vict. c. 60) the Superior Court can do it. The words of sub-sect. 5 are these: "The Superior Court shall, subject to the provisions of this Act, have the same powers, jurisdiction, and authority with reference to an election petition and the proceedings thereon as it would have if the petition were an ordinary cause within its jurisdiction." Those words seem to me to be sufficient, without giving a final decision upon it. I should not like to do that without having it more fully argued. My present impression is, that in the case of a mistake under this Act the suitor is not without remedy. But whether that be so or not, whether he has a remedy by an application to the High Court, or whether he has any remedy at all, it is clear to me that he has no remedy in the Appeal Court; it must be an original application to amend. There is one consideration to show that, namely, that Mr. Dawson would be a necessary party. The application would be to amend the record by inserting an order that Mr. Dawson should pay the costs. The court would not entertain it in the absence of notice to Mr. Dawson, because it is simply an application to make as against him an order to pay costs which up to that time he is not liable to pay. Besides that, I think it could not be made to the court below for the same reason; it must be an independent application. So that we could not say the court below was wrong in refusing it, if it did refuse it, which I rather think it did. Again, you could not make an application here, if not made to the court below, because this is only a Court of Appeal. But assuming the utmost in favour of the appellants, that they did make the application to the court below and that it was refused, then I am not at all sure that it was not properly refused, having regard to what is stated by Pollock, B. After discussing the question, he says: "For us to amend by this mere expression of intention"—that is, the intention in the letter of Mr. Coleman, so often referred to—"which is contrary to the two written orders signed by the barrister, appears to me to be not only without precedent, but it goes to destroy the very wholesome rule that the judgments and proceedings of a court of record must be proved by the record. For a judge to amend his own record, or for a court before which that record comes to amend it so as to be in accordance with the judge's notes, is reasonable and intelligible; but for another court to amend a record upon the suggestion of a judge's intention, expressed by a mere letter, which is not written in consequence of an application made by one of the parties to the proceedings, nor indeed written to either of the parties, or those who represent them, would lead to consequences tending to produce the greatest uncertainty and inconvenience:" (8 Q. B. Div. 353, 354.) I must say I am not able to dissent from that. I cannot help saying that this case was tried in a manner which is open to observation. It is not now a question of a new trial before us. It is open to observation, and I do not feel satisfied to act

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merely on the verdict of the jury on a trial so conducted with reference to the amendment. If the application to me were an original application to amend, I should certainly put the case in course for further inquiry. The action was an action to try what were the words uttered by the commissioner in giving judgment on a day long since past. There were two records in "writing," to use the word in its popular and not in its technical sense, of what he then said, made at the time; one was by the Government shorthand writer, whose duty it was to take a shorthand note of what was said, and which shorthand note did not contain the words in question, although there were, as I understand, some words on which an argument was founded, but not these words; and then there was the registrar of the court whose duty it was to make an accurate note of the judge's decision, and draw up the order, and that record does not contain such words. That record was not only drawn up by the registrar, but it was signed by the judge; therefore it was an authentic (I am not now using the word in a technical sense) and contemporaneous reduction to writing, made by a person whose duty it was to record accurately what took place, and like the other one, which is a similar document, does not contain the words in question. Against that several people were called, who did not appear to have made any notes in writing at the time, and whose recollection was as to words uttered by a judge a very long time before, and who said he did use the words. There was also a letter of the judge himself, who was not called. That being the state of matters, I must say, without saying the jury were wrong, I do not see the evidence. The witnesses may have had some extraordinary reason for recollecting accurately, at that distance of time, without a note, exactly what took place. I cannot say. But I must say that, if an application had been made to me to amend a record on such materials, I should have put it in train for further inquiry. That disposes, I think, of the application to amend. Then, to put it shortly; if there is no application to amend, the borough is liable to pay. The Act of Parliament makes the treasurer liable to pay out of the borough fund or rate. The substance of it is that the borough has to pay, and the borough has to get the money, if it has not got it, by means of a rate. The next point argued before us was that there is no authority in this Act of Parliament to enable a borough to make a retrospective rate. I agree it has been decided that under the terms of the 92nd section of the Municipal Corporations Act (5 & 6 Will. 4, c. 76) there is no such authority, but the question is whether that authority is not implied and conferred by the terms of the Act of 1872 taken in connection with that? I think it is. When you see that the treasurer is to pay out of the fund, and therefore the rate must or may be retrospective—in fact it must be in order to make this payment—of course Parliament must be intended to enact everything necessary to obtain the payment. Therefore where you see that, in order to obtain payment you must make a retrospective rate, it comes to this, that Parliament has given all the necessary power, by implication if not by express words, to carry out the purpose of the legislation, which is to secure payment of these moneys; and therefore whether or not, as a general rule, a retrospective rate is made,

it could be made with a view to complying with the terms of this Act of Parliament. That being so, I think that contention fails. The next question argued by Mr. Matthews was as to the matter of discretion. That depended on two points; one was that the original order or certificate ought not to have been cancelled, and that the second order or certificate was not one which could be acted upon. But I understood him to use that as an additional argument as to the exercise of discretion, and not as an absolute argument, that in no case could a peremptory *mandamus* issue by reason of the cancellation. At any rate, either way, as the objection is not well founded it does not matter in what way the argument was used. First of all, I am not convinced that the Commissioners of the Treasury could not cancel the certificate or order. I do not see why they could not if they made a mistake. It is not a judgment. I do not see why they could not recall it upon reasonable grounds, or if a mistake were made. It appears to me therefore it is not right to say that the mere withdrawal of it prevented their issuing a fresh certificate for the same sum or for two sums. That I think gets rid of the whole question. But without that I do not think the mere altering of the date, supposing the first certificate were valid and could not be cancelled, to issue a second certificate at a subsequent date, repeating the same sum, would substantially affect the certificate; it might lead to a recital in the *mandamus* or the writ of the original certificate of the cancellation, and the issuing of the second, but if in substance it came to a certificate for that sum, the fact of the first being treated as cancelled does not appear to me to affect the necessary result; the money is still payable, and payment may be enforced by *mandamus*. I now come to the last point, that is, that the acts of the commissioners have been such as to disentitle them to the order in our judgment. The first act relied upon was delay, the effect of which has been that, after the issuing of the certificate, the town council made arrangements, and afterwards it was returned and a second certificate was made. It was contended that the ratepayers had changed to a considerable extent, and therefore it was said by reason of the delay of the commissioners, and by reason of their mistake in cancelling the first certificate and issuing a second, the people who would have to pay the rate under the second certificate would not be the same people who would have had to pay it under the first. Supposing that were so, is it a reason for refusing the *mandamus*? Nobody supposes, should think, that the ratepayers would remain unchanged. This is a mere accident. A good many months may have elapsed between the commencement of the inquiry and its final termination, and a good many of the ratepayers may have left the place, and a good many new people have come into the place, even if there was only one certificate issued. The ratepayers must take their chance of these things. You cannot administer abstract justice in this manner and weigh the liabilities of people with such nicety as these considerations involve. The substance of the matter is that the borough is to pay, and the inhabitants of the borough are, if necessary, to contribute to the borough rate. There is no real injustice in it, and there is no equity between the former and the present ratepayers that will throw

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this burthen necessarily and exclusively on the former to the prejudice of the latter. There is one matter, upon the discretion being subject to appeal, which I ought to say a word about. I think, whatever the law was before the passing of the Judicature Act, the discretion is now subject to appeal by reason of the words of the Act of 1873, s. 19, which says that every order of the High Court shall be subject to appeal, with certain exceptions. But I think also the rule applies that on the question of discretion it is not so easy to succeed on appeal as it is on the question of right. It has been said over and over again, on matters of discretion, that the court requires a very strong and plain case to over-rule the judge's decision in the court below. In this case I think the discretion was rightly and correctly exercised. But if I had any reasonable doubt on the matter I should have still held that the Court of Appeal is not to exercise a discretion in the same way as if it were a court of first instance, but it must be satisfied that the discretion was so wrongly exercised as to cause injustice. Certainly if my opinion had not been that the discretion had not been rightly exercised I should have been clearly of opinion that there was no such error as to alter it. Upon these grounds I think that the careful and elaborate judgment of Baron Pollock was right, and this appeal ought to be dismissed with costs.

BART, L.J.—In this case there is a *mandamus* issued to the treasurer and the borough of Maidenhead to repay to the Commissioners of Her Majesty's Treasury certain expenses which they have been obliged to pay in respect of an inquiry into a municipal election. In answer to that *mandamus* a reply was put in which raised certain issues. Those issues were tried before Mellor, J., and upon those issues the jury found as a fact that at the hearing before Mr. Coleman of the petition he did order that Mr. Dawson, one of the candidates, should pay the expenses which are now in question. No motion was made to set aside that finding of the jury on the ground that it was a verdict against the evidence; therefore, in my opinion, as at present advised, we are bound to take that to be a correct finding of the facts. But that is a finding on the issues taken on the return to a *mandamus*. Upon that finding it is argued on behalf of the defendants, the Corporation of Maidenhead, that, assuming Mr. Coleman could have ordered, at the hearing before him, that Mr. Dawson should pay the expenses, it follows as a necessary consequence that the borough is not bound to pay them at all. I will, for the purpose of this discussion, assume that the second proposition is true, that if it was an order that Mr. Dawson should pay the expenses thereupon the borough should not, although I do not think it necessary to decide that point on the present occasion. It may be hereafter contended that if there be an order that one of the candidates should pay these expenses and he should fail to do so, nevertheless the borough may be bound to pay them. It is not necessary to decide this. An objection is taken that notwithstanding the finding of the jury that Mr. Coleman did order Mr. Dawson to pay the expenses, yet it cannot be held as a matter of law that he did make such an order, because it was alleged that his court was a court of record, and therefore the judgment which he gave must be a judgment in writing,

and on the true construction of it there is no order that Mr. Dawson should pay the costs, and therefore the jury were not at liberty to find that by parol or otherwise the commissioner had made such an order. Against that it was urged that this court of the commissioner at the time he held it was not a court of record. In my opinion the court of the commissioner was a court of record. It appears to me that the 5th subsection of the 14th section of the Corrupt Practices (Municipal Elections) Act 1872 makes the court of the commissioner sent down to try cases under that Act the same kind of court as the court of a judge who is sent down under the Parliamentary Corrupt Practices Act to try a petition. I do not think it could be contended that the court of such a judge is not a court of record. Therefore it follows that the court held by Mr. Coleman was a court of record. It is a necessary consequence of its being a court of record that its judgment must be in writing, and of the nature of a record. It seems to me, therefore, notwithstanding the finding of the jury, that in fact Mr. Coleman did order; that is, in other words, he did so by parol, nevertheless his certificate or judgment can only be legally looked for in the record or writing which was the judgment of that court, and the jury cannot find contrary to the legal construction of that judgment. The only way in which the finding of the jury upon the fact can be admissible would be for the purpose of amending that written record, if it could be amended. But I am of opinion, for several reasons, that the record could not upon this trial be amended. In the first place that record of Mr. Coleman's was not merely a record drawn up by an officer of the court, it was a record signed by himself. It must be taken, therefore, that it was his own record; it seems to me clear that Mr. Coleman could not amend it. The moment that he has made that order, and has left the place, it seems to me that he is *functus officio*, he is no longer the court; he himself could not amend the record however the mistake had been made. I think it is equally clear that no order of his made later on directing these costs to be paid by Mr. Dawson could possibly avail. He was entirely *functus officio*. It may be that if that record had been brought before the High Court by way of appeal—if there is an appeal from such a decision—or upon motion, that record might have been treated as a record of the High Court, and they might have the power of amending it, and might, upon due evidence, have amended it. But it seems to me that in the present case where the trial is upon the issues taken on the return to a *mandamus* to enforce that judgment, neither the High Court nor this court can amend the record. These are proceedings taken upon the record to enforce the record, not proceedings in which that record is questioned or can be questioned. It seems to me that in these proceedings the judgment or record could not be amended by any court. If in these proceedings it might have been amended it might have been difficult to say, upon the finding of the jury, that the court ought not to have amended. If the High Court had had power to amend it and had declined, then I think we should have also power to amend it upon this appeal. If that record could not be amended, as I think it could not, and that record does not make Mr. Dawson the person to pay, then it is

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conceded that it is the borough which in the first instance ought to have been made to pay by the commissioner. But it is said that the borough cannot now by *mandamus* be made to pay the sum which the court is requested to order them to pay. I certainly understood it to be argued that it could not—for this reason, that there was a certificate given by the Commissioners of the Treasury, but that that certificate was cancelled, or was assumed to be cancelled, and the commissioners had no right to cancel that, and therefore had no right to give a second certificate. Then it was said that if they have no right to give a second certificate this *mandamus* could not be applied to the first certificate, because this *mandamus* when it was issued did not ask that the first certificate should be enforced, but asked that the second should. The reason why it was urged that the first certificate could not be cancelled was, it was said to be in the nature of an award or a judgment. If it was in the nature of an award, or a judgment, after that award or judgment was made it is obvious that the persons who made either could not cancel them. But it seems to me that the certificate is certainly not an award, and it seems to me that it was not a judgment; and I agree with Pollock, B. and with the Lord Chief Justice, and with Manisty, J., who does not dissent upon this part of the case, that the certificate is neither an award nor a judgment; it is a mere ministerial act. There is no judicial discretion exercised about the contents of the certificate; there is no judicial inquiry previously as to the contents of it. The certificate merely comes to this: such and such amounts, according to a scale allowed by certain judges, has been found to be due to the commissioner who held this court and to other officers; we have paid, or are liable to pay, the amount, and we certify to you that it is so-and-so. That does not appear to me to be a judicial act, or an award, or anything like the one or the other. I am of opinion therefore that the Commissioners of the Treasury are at liberty to cancel any such certificate and to issue another, and that they may do so whether the mistake as to the first certificate is one made by themselves or by anybody else. There is nothing to prevent them from issuing a second certificate. If that be true, the second certificate in this case was a valid certificate, and one which might be enforced by this *mandamus* if nothing else occurs to the contrary. But it was said that the High Court exercising the powers of the old court of Queen's Bench ought not to have issued this *mandamus* on account of injustice and hardship to certain persons if it did issue it, and for another reason, which was that it would order the authorities of the borough to do that which was an illegal thing for them to do. I will take that which I have just stated second first. It was said that this *mandamus* orders them to make a rate, that if that rate is made it is a retrospective rate, and a retrospective rate is illegal. Now a good deal was said about the doctrine of making a retrospective rate. I apprehend that, as a general rule, both with regard to parishes and with regard to corporations, they cannot make what is called a retrospective rate. But the question here is whether for the purpose of this *mandamus* the Corrupt Practices (Municipal Elections) Act itself does not give the corporation a power and impose upon them the duty, if they cannot otherwise pay

these expenses, to make a rate in order to pay them, and to make a retrospective rate. It seems to me that sect. 22 at the end of it does direct that they should pay out of a rate, and it seems to me it is a true proposition that wherever the Legislature says a payment is to be made out of a rate, and where it is a necessary implication that that rate must be retrospective, then the order to pay out of the rate carries with it an order to make the rate and to make a retrospective rate. It seems to me the expenses of such an inquiry as this cannot be ascertained, and it cannot be known whether there should be any payment out of a rate at all, until the inquiry is closed; and that therefore when the Legislature says that that is to be paid out of the rate or out of the borough fund, it seems to me that, if there is no borough fund, and no rate existing at the time, it follows, as a necessary consequence, the Legislature intended that a rate should be made either to fill up the borough fund, or for the purpose of paying these expenses. Therefore a power to make a retrospective rate is given by this very statute. Then with regard to the discretion, it was only put upon the ground of hardship which had occurred by the delay of the commissioners in asking for this *mandamus*. It seems to me that there was no unreasonable delay in sending in the second certificate. The truth is that the necessity of cancelling the first certificate and of issuing the second certificate were the results of the mistake made by Mr. Coleman, the commissioner, in drawing up his record in a way which, if he intended to make Mr. Dawson pay the costs, did not carry out his intention. It was by the natural result of his mistake. Then it does not seem to me that there was any unreasonable delay in discovering that mistake and issuing the second certificate. The delay after that was the delay of the corporation itself. Of course, after the commissioners had sent in their second certificate, they did not at once ask for a *mandamus*. They left a certain time to the authorities in the borough to find the money, either by making a rate or otherwise. It does not seem to me there had been an unreasonable delay in asking for the *mandamus*. If there had been an unreasonable delay in asking for the *mandamus*—if, for instance, they had held over the application for four or five years—I should have thought the High Court in their discretion would have certainly said (and they would have had a discretion) "after so long a delay as this we will not assist you by a *mandamus*." Then it was said that, whatever the court had done, there was no appeal upon this matter of discretion of granting a *mandamus*, to this court. I must repeat my view, although it does not, I know, accord with the views or perhaps with the wishes, of many judges, that the Legislature meant in the Judicature Act to give an appeal against orders of the High Court, even though those orders are discretionary orders. Therefore, if there had been an undue delay in asking for this *mandamus*, and the court had exercised, in our opinion, a wrong discretion, we should have been bound to entertain that appeal. But as I think there was no error at all in the way in which the court did exercise it, that does not come before us. I am of opinion that the judgment of all the judges of the Divisional Court, in all points in which they agree, was right, and that on the only point in which Manisty, J. differed from the Lord Chief Justice and Pollock,

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B., the Lord Chief Justice and Pollock, B. took the right view.

COTTON, L.J.—I am of the same opinion. After the judgments which have been delivered I shall only deal shortly with one or two points raised in this case. The main point here is that there has been an order made by the election judge, which leaves these costs to be paid by the respondent. I will assume that this is a sufficient defence, and also assume, to which I agree, that the court was a court of record, and therefore this order must be in writing, and his order does not order these costs to be paid. That is undoubted. But I will only add a word on the question as to whether this court can amend the order. Now that is the question which arises here. But I must say that on the facts before us I should not be inclined, if one had the power, to make any order for amending the written order or making a new order of the election judge. This differs essentially from the case which was so much relied upon of *Williams v. Lord Bagot* (4 D. & R. 315). In that case the court had the order of the inferior court up before it, as before a court of error, for the purpose of deciding whether there was error in that order. Of course, when the order was before the court for that purpose, the court must have the power to see that the court below had in fact returned to it the order which in fact it conveyed. Therefore it was right, when it was suggested that the order before it was not the order in fact made by the court, that the court should send it back for the purpose of directing the judge of the court below to send to them what in fact was his order. Here the order of the election judge does not come before this court in any way except incidentally; it is a mere matter of evidence adduced on behalf of the appellants for the purpose of showing that the court ought not to decide that they are liable under the Act of Parliament, because they say, not that in this proceeding something has been done which makes that order wrong, but that as a matter of evidence the judge has ordered somebody else to pay these expenses, and therefore it only comes before the court incidentally. I am of opinion that in such a proceeding neither the court below nor this court could make any alteration in the order, even if the facts authorised an alteration to be made upon an application properly made to a proper tribunal. Then it is said the Treasury cancelled the first certificate, but that was merely a certificate of the fact that the Treasury had paid the expenses mentioned in the certificate, and considered them proper expenses; it is not a judicial order, but only a certificate of the court of the amount which has been ascertained, and the liability of the corporation to pay which is derived, not from the certificate but from the statute, and it is a demand for repayment. The Treasury had power to withdraw the first certificate and to issue the second certificate. There is then a legal liability on the corporation of the borough; but it is urged that the court will exercise a discretion before it issues a *mandamus*. That is so; but the order made directing the *mandamus* to issue is an order, which by the Judicature Act is made subject to appeal. No doubt this court would be slow to interfere with the discretion of the court below, but that discretion must be exercised on regular rules; the discretion to be exercised is that kind of discretion which the Court of Chancery would

exercise, not on interlocutory proceedings, but at the hearing of the cause, when it had to decide whether the plaintiff was entitled to an injunction or any other extraordinary relief, that is, relief given only on equitable principles and by the old Court of Chancery. This is really a proceeding for the purpose of giving a person relief to which it has been ascertained that he is entitled, and yet we are asked to deprive him of his rights. It would require a very strong case to cause us to say that the plaintiffs should not have what on the ascertained facts appear to be their rights. In *Nicoll v. Allen* (31 L. J. 283, Q. B.) the plaintiff recovered damages on the ground that the bridge was out of repair, and the question was whether he ought to have any additional or extraordinary relief. Here, on the contrary, it is not a question whether a *mandamus* should be granted for the purpose of giving something other than damages, but a proceeding to compel the defendants to put themselves in funds for the purpose of paying damages. It is not a proceeding to give something different from damages, such as specific performance or an injunction; strong reasons would therefore be required to prevent the court from granting a *mandamus*. The only reason urged here is delay. As to this point I agree that there is not sufficient in the conduct on the part of the Commissioners of the Treasury to enable us to say, as a matter of discretion, that we ought to abstain from granting a *mandamus*.

*Judgment affirmed.*

Solicitors for the prosecution, *Hare and Fell*.

Solicitor for the defendants, *G. J. Mander*, for *B. A. Ward*, Maidenhead.

#### SITTINGS AT LINCOLN'S INN.

*Thursday, July 6, 1882.*

(Before JESSEL, M.R., Sir J. HANNEN, and LINDLEY, L.J.)

THE GUARDIANS OF THE MANSFIELD UNION v. WRIGHT. (a)

*Rate collector's bond—Default of collector—Loss to the parish—Negligence of overseers.*

*The sureties to a rate collector's bond are liable to refund to the guardians of the union the amount of any loss incurred by a parish in their union through the default of the collector to duly collect the rate; and the fact that there has been laches on the part of the overseers of the parish does not affect the right of the guardians to recover.*

THE plaintiffs, the guardians of the poor of the Mansfield Union, appointed J. B. Carter in March 1876 to be collector of the poor rates for the parish of South Normanton in the county of Derby.

J. B. Carter, and the defendant J. Wright, and V. H. Radford, by a bond dated the 16th May 1876, became jointly and severally bound to the plaintiffs in the sum of 100*l*. The condition of the bond was, that J. B. Carter should faithfully and honestly perform the duties of collector of rates, and diligently collect the rates, and duly, punctually and correctly account for them, and from time to time pay to the person or persons entitled to receive the same all moneys collected and received by him.

The plaintiffs alleged that J. B. Carter had

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.



appropriated to his own use moneys received by virtue of his office between April 1877 and Jan. 1878 to the amount of not less than 84*l.* 9*s.* 6*d.*, that he had not diligently collected the rates, that he had absconded in Feb. 1879, and that, in consequence of his failure, rates to the amount of at least 15*l.* 10*s.* 6*d.*, which he could have collected, had not been received by the plaintiffs, and they could not recover the same. They claimed 100*l.*

The defendant alleged in his statement of defence that, with regard to the 15*l.* 10*s.* 6*d.*, if damage had been sustained, it was damage which might and would have been prevented had the plaintiffs used ordinary diligence in collecting the rates or appointing another person to collect the same within a reasonable time after J. B. Carter's default. The defendant further alleged that the plaintiffs were guilty of laches in allowing the rates to remain uncollected and the duties of the office of collector to remain unperformed, and that he was thereby discharged from his suretyship in respect of such alleged damage.

The defendant paid 84*l.* 9*s.* 6*d.* into court.

At the trial of the action at Nottingham, on the 26th July 1881, it was ordered by the court, with the consent of the parties, that the jury should be discharged, and that the issues of fact should be referred to Edmund Lumley, Esq., barrister-at-law, to take evidence and report thereon to the court.

The material portions of the report made by Mr. Lumley were as follows :

I have heard the evidence of the witnesses called on behalf of both parties and examined the rate-books, receipts, correspondence, and other documents put in evidence, and I find, with regard to the issues of fact raised by the pleadings, as follows :

Certain rates for the relief of the poor were made for the parish of South Normanton in the plaintiffs' union for which the said John Bell Carter was collector, which rates it was his duty to collect, viz. : A rate made in April 1877, a rate made in June 1877, a rate made in November 1877, and a rate made in February 1878. The rate-books were made out and kept by John Bell Carter.

It appeared from the summary at the end of the rate-book for April 1877, that the sum of 15*l.* 8*s.* 5*d.*, recoverable arrears of that rate, remained uncollected at the time of balancing that book; from the summary for June 1877, that the sum of 124*l.* 4*s.* 1*d.*, recoverable arrears of that rate and the April rate, remained uncollected; from the summary for November 1877, that the sum of 137*l.* 9*s.* 9*d.*, recoverable arrears of that rate and the previous rates remained uncollected; and it appeared from the summary for February 1878 that the sum of 201*l.* 7*s.* 9*d.*, recoverable arrears of that and the previous rates, remained uncollected at the time of balancing that book.

After investigating in detail each of the items specified in the particulars with regard to which evidence was laid before me, I find that John Bell Carter did not diligently collect the said rates, more especially the rates made in June and November 1877 and February 1878; and I find that, by reason of his not collecting the rates diligently, damage was occasioned to the extent of at least 15*l.* 10*s.* 6*d.* (in addition to the sum of 84*l.* 9*s.* 6*d.*), as alleged in the statement of claim, and that, in consequence of such neglect of John Bell Carter diligently to collect the rates, poor rates amounting to not less than the said sum of 15*l.* 10*s.* 6*d.*, which John Bell Carter ought to have collected, have not been received and cannot be recovered, and so are lost to the parish.

No evidence was given before me to show that the attention of the plaintiffs was called to the neglect of the collector diligently to collect the rates prior to a communication addressed to them by the Local Government Board, dated the 30th Aug. 1878, calling their attention to the fact that the auditor had, after the audit for the half-year ending Lady-day 1878 of the accounts of the said collector, reported unfavourably with regard to the state of his accounts and his mode of performing his

duties. John Bell Carter resigned his office of collector in September 1878, and left Normanton in or about February 1879. A new collector was appointed in October 1878. The overseers, who were called as witnesses, admitted and I find as a fact that, previously to the resignation of the collector, they left the collection of the rates to the collector and did not see from time to time that he got in the arrears of the same.

After the resignation of the collector, the overseers of the parish repeatedly applied to him for the delivery to them of his books. They did not obtain the books from him till the end of December 1878, when he was ordered to deliver up the same by the auditor at the Christmas audit 1878. I find that, previously to that date, the overseers were not aware that there had been embezzlement on his part, though they knew at or about the time of his resignation that he had not kept his books satisfactorily to the auditor.

In January 1879 the overseers began to go into the accounts of the late collector and to make inquiries in the parish for the purpose of ascertaining what sums had been collected and of collecting the arrears of the rates, one of the overseers personally going round the parish for that purpose. They took several months in doing this, and it was urged before me that they or the guardians ought to have employed assistance for the purpose.

So far as it is a question for me, I find, with regard to the steps taken by the overseers after they received the books from the collector, that all reasonable diligence was used by the overseers to collect the arrears, and that, considering the circumstances of difficulty arising from the dishonesty of the collector and the irregularity of his accounts and that the arrears were of long standing and consisted of a great number of small amounts due from a fluctuating population of poor persons, as much of the arrears of the said rates was collected as was then reasonably practicable.

I have stated the facts specifically, but if and so far as they raise questions of fact for me, and so far as any other ground for the allegation against the plaintiffs of negligence or laches conducing to the damage is concerned, I find that there was not any negligence or laches on the part of the plaintiffs, in respect of the collection of the said rates or otherwise, as alleged in the statement of defence.

E. LUMLEY.

On Aug. 6, 1881, the case came before Watkin Williams, J., on further consideration.

*Alexander Glen*, for the plaintiffs, referred to

*Dawson v. Lawes*, 22 L. T. Rep. O. S. 254; 23 L. J. 434, Ch.;

*MacTaggart v. Watson*, 10 Bli. 618, 625; 3 Cl. & F. 525.

*Morton Daniel*, for the defendant, referred to

8 & 9 Vict. c. 101, s. 32;

*Wulff v. Jay*, 27 L. T. Rep. N. S. 118; L. Rep. 7 Q. B. 756;

*Polak v. Everett*, 34 L. T. Rep. N. S. 128; 1 Q. B. Div. 669, 675.

WATKIN WILLIAMS, J.—If Mr. Daniel can show that this report is not satisfactory and that Mr. Lumley ought to add a postscript containing the evidence, I might send it back to him; otherwise he ought to have moved to upset it, and cannot question it now. I decline to hear what was proved before Mr. Lumley, and I will not review his report in any way. This was an action upon a bond for 100*l.* given by John Bell Carter, John Wright, and Vaughan Hobbs Radford, to the guardians of the poor of the Mansfield union for the faithful and diligent execution of his duties by Carter as a rate collector. The statement of claim alleges that the conditions of the bond had been broken. That being the case, it is only the actual damage which was sustained that can be recovered. That damage resulted from the following alleged breaches, viz., embezzlement by Carter of 84*l.* and a neglect on his part to collect rates, which made up the balance to 100*l.*; 84*l.* odd has been paid into court, and the only question is as to the remainder.



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Mr. Daniel makes two answers to the claim. The first is, that there was no breach of the conditions of the bond at all, because it was the duty of the collector to observe the orders and obey the directions of the guardians and overseers in collecting the rates; that the overseers left the collection to him, and he therefore neglected no orders, and there was therefore no breach. But, in my opinion, he was a public officer, whose duty it was to collect the rates; and that branch of the conditions of the bond was undoubtedly broken. The second answer made is that, assuming there was a breach of the conditions, no damages can be recovered except those which were occasioned by the default of the collector. That is perfectly clear, and if it is made out that the collector could not have collected the rates and that no real loss occurred, then no damages could have been recovered. From the nature of the case and the necessity of examining the rate collection accounts in detail, it was impracticable to try the case before a jury, and the parties agreed to refer it to Mr. Lumley, who has great experience in these matters. He has reported that there was neglect on the part of the collector, but no neglect on the part of the guardians, and that the loss of the 15*l.* odd has not been occasioned by any omission on the part of the overseers since they discovered the default of the collector. I am therefore of opinion that the plaintiffs are entitled to recover, and the verdict and judgment must be entered for the plaintiffs.

The defendant appealed.

*Morton Daniel* for the appellant.—In omitting to see that the collector passed his accounts, the plaintiffs were guilty of laches. A surety has a right to expect that the guardians will act according to law and discharge their duties:

*Mactaggart v. Watson*, 10 Bli. 618, 625; 8 Cl. & F. 525.

Carter could only collect the rates by the directions of the guardians. [JESSEL, M.R.—If people made default in paying their rates, it was his duty to report them and get directions. The finding is against you that the rates were lost by his default.] The court has power to deal with the report and the whole matter under sect. 57 of the Judicature Act 1873 and Order XXXVI., r. 34. [JESSEL, M.R.—You are bound by sect. 58; the report is equivalent to the verdict of a jury.] By the order of reference the referee was to report on the evidence. [JESSEL, M.R.—No; "thereupon" refers to the issues of fact. Under sect. 56 a particular question may be referred for inquiry, but that is not what was done here. The issues of fact were referred. A report under sect. 56 requires confirmation, but one under sect. 58 can only be set aside, like a verdict, on the ground that it is against the weight of evidence.] The evidence did not justify the finding that there was a loss, and I ask for leave to move to set aside the report as being against the weight of evidence. [JESSEL, M.R.—On the present occasion you have to show that Williams, J. was wrong on the materials before him.] What then are the duties of the guardians and overseers? The collector has to collect and proceed against defaulters under their direction. The guardians only incurred damages resulting from their breaches, and such breaches could not have happened if the overseers had done their duty as prescribed by 7 & 8 Vict. c. 101, ss. 32, 33. The money was payable to the

overseers. The guardians sue as trustees for them, and have no greater rights than if the overseers themselves sued; the loss arose through their default, and the surety is discharged. There was actual embezzlement in all the cases in which strong expressions were used as to the liability of sureties, and the surety is responsible for the honesty of the collector. [JESSEL, M.R. read the observations of Lord Brongham in *Mactaggart v. Watson* (*ubi sup.*): "The error in the present case arises in supposing that any want of care on the party's side, in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the surety's equities or diminution of his rights at law."] Story's Equity Jurisprudence, s. 325, is in the defendant's favour. [JESSEL, M.R.—That is a defective statement taken from *Watts v. Shuttleworth* (7 H. & N. 353; 5 L. T. Rep. N. S. 58; 29 L. J. 229, Ex.), abridged so as to become inaccurate.] A surety is discharged where, in consequence of neglect on the creditor's part, a security, to the benefit of which a surety is entitled, is lost or is not properly perfected:

*Strange v. Fooks*, 4 Giff. 408, 412;

*Wulff v. Jay*, 27 L. T. Rep. N. S. 118; L. Rep. 7 Q. B. 756, 765.

[JESSEL, M.R.—The very point was decided against you by Lord Kingsdown in *Black v. Ottoman Bank* (6 L. T. Rep. N. S. 763; 8 Jur. N. S. 801); and *Oreighton v. Rankin* (7 Cl. & F. 325) is also in your way.] That again was a case of embezzlement. It was not a case on the present point.

*Alexander Glen*, for the plaintiffs, was not called upon.

JESSEL, M.R.—This is an appeal from a decision of Williams, J. in an action against a surety who had entered into a bond for the due discharge by a collector of rates of his duties as such collector. The collector embezzled some of the rates and neglected to collect others. The defendant did not dispute his liability as regarded the sums embezzled, but he insists that he is not liable as regards the sums omitted to be collected, for that the overseers ought to have looked more diligently into the proceedings of the collector. It was urged that the guardians are in fact suing on behalf of the overseers, to whom the sum recovered is payable, and are therefore not entitled to any greater rights than if it was the overseers who were suing. It was urged that the overseers could not sue because the amount lost was lost by their default. The referee states in his report facts very unfavourable to the defendant. He finds that the collector's default caused the loss of certain sums payable for rates. It is quite consistent with the report that, if the collector had applied for these rates, he would have received them, and even if there were reason to doubt the accuracy of the finding that they were lost owing to the neglect of the collector, which reason I do not see, we still should not be able to go behind the report. Then as to the right to sue, I cannot agree that the guardians are in the same position as the overseers. The people who lose if this money cannot be recovered are the other ratepayers, and the guardians sue on their behalf. The measure of damages is not what the obligees named in the bond lose, but what is lost to the rates. I am of opinion, therefore, that the appeal fails. I am further of opinion that it would have

failed even if the overseers had been the plaintiffs. The case made by the defendant is that, if the overseers had duly called on the collector to render his accounts, the loss would not have occurred. But mere negligence on the part of the obligee does not discharge a surety, and the mere omission to call on the collector to account cannot exonerate the defendant.

Sir JAMES HANNEN.—I shall confine myself to one point, viz., whether the guardians are affected by the alleged laches of the overseers. I am of opinion that they are not. The guardians appointed the collector, and then the bond was given to them. They are not answerable for the conduct of the overseers. The report is inconsistent with the view that they were guilty of any laches. It finds that the money was lost by the default of the collector, and that it was not shown that the guardians knew anything of his negligence till the 30th Aug., and his resignation took place in the next month. The report of the referee, which stands on the same footing as the verdict of a jury, is decisive against the defendant. Whether, if the overseers had been the plaintiffs, their laches would have been a defence, is a point which we have not, in my opinion, sufficient materials to decide. It is clear that mere passive negligence on the part of the obligee does not discharge a surety. It is shown, however, by *Watts v. Shuttleworth* (*ubi sup.*), that a neglect of duty by the employer may in some circumstances be set up as a defence, and if the action had been by the overseers and it was shown that they had neglected a duty imposed upon them by statute, I think the principle of that case would have applied. I rest my judgment on this, that the guardians are not responsible for the negligence of the overseers.

LINDLEY, J.—I am of the same opinion. The bond is given to the guardians, the action is by them, and no negligence is imputed to them. The collector was guilty of default in two respects; he embezzled some moneys, and allowed others to be lost by not collecting them. It is urged that the action is in substance an action by the guardians as trustees for the overseers. I think that is a mistake, and that there is no ground for saying that only nominal damages can be given because they suffer no individual loss. They sue, in my opinion, as trustees for the parish. I do not think that the facts are sufficiently before us to enable us to form an opinion how the case would stand if the overseers had been obligees and plaintiffs; nor is it necessary for the decision of the case that we should form any opinion on that point.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Hardisty and Rhodes*.  
Solicitors for the defendant, *Stevens and Co.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

Dec. 19, 1892, and Jan. 11, 1893.

(Before FIELD, J.)

BRADLAUGH v. ERSKINE. (a)

*Parliament—Power to exclude Member—Assault—Justification—Jurisdiction of Courts of Law.*

*To a claim for damages for an assault committed on plaintiff, a member of Parliament, whilst attempting to enter the House of Commons for the purpose of taking his seat, the defendant pleaded in justification thereof that the House had previously resolved and ordered that the defendant (one of its officers) should "remove the plaintiff from the House until he should engage not further to disturb the proceedings of the House," and that, acting in pursuance of such order, the defendant resisted and removed the plaintiff.*

*Held, on demurrer, that the plea was good.*

*Stockdale v. Hansard* (9 Ad. & E. 1) and *Burdett v. Abbot* (14 East 1) commented on.

THIS was a demurrer to a statement of defence. The action was brought by the plaintiff as member of Parliament for the town of Northampton against the Serjeant-at-Arms of the House of Commons for an assault committed by the defendant in forcibly preventing the plaintiff from entering the House of Commons.

The statement of claim alleged:

1. That on the 9th April 1881 the plaintiff was duly elected by the burgesses of the borough of Northampton one of their members in the Commons House of Parliament.

2. That the defendant, at the time of committing the grievances hereinafter mentioned, was the Serjeant-at-Arms of the said Commons House of Parliament.

3. That on the 3rd August 1881 the plaintiff went to the outer door of the said House quietly and peaceably for the purpose of entering the House and taking his seat as being a duly elected member entitled to sit in the said House.

4. The defendant was, together with a number of policemen and other persons, standing outside the said doors, and such policemen and other persons acted as hereinafter mentioned, in obedience to the orders and in accordance with the direction of the defendant.

5. The defendant thereupon, and the said policemen and other persons, assaulted and beat the plaintiff, whereby he became sick and ill and suffered great pain for a long time, and incurred great expense in medical and surgical attendance.

The statement of defence alleged:

1. That the defendant is the Deputy Serjeant-at-Arms and an officer of the House of Commons, and as such is bound to obey and carry out the lawful orders of the said House and of the Speaker of the said House, to act as deputy or assistant Serjeant-at-Arms of the said House, and in his absence to do all such things that the Serjeant-at-Arms might or could do.

2. On the 10th May 1881, while Parliament was in full Session, the House of Commons, having duly considered certain matters and things that had arisen and occurred before it, duly resolved and ordered in relation thereto, that the Serjeant-at-Arms do remove the said plaintiff from the said House until he shall engage not further to disturb the proceedings of the said House.

3. That afterwards, on the 3rd Aug. 1881, while Parliament was in full Session, and the House of Commons was sitting, the plaintiff not having engaged not further to disturb the proceedings of the said House, and while the order aforesaid was in full force and effect, attempted to force his way into the said House and assaulted the

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

[Q.B. Div.]

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defendant, then duly acting as the Deputy Serjeant-at-Arms, as aforesaid. Whereupon, for the purpose of preventing the plaintiff from forcing his way into the said House, and for the purpose of preventing noise and disturbance at the doors of the said House and within the precincts thereof, and of preventing the proceedings of the said House from being disturbed, the defendant, duly acting as Deputy Serjeant-at-Arms as aforesaid, together with other persons in the said House whom he called to his assistance, acting in obedience to the orders of the said House, and by virtue of the authority vested in the defendant as such Deputy Serjeant-at-Arms, and by the orders of the said House, and in order to carry out the said orders, resisted and removed the plaintiff as he lawfully might for the causes aforesaid.

4. That the House, having duly considered all the circumstances of the case and heard the report of the Speaker, thereupon resolved as follows: That this House approves the action of Mr. Speaker and of the officers of this House acting under his orders.

5. Save as aforesaid defendant denies each and all the paragraphs 3 and 4 of the statement of claim.

To this statement of defence the plaintiff demurred.

Plaintiff, in person, in support of the demurrer. —It must be taken to be admitted on the pleadings that I was, at the time of the happening of the assault alleged, a duly elected member of the House of Commons, and entitled to sit and entitled to every privilege lawfully enjoyable by a member of Parliament. It must also be taken to be admitted that the assault alleged was committed outside the House of Commons. It is not alleged in the statement of defence that the order of the 10th May 1881 was a lawful order of the House. It is for the court to examine into the nature of the order and into the matters immediately preceding the order, and upon which it is based, to see whether the order is such a one as the House of Commons has authority to make. It is necessary, therefore, that such matters should have been set out. The court is bound to inquire what was the matter considered before it gives any force to this order as a defence. In *Reg. v. Paty* (2 Raym. 1114) Holt, L.C.J. said that when a matter of privilege comes in question in Westminster Hall, the judges must determine it as they did in *Binyon's case*—that is to say, they must determine whether the House has the privilege it claims of making the order relied upon as a defence. I admit that the House has unlimited power to commit for any contempt it chooses to allege. If the House had said that I had committed contempt and had ordered imprisonment, I admit I should not have had the right to ask this court to go behind the consideration of the House. Paragraph 3 of the statement of defence says that while the said order was in force, the defendant did so-and-so, but it does not state what the order was. [FIELD, J.—It clearly must be the order of the 10th May.] Then that order does not authorise the defendant outside the House to assault me, admittedly a person duly elected to Parliament. The House had no right to prevent me from entering the House. The House might, when I am within its walls, order me into arrest, if it is displeased with me. It may also suspend me from the service of the House for a limited period for disobedience to the rules of Parliament. But it has no power to stop me entering the House. What is the effect of stopping me? The return is rendered nugatory and the franchise made useless. The duty of every member of Parliament, and the

right and privilege of every voter is thereby interfered with. Every person returned as a member of Parliament is bound to attend the House. In Coke's Institutes, vol. 4, chap. 1, it is laid down, "Every lord, spiritual and temporal, and every knight, citizen, and Burgess, shall upon summons come to Parliament, except he can reasonably and honestly excuse himself, or else he shall be amerced." The right and privilege of a member duly elected has two foundations: First, the right and privilege of the electors to be duly served in Parliament by a man whom they have duly returned; and, secondly, that of the person elected. [He cited passages from the judgment of Holt, C.J. in *Ashby v. White* (2 Lord Raym. at pp. 950-58.)] I consider that the court has the right and duty to inquire whether the House of Commons had any jurisdiction to make the order of the 10th May 1881. In *Burdett v. Abbott* (14 East, 1) which was an action of trespass by a member of Parliament against the Speaker of the House of Commons for forcibly entering into the plaintiff's house and arresting him there, and for imprisoning him in the Tower, the defendant justified himself on the ground that Parliament was sitting during the period of the trespasses complained of, and had resolved that a certain letter (which the plaintiff admitted having published) was libellous and scandalous, and reflected on the rights and privileges of the House of Commons, and that the plaintiff had thereby been guilty of a breach of the privileges of the House, the House had ordered that the plaintiff should be imprisoned for such conduct. Further, that the defendant, in pursuance of such resolution and order, and according to the laws and customs of Parliament, did commit, &c., the acts complained of. It was there expressly pleaded that the order was made according to the "laws and custom of Parliament." There is no such allegation here. [FIELD, J.—I think that is sufficiently shown by the insertion of the words "duly considered."] Next, what was the order of the 10th May? It was an order that was either executed on that day, or it was not. The order does not say that the defendant shall take steps to prevent the plaintiff from re-entering the House. The words of the order are, "Do remove the plaintiff from the House until he shall engage not further to disturb the proceedings of the House." But in order that I might have been able to give that undertaking, which I submit must have been given within the precincts of the House, I must have had the right to re-enter the House. I could not give the undertaking except from my place in the House. Again the order does not say the plaintiff shall give his undertaking to the defendant or the Serjeant-at-Arms. There is no process by which a member can give such an undertaking except by his speech in his place in the House. I contend that known or established laws cannot be superseded, suppressed, or altered by any resolution or order of the House of Commons, and that the House cannot by any resolution or order of themselves create any new privilege to themselves inconsistent with the known laws of the land. I rely upon *Stockdale v. Hansard* (9 Ad. & El. 1) which was an action against the Parliamentary printers for libel. It was held that it is no defence in law to an action for publishing a libel, that the defamatory matter is part of a document, which was, by order of the

House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by order of the House, printed and published by the defendant, and that the House of Commons heretofore resolved, declared, and adjudged, "that the power of publishing such of its reports, notes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament as the representative portion of it." On demurrer to a plea suggesting such a defence, it was held that a court of law is competent to determine whether or not the House of Commons had such privilege as would support the plea. There is no power on the part of the House to adjudicate upon what occurred outside the House, not being a matter of privilege. Further, if the House has power to adjudicate, they must adjudicate on those matters only within their privileges. There has been no such adjudication here. This not being a case of commitment for contempt, the court has the power to say, and ought to say, that the facts which warrant the order should be stated. The privilege claimed here is that of making the order of the 10th May, and the proof of it is grounded upon three principles, viz.—necessity, practice, and universal acquiescence—for these are the only matters which can be put forward to justify a claim of privilege on the part of the House. Per Lord Denman, C.J. and the other judges in *Stockdale v. Hansard* (sup.). Practice and universal acquiescence cannot be shown, for there are no authorities on an order of the kind under consideration. Then where was the necessity? [FIELD, J.—That the engagement had not been given by you. Is not that a necessity?] There could be no necessity for an assault when the House has the power of commitment, imprisonment, or expulsion. The reason stated in the pleadings is "that the proceedings should not be further disturbed." There is no allegation that they had been disturbed.

Sir H. James, A.G. (A. L. Smith with him) for the defendant.—The defendant alleges that as an officer of the House of Commons he is bound to obey the orders given to him personally, or to his superior officer, the Serjeant-at-Arms, whose deputy he is. Next that an order was made by the House on the 10th May. With all respect to the court, that order must be taken to be a valid and binding order, and one not open to review by any court of law. We contend that that which is alleged does not contain matter cognisable within the courts of law; that it is matter which has arisen within the House of Commons; that the House has dealt by its resolutions, and by its servants, with one of its own members, on a matter affecting the procedure of the House; and that the House of Commons has the right, as one of the Houses of Parliament, to deal as it will with all matters that may arise within its own walls in relation to its own procedure. That claim is not one of arbitrary power—it springs from the constitution of the Houses of Parliament as the highest court of the realm. It is no higher right than that which would be claimed by the judges of the land in dealing with what occurs in the courts over which they preside. So long as it appears that a judge is acting within the area of

his judicial power, he has the right to regulate the procedure of his court. There is no power on the part of any court, either in Westminster Hall or in this country, to enter into the question of whether the things of which the plaintiff complains have been rightly done, or whether there is any ground for the course that the House of Commons thought it right in its discretion to take. As to the order of the 10th May being without precedent, we contend that, inasmuch as it is not open to review by a court of law, it is sufficient to say that it has been made. But in answer to the plaintiff's contention that there must be precedent for what is done, there is ample precedent for it. In *Fry's case* (6 Com. Jour. 124) in 1648 the order was "that Mr. Fry do continue suspended from sitting in this House . . . till he shall give better satisfaction to this House." Orders similar in effect were made in *Love's case* (8 Com. Jour. 289) and *Gilbert's case* (10 Com. Jour. 146), in 1692. These orders being either of suspension or removal, were orders uncertain in their extent. As to the plaintiff's distinction that the House has authority to suspend a member for a period, after he has taken his seat, but not before, it is contended the point does not arise here, for the plaintiff is undoubtedly a member of the House. He can claim privilege against arrest; and he can sit on committees of the House, as Baron Rothschild did. If, however, he be not a member, he had no right to be where he was, and the House had the power to remove him. With regard to the three objections raised by the plaintiff, viz. (1) that the order of the 10th May should have been set out in terms; (2) the facts upon which that order was founded should have been stated; and (3) the pleading should further state that the resolution was arrived at according to the law and custom of Parliament, it is clear the only object there could be in setting out the views of the order and the facts which led to the making of it, is that they may be reviewed both by jury and by the judge. It is sufficient to say that Parliament has the right to determine what its own laws are; it is within the walls of Parliament, and by Parliament only, that the determination of what are its rights and what is its law can be arrived at. This is not a question of privilege of Parliament, but only one of its inherent authority, which rests in this respect upon the same ground as the authority of the courts themselves. That both the courts of law and the Houses of Parliament have the power to prevent disturbance cannot of course be doubted. This power, however, is not exercised by virtue of any privilege, but by virtue of the inherent authority which they both possess to maintain order. We rely on *Burdett v. Abbott* (14 East 1, in Cam. Scacc. 4 Taunt. 402, in House of Lords, 5 Dow. 165), in which the arrest on the Speaker's warrant of a person outside the House was held to be justified. In *Rees v. Hobhouse* (2 Chitty 207), the power of the House to commit for contempt was clearly recognised. The plaintiff admits that the House has power to commit for contempt; but surely the power to send to prison for contempt involved the lesser power of excluding a member from its walls. *Stockdale v. Hansard* (9 Ad. & El. 1) has no application here. That was an interference with the ordinary law of the country, inasmuch as it was a defence of the right to libel a person by

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virtue of an order of the House of Commons that the libel should be published. *Howard v. Gossett* (10 Q. B. 359 and 411) is in point, for it decided that the House had authority to arrest for contempt of its order strangers outside the precincts of the House, and that the House alone has the power to judge where the power is to be exercised. He cited also

*Entick v. Carrington*, 19 Howell St. Tr. 1047;  
*Brass Crosby's case*, 3 Wilson, 305;  
*Hawkins' Pleas of the Crown*, vol. 3;  
*Reg. v. Paty*, 2 Raym. 1.

The power to make this order does not depend upon the power to commit. In Colonial assemblies there was no power to commit for contempt; yet the power to exclude persons was held to exist:

*Doyle v. Falconer*, 4 Moore P.C. 203.

The plaintiff replied.

*Our. adv. vult.*

Jan. 11, 1883.—FIELD, J.—This is a case which was argued before me on demurrer. The plaintiff, who is one of the elected burgesses of the borough of Northampton, but who has not yet taken his seat, brings this action against the defendant, the Deputy Serjeant-at-Arms of the House of Commons, to recover damages for an assault committed upon him as he was, as he alleges, about to enter the House of Commons for the purpose of taking his seat. The defendant admits the allegation in question, but states that he did that which amounts to an assault upon the plaintiff, and seeks to justify the wrong by alleging that he did so under the authority of, and in obedience to, the House, which on the 10th May 1881 resolved and ordered the Serjeant-at-Arms, whose deputy the defendant is, to remove the plaintiff from the House until he should engage not further to disturb its proceedings. Then the defendant alleges that because the plaintiff had not given any such engagement, but was, nevertheless, attempting to force his way into the House, the defendant, as Deputy Serjeant-at-Arms, resisted and removed him. To these pleadings the plaintiff demurs, alleging that the defendant shows no justification for committing a personal wrong. In support of the demurrer the plaintiff contends, firstly, that although the House, when any breach of its privileges has been committed, has the undoubted power of arresting, of imprisoning, and of removing any of its members, or any stranger so offending, yet that that power does not extend so far as a member of the House is concerned to one who like the plaintiff, although duly elected and returned, has not taken his seat, and is in fact, as alleged, in the act of entering the House for the very purpose of completing his qualification for sitting and voting. The plaintiff did not cite any case or authority in support of this alleged distinction, but there are precedents the other way which show that an elected burgess, although he has not taken the oaths required by law, is still a member of the House, and that he may be called on to serve upon committees of the House. There is the case of Sir Joseph Jekyll in 1715, and the case of Baron Rothschild in 1858, in which the Baron not only served on a committee, but was also appointed a member of a committee to confer with the Upper House. As a member, too, he may remain in the House below the bar, although at that time strangers are ordered to withdraw. Another case

occurred in 1851, when Alderman Salomons, having refused to take the oath in the form then required by law, but having taken his seat within the bar, was ordered to withdraw. He, however, still remained sitting within the bar, whereupon the Speaker ordered the Serjeant-at-Arms to remove him. This was done by the officer of the House placing his hand on the Alderman and conducting him below the bar. This was an unquestionable assault in point of law, but no doubt was ever raised that the House has as full power over a member in that position as over a member who by taking the oath, has qualified himself to sit and vote. There is no foundation, therefore, either in authority or principle in support of this objection, and I pass therefore to the second, which is that in the statement of defence it was not alleged that the plaintiff had in fact committed any breach of the privileges of the House, or that the House had so adjudged. In answer to this objection, however, the Attorney-General cited and relied upon a long line of precedents and authorities to the effect that in the case of proceedings by the House of Commons for breach of its privileges, the House is the sole judge of what is, or is not, a breach of its privileges, and also of the mode of prevention or punishment—in fact that the House of Commons is a portion of the highest court of the realm, and is clothed with all those rights and privileges for the protection of its proceedings which belong to every court of record in the kingdom. Its one undoubted and clear privilege is that no other court has power to examine into the effects of the authority of the House, or to question the form in which that authority is exercised. In the case of *Burdett v. Abbott* Lord Ellenborough states the origin of, and the necessity for, this power in the clearest terms. He said: "The privilege which belongs to each House seems at all times to have been, and necessarily must be, inherent in it, independent of any precedent. It was necessary that they should have the most complete personal security to enable them freely to meet for the purpose of discharging their important functions, and also that they should have the right of self-protection. I do not mean merely against acts of individual wrong, for poor and impotent indeed would be the privileges of Parliament if they could not also protect themselves against injuries and affronts offered to the aggregate body which might prevent or impede the full and effectual exercise of their parliamentary functions. This is an essential right necessarily inherent in the supreme Legislature of the kingdom, and of course as necessarily inherent in the Parliament assembled in two Houses as in one. The right of self-protection implies, as a consequence, the right to use the necessary means to render such self-protection effectual. Independently, therefore, of any precedents or recognised practice on the subject, such a body must *a priori* be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions may be. On this ground it has been, I believe, very generally admitted in argument that the House of Commons must be and is authorised to remove any immediate obstructions to the due course of its proceedings." Lord Ellenborough then goes on to apply the question of power to

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the case then before him, which was the case of an alleged libel. I have cited the first part for the purpose of showing the foundation of the jurisdiction and practice. "It is," Lord Ellenborough points out, "the general admission that the House of Commons must be, and is authorised to remove any immediate obstructions to the due course of its own proceedings." Several other authorities were also cited in support of the Attorney-General's proposition. One of them, and one that bears strongly on the present case, is the well-known case of the five men of Aylesbury, reported in 2 Raym. 1105 under the title of *Reg. v. Paty and others*. The House of Lords, in the case of *Ashby v. White*, held that an action would lie in the case of a person entitled to vote at the election of a member against a returning officer who had improperly refused to allow him to do so. The action was one brought by five Aylesbury electors against the constable, complaining of the rejection of their votes. The House of Commons, however, resolved that in so doing they had committed a breach of the privileges of the House, and ordered them into custody. Upon this, a writ of *habeas corpus* having been obtained, the return was in the following words:—"By virtue of an order of the House of Commons of England in Parliament assembled, these are to require you forthwith, upon sight hereof, to receive into your custody the body of John Paty, who, it appears to the House of Commons, is guilty of commencing an action at law against the constable of Aylesbury for not allowing his vote, in breach of the known privileges of this House." Now to this return several objections were taken at different times, but it is not necessary for me to go into them; but among them was an objection to the general nature of the return—a similar objection, in point of fact, to that which Mr. Bradlaugh takes in the present case to these pleadings or to this order; and upon that Justice Gould, in giving judgment, said it was the first case of *habeas corpus* that ever brought up parties committed by the House of Commons. He said that "if this had been a return on a commitment by an inferior court it would have been nought, because it did not set out a sufficient cause of commitment; but this return being a return by the House of Commons, which is superior to this court, it is not reversible." He then went through certain objections, and the result was that the prisoner's discharge was refused. Now it is perfectly true, as was pointed out by Mr. Bradlaugh in arguing the question, that Holt, L.C.J. differed from the other judges in that case; but then, even in regard to that, it is to be observed that he made no question of the power of the House of Commons. He said (page 1115) they might commit any man for offering affront to a member, as a breach of privilege; and he drew a distinction between Lord Shaftesbury's case and this. He said: "The commitment was for a contempt done in the House, and the cause of commitment being expressed in the warrant excluded any intendment that it might be for any other cause than that expressed in the warrant." In the case of Lord Shaftesbury the warrant was, if I remember rightly, in the same general terms, if not more general, than those of the warrant in this case of Aylesbury. Now, in addition to that case, there is the

modern case of *Howard v. Gossett* (10 Q. B. 359), which is also strongly in favour of the same view. In that case the plaintiff had sued the Serjeant-at-Arms for arrest, and the Serjeant-at-Arms justified himself under the orders of the House and the warrant of the Speaker. Now, the resolution and the warrant are pleaded in that case at pages 361 and 362. They are in these words; the pleadings go on to say: "Thereupon, in order to compel the attendance of the plaintiff at the bar of the House, it was ordered and resolved by the House of Commons, in pursuance of, and in accordance with, the ancient usages and privileges of the House and the law and custom of Parliament, as follows: 'The plaintiff should be sent for and brought before the said House of Commons in the custody of the Serjeant-at-Arms attending the House of Commons, and that the Speaker of the House should issue his warrant accordingly.'" It is to be observed that there the order is in the most general of all possible terms—a simple order that the Serjeant-at-Arms is to bring the body of the plaintiff before the House. It then goes on to allege the warrant, and says: "It is issued in these terms: 'By his warrant in that behalf made in respect thereof, that the House of Commons had to-day ordered that the plaintiff should be sent for in the custody of the Serjeant-at-Arms attending the House does require and order the Serjeant-at-Arms attending the House to take into custody the body of the plaintiff.'" The warrant equally there, with the order and resolution, does not allege in any shape or way what contempt had been committed, or that the House had in terms so adjudged, but simply directed their officer to take the body of the subject of the order into his custody, and bring it before the House. Now when this case was argued in the Court of Queen's Bench, the learned judges of that court were of opinion that the warrant was a bad one, on various grounds—some on one ground, some on another—but the majority of them thought the plea was bad, and the plaintiff had judgment. However, in the Exchequer Chamber, that judgment was unanimously reversed, and the grounds of this reversal bear so strongly on the various points in this case, that I will go very shortly through the material parts of the judgment: "On the argument on demurrer the Court of Queen's Bench was divided, and the judgment was given by a majority for the plaintiff on the ground of a defect in the warrant; and the question we have to decide is whether the warrant is good or not. Firstly, it cannot be disputed that the House of Commons has by law the power to take into custody. That House, which forms the great inquest of the nation, has the power to institute a trial, and to order the attendance of witnesses; and secondly, if there be a charge of contempt and breach of privilege and an order for the person charged to attend and answer for wilful disobedience of that order has been made, the House has the undoubted power to cause the person charged to be taken into custody, and to be brought to the bar to answer the charge; and further"—and this is the important passage—"the House, and that alone is the proper judge, that these powers of commitment should be exercised. These are the only questions of privilege involved in this inquiry. The first proposition was rightly decided in the judgment of the court below, and



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was not disputed; and the second proposition was equally clear, for it belongs at least to every superior court, as in the present case it is the House of Commons, and that House alone, who is the proper judge, and has the power to commit where a disobedience has been committed, and to say whether the power of preventing or punishing should be exercised." Then, in going through certain objections to the warrant, the court proceeded to say: "The answer to the question as to the validity of the warrant depends on the preliminary point, on what principle the instrument is to be construed. Is it to be examined with the strictness with which we look at the warrants of a magistrate acting by statutory authority and out of the course of common law? Is it to be regarded as a mandate or writ of a superior court according to the course of common law? The judges who composed the majority of the Court of Queen's Bench seemed to think that the Speaker's warrant was to be strictly construed, and Lord Denman thinks that, as in the case of a writ of a justice of the peace, the same rules of construction should be applied. All the three judges held it to be void because it did not show sufficient authority on the face of it to justify the defendant in all he attempted to have done, although they did not agree in the nature of the defence. If this had been a case of a magistrate, acting under some statute which gave him special authority to take a man into custody, we should no doubt have agreed with the learned judges that a warrant in the same terms would be void. But the circumstances are not similar, for in cases of special authority given to justices of the peace acting out of the ordinary course of common law, the instruments by which they act, whether warrants to arrest or for commitment, show their authority on the face of them, by direct averment or reasonable intendment. Not so the processes of superior courts acting by authority of the common law. The rule has been well expressed in the case of *Peacock*, that the rule for jurisdiction is that nothing shall be intended to be without the jurisdiction of the superior court but that which specially appears to be so, and that nothing shall be intended to be within the jurisdiction of the inferior court but that which is expressly alleged. Therefore the majority of the court resolved that it was within their jurisdiction. In like manner in the present case it is to be presumed in respect of such writs, which are actually issued by superior courts, that they are duly issued, and in cases where they have jurisdiction, unless the contrary be clear on the face of them. Both writs from the Court of Common Pleas and writs issued from superior courts without any further allegation are sufficient protection for all officers and others in any way acting as ordered." A still more remarkable case, perhaps, bearing on the present question, was the well-known case of the Sheriff of Middlesex (11 Ad. & El. 288). In that case it appears in one of the numerous actions brought by Mr. Stockdale against Messrs. Hansard, he recovered 600*l.* by default. Thereupon the Sheriffs of Middlesex having levied on a writ of execution issued by the Court of Queen's Bench, the sheriffs were committed by the House for contempt for so doing. Although it appeared on affidavit that the act alleged to be contempt was really an act of obedience by the sheriff to the process of the court, still the court

refused to discharge. The grounds are stated very clearly in accordance with what is stated in *Howard v. Gossett*. In the judgment Lord Denman says: "The great objection remains behind that the facts which constitute the alleged contempt are not shown by the warrant. It may be admitted that the words containing this kind of statement have appeared in most of the former cases, indeed there are few in which they have not." Then he goes through the various cases, that of Sir F. Burdett and Mr. Hobhouse, and says, in *Lord Shaftesbury's case* the averment was general, and it was held unnecessary to set out the facts under which the contents arose." He then refers to *Reg. v. Pate* in which he says: "Three judges held that the court should not inquire into the ground of commitment." Holt, L.C.J. differed on that occasion, but did not question that the commitment should not be inquired into. Then the learned judge referred to *Burdett v. Abbott* and the result of it was that the court held, although they knew perfectly well that what the sheriff did was done in obedience to their own process, that, inasmuch as it appeared on the face of the warrant that it was a commitment for contempt, still it was not competent for the court to interfere with the process of execution by a superior court, and they, therefore, refused to discharge. Now, in the present case, it was said that the present warrant did contain sufficient averments even to supply what was supposed to be a defect, and for that purpose it is necessary to see exactly what it is that the pleadings allege on the matter. Now the plaintiff's statement of claim merely says that he was going quietly and peaceably to enter the House for the purpose of taking his seat, and the justification is in these words. The defendant says, "On the 10th May 1881, while Parliament was in full session, the House of Commons having duly considered certain matters and things which had arisen and occurred there, it was duly resolved and ordered in relation thereto that the Serjeant-at-Arms should remove the plaintiff from the said House until he should engage not further to disturb the proceedings of the said House." Now, applying the rules which I have just read in language far better than I can express it, as to the mode in which the proceedings and orders of this branch of the Legislature is to be construed and regarded, let us see what this order really does in its substance allege. It is perfectly clear that any objection on the ground of want of direct averment is without foundation at all. It has been over and over again decided in other cases. Therefore let us see what the pleadings allege: The defence alleges that at the time the order was made, Parliament was "in full session," and it then says that "the House having duly considered certain matters and things which had arisen and occurred" before it; and it is to be observed that the order and resolution was in reference to and in relation to those matters and things which the House was then discussing and considering. Therefore there is an averment there and an allegation on the very face of it, that what they had done was a matter relating to their own proceedings. It then proceeds to order "that the Serjeant-at-Arms should remove the plaintiff from the said House until he shall engage not further to disturb the proceedings of the House." Surely it is a fair inference to be drawn from the terms of the order that the House



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adjudged, and by the terms of the resolution did, in point of fact, adjudge that something had happened within its own walls in reference to the proceedings before itself, while engaged in the important deliberations and discussions which it is its duty to undertake on the part of the country; something which amounted in their judgment—I do not say whether it was a fact or not—to a disturbance of its proceedings, and rendered it necessary, in the language of Lord Ellenborough, that the plaintiff should be removed from the House. Now I am unable, having carefully considered the pleadings here in this case, and a great many more cases than those I have referred to, to distinguish the present case from them. I now proceed to consider what the plaintiff says in answer to the pleadings of the defendant. He does not deny the authority of the House, but relies principally on the case of *Stockdale v. Hansard* (9 Ad. & El.), and also on what many of the learned judges said in their judgment in that case. That was an action brought by Mr. Stockdale for libel against Mr. Hansard, who had by authority of the House published a libel on the plaintiff—a personal wrong, just as the assault in the present case, if unjustifiable, is a personal wrong. In justification the defendant set up the order of the House, and the Court of Queen's Bench held that this order was no justification. It is perfectly true, as Mr. Bradlaugh says, that that decision has never been reversed; it was never carried to a Court of Appeal. That is an observation which is often made with regard to what weight is to be given to a decision of a court of law; but a great deal of the weight of that observation is lost in the present case, because it is well known—I do not say it was the reason why it was not carried to the Court of Appeal—that the Legislature afterwards stepped in and gave by Act of Parliament that authority to the House of Commons which the House of Commons in that case claimed to have by reason of the lawful exercise of its own privileges. There is no doubt whatever that in the judgment of the very eminent and learned judges who decided the case in the Queen's Bench there are passages which go strongly to the fact that the mere existence of the order of the House is not of itself a justification for any of its officers committing a personal wrong; but then it must be recollected that that case was a very different one from the present. The present action appears on the face of the pleadings to be for an alleged breach of the privileges of the House committed within its walls and committed in the face of the House. I have always understood, and I have no authority to the contrary—though a great deal is reported of these cases—that it would be highly unjust and contrary to the great advantages which this country possesses, both in its legislature and its judicial system, that either Parliament or any other court, even the lowest court of record in the realm, should not have in itself the power not only of deciding effectively and immediately upon all questions whether its privileges had been broken or contempt had been committed, but also it should not be the sole and final judge of the contempt. Mr. Bradlaugh said, and I do not know whether truly or not, that it might be possible that that which the House had judged to be a contempt was merely a lawful act on his part of going into the House for the purpose of completing his qualification and

enabling him to perform the duties of his position in the House. He said how unjust it is and how wrong it will be in such a case, that it should be in the power of any man to declare that to be a contempt which, under these circumstances, would be merely a simple performance of his duty. That argument has received its answer in many of the cases to which I have referred. In the first place it is not to be presumed that any court, whether it be a High Court of Judicature or this court will do that which in itself is flagrantly wrong. There were three other objections of a minor character with which I can deal shortly. I do not think Mr. Bradlaugh relied very strongly upon them because unquestionably his main object was to endeavour to force the defendants to set out in greater particularity than they had done the matters and things in relation to which the order was made. It is evident, and he frankly confessed, that his desire was to force the defendant to state that which the House had adjudged to be a contempt. His object in doing so was plain; he wished to take the issue either in fact or law, as the case might be, and to have that issue determined either by the jury or the court. But the authorities cited show that it would be incompetent for either to decide such questions; and desirous as the plaintiff was to make the defendant make some such allegation, equally determined was the defendant to make no such allegation. The statement of defence was carefully prepared for the purpose of asserting the privileges of the House to conduct its proceedings in the way alleged in the order, and upon that issue he stood either to succeed or fail. The other objections which the plaintiff takes are shortly these. He first says that the order of the 10th May was no longer in force at the time when the Serjeant-at-Arms sought to put it into force. He says that the terms of the order were that the Serjeant-at-Arms do remove Mr. Bradlaugh, and that that order was satisfied by the removal as soon as it had taken place; but he does not refer to the fact that the order contains words which suspend it if he engages not further to disobey. No such engagement having been given, it seems perfectly clear that it was a subsisting order when it was acted upon, and therefore is free from the objection made to it. Another objection taken was this: Mr. Bradlaugh admits the power of the House to imprison or arrest, but he says they have no power to make such an order as this of the 10th May in this respect, that it was not an absolute order to conduct him to prison, or to bring his body in custody, nor was it an order to remove him from the House, but it made his removal or the having of him removed conditional on some engagement which he might enter into. The Attorney-General cited several cases to show that the House had made such conditional orders; but even without any such precedents, I am at a loss to see what possible objection there could be to it. If it is admitted that the House had power to send Mr. Bradlaugh to prison, surely it will be admitted that they had power to say to him, you must keep out of the House unless you promise not further to disturb the proceedings. So far from that being a ground of complaint, it seems to me a most moderate and judicious exercise of its power, which I assume to be necessary from the terms

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of the order and resolution. The last point is one which I hardly know how to dispose of without a smile. It is that the Deputy Serjeant-at-Arms was not justified in doing what he did, because Mr. Bradlaugh was outside the House at the time; it could only justify him in removing Mr. Bradlaugh from the House when he was in it. I know nothing of the facts of the case but from the pleadings, and the pleadings are that on this occasion, this order being still in force, Mr. Bradlaugh was forcing his way into the House at the door of it, and in order to prevent his forcing his way into the House the defendant lawfully resisted and removed him. I suppose the contention must be that the duty of the Serjeant-at-Arms was to allow Mr. Bradlaugh to come into the House and then take him and put him out. I confess that that is not my view of the matter. I think he acted very judiciously and legitimately in preventing what would have been a flagrant scandal. On the whole, therefore, I give judgment for the defendant with costs.

*Demurrer overruled.*

Solicitor for the defendant, *The Solicitor for the Treasury.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT LINCOLN'S INN.

*Thursday, July 13, 1882.*

(Before JESSEL, M.R., BRETT and COTTON, L.JJ.)

REG. v. WEIL. (a)

*Extradition—"Apprehension"—Detention of person already in custody—Extradition Act 1870, s. 8—Court of Appeal—Jurisdiction—Habeas Corpus—Judicature Act 1873, ss. 19, 47.*

*Where a fugitive criminal is arrested without a warrant, he may be detained in custody for an offence coming within the Act on a warrant for his apprehension under sect. 8 of the Extradition Act 1870, as the word "apprehension" in that section includes "detention."*

*Quere, whether, having regard to the provisions of the Judicature Acts, the Court of Appeal has jurisdiction to hear an appeal from the refusal of a divisional court to issue a writ of habeas corpus in such a case.*

JACOB WEIL on his arrival on the 25th May 1882 at Queenstown, Ireland, in the ship *Servia*, from the United States of America, was arrested before he landed by James Maguire, an Irish police constable, on a charge of having committed a forgery at New York. The arrest was made without any warrant, on the receipt of a telegram from George Kendal, a private inquiry agent in London, who had received a telegram from a private detective office in New York, stating that Weil had, on the 24th May, been indicted there for forgery.

The prisoner was then taken before Mr. Starkie, the resident magistrate at Queenstown, who, committed him for further examination by a warrant addressed to the sub-inspector of the Royal Irish Constabulary.

On the 28th May the prisoner was brought up for further examination, when the depositions of Kendal and Maguire were taken, and the magistrate reported the arrest to Sir William Harcourt, the Secretary of State for the Home Department.

On the 31st May the magistrate issued a warrant for the conveyance of the prisoner to London and taking him before the chief magistrate at Bow-street, to show cause why he should not be surrendered under the Extradition Act 1870 (33 & 34 Vict. c. 52).

On the 2nd June the prisoner was brought before Sir James Ingham, the chief magistrate at Bow-street, and was remanded till the 8th June. On that day he was again remanded till the 15th June, on which day he was brought up and again remanded till the 22nd. Sir James Ingham then reported the matter to the Home Secretary.

On the 19th June the Home Secretary issued an order addressed to the chief magistrate, stating that, in pursuance of the Extradition Acts of 1870 and 1873 a requisition had been made to him by Mr. J. R. Lowell, the diplomatic representative of the United States of America for the surrender of Weil, and requiring that magistrate to proceed in conformity with the provisions of those Acts.

On the 22nd June the prisoner was brought up at Bow-street for further examination, when it was objected by his counsel that he was illegally in custody, because he had been arrested without any information or complaint being made and without any warrant. Sir James Ingham expressed an opinion that the error (if any) was rectified by the order of the Home Secretary, and issued a warrant for the prisoner's apprehension. The warrant was read over to the prisoner whilst in the dock, and on the 29th June the magistrate issued a warrant for the prisoner's committal which was in the form in the second schedule to the Extradition Act 1870. This warrant was not addressed to any particular constable by name, but was in blank. Under it the prisoner was lodged in Clerkenwell prison.

Application was made on the 10th July on his behalf to the Queen's Bench Division for a writ of habeas corpus.

*Mead* appeared for the prisoner.

The Divisional Court (Lord Coleridge, C.J. and Field, J.) refused the application.

The prisoner appealed.

*W. G. Harrison, Q.C.* for the appellant.—There has been irregularity in the proceedings throughout. The prisoner was originally arrested without any warrant, which was illegal, and the magistrate did not issue a warrant for the "apprehension" of the prisoner within the meaning of sect. 8, sub-sect. 1 of the Extradition Act 1870 (a)

(a) Sect. 7 of the Extradition Act 1870 provides that:

A requisition for the surrender of a fugitive criminal of any foreign State, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign State. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time

(a) Reported by W. C. BISA, Esq. Barrister-at-Law

for the prisoner was then in custody. If a prisoner is illegally in custody he must be liberated before he can be properly apprehended under the statute. The evidence before the magistrate was not sufficient to justify him in issuing a warrant at all, even if he had issued a proper one. [BRETT, L.J.—Does an appeal lie in such a case? Is not this a criminal matter? JESSEL, M.R. referred to the Judicature Act 1873 s. 19, 47.] This is not a criminal matter. It resembles a case of prohibition. Appeals are allowed in these cases. The Court of Appeal discharged a prisoner in *Ex parte Dale* (43 L. T. Rep. N. S. 769; 6 Q. B. Div. 376), and it can issue a *habeas corpus*. [JESSEL, M.R.—If an appeal lies.] The appellant says that he is not a criminal. This is a question of the liberty of the subject. The proceedings are entirely collateral. [JESSEL, M.R.—We will reserve this point. I do not see how we can determine it till we know more about the case.] The requisition which the Home Secretary made was not in the form in the schedule to the Act. The magistrate was not required or authorised to issue a warrant for the apprehension of the prisoner, but only “to proceed in conformity with the provisions of the Acts.” The warrant of committal ought to have been addressed to some constable by name, in order to make it regular.

JESSEL, M.R.—There will be a serious question to be considered at some time, if the case should ever arise, whether, having regard to the provisions of the Judicature Acts, the court has jurisdiction to entertain an appeal from a divisional court in a case like the present. The question whether we have jurisdiction depends on a very careful consideration of various sections of the Acts, and it is far too serious and grave a matter for me to give an opinion upon it off-hand. If it were necessary to decide it, I should take time to consider it, and I should require to hear further argument. For the purpose of deciding the present case, I will assume that we have the jurisdiction. But it does not appear to me that the only objection to the prisoner's committal which can be fairly argued is of such weight as to justify us in interfering by granting a *habeas corpus*. The question turns upon the proper construction of

order a fugitive criminal accused or convicted of such offence to be discharged from custody.

Sect. 8 provides that:

A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in, or suspected of being in, the United Kingdom, may be issued:

(1.) By a police magistrate on receipt of the said order of the Secretary of State, and on such evidence as would, in his opinion, justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and

(2.) By a police magistrate, or any justice of the peace in any part of the United Kingdom, on such information or complaint and such evidence or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction.

Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to a Secretary of State, who may, if he think fit, order the warrant to be cancelled and the person who has been apprehended on the warrant to be discharged.

sect. 8 of the Act of 1870. In the present case the applicant was accused of committing forgery in the United States. He was arrested on board a steamer at Queenstown Harbour by an Irish police constable without any warrant, and was brought before a magistrate there, who then issued a warrant ordering his detention in prison; after further inquiry he issued another warrant for taking the prisoner before the chief magistrate at Bow-street, who then reported the arrest to the Secretary of State for the Home Department. The prisoner having been brought before Sir James Ingham, the chief magistrate, he directed the usual reference to the Secretary of State, and within the time limited by the Act he received a requisition from the Secretary of State requiring him to proceed in conformity with the Act. A warrant was then issued for the prisoner's apprehension; afterwards an order was made for his committal. All the proceedings were strictly regular, with this exception, that the prisoner was originally arrested without any warrant; and the whole objection is this, that the Irish magistrate's warrant was not a warrant for the “apprehension” of the prisoner within the meaning of sect. 8 of the Act. It appears to me that this would be to give too narrow a meaning to the word “apprehension.” The word, strictly construed, means the seizing or taking hold of the man, and literally and truly you can do that although he may be already in custody. It means the taking hold of him and detaining him with a view to his ultimate surrender. I am not inclined to limit the word “apprehension” to taking hold of a man who is not already in custody. It would follow that, if a man was already in lawful custody, you could not take him at all under the Act; the word “apprehension” would not apply. You would be compelled to restore him to liberty before you could apprehend him. It appears to me that this would not be a rational mode of construing the Act. I think, therefore, that the whole proceedings were regular. Another point suggested was this, that the evidence on which the Irish magistrate issued his warrant was not such as would have justified the issue of a warrant if the crime had been committed or the criminal convicted in Ireland. But all that the Act requires is that the evidence should be sufficient “in the opinion of the person issuing the warrant.” That is a matter of judicial discretion. There must be some evidence, but very little will do, for it is merely for the purpose of detaining the man. It is very different from the evidence which is required under sect. 10 (a) to justify the committal of the prisoner. There the evidence must be such as would, “according to the law of England, justify the committal for trial of the prisoner, if the crime of which he is accused had been committed in England.” There is nothing in the present case to show that the evidence was not sufficient in the opinion of the magistrate. Assuming, therefore, that we have

(a) Sect. 10 of the Extradition Act 1870 provides that: In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

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jurisdiction, I think that in the present case we ought not to interfere.

BRETT, L.J.—I desire to give no opinion on the very important question whether there is any jurisdiction in the court to consider whether, in a case of this kind, a writ of *habeas corpus* should or should not issue. What we are doing to-day must not be construed as a decision that we have any jurisdiction. But, assuming that we have jurisdiction, I think there is no ground for our exercising it in the present case. I doubt whether there has been any irregularity whatever in the proceedings. I doubt much whether a policeman is not justified in arresting a man, without a warrant, on reasonable grounds of suspicion of his having done that which would be a felony if committed in this country. But, assuming that the Irish policeman was wrong in making the arrest, the Irish magistrate issued a warrant that the prisoner should be detained in custody, and afterwards a second warrant that he should be taken before the chief magistrate at Bow-street. It seems to me that the Irish magistrate's first warrant was a warrant for the "apprehension" of the prisoner within the meaning of the Act. I cannot think that the Act ought to be construed in the way suggested. It is necessary that the magistrate should issue a warrant for the "apprehension" of the criminal, but, if he is already in custody, a warrant for his detention is a warrant for his "apprehension." And, if it was necessary to do more, Sir James Ingham issued a warrant for the detention of the prisoner, and it seems to me that it was a warrant for his "apprehension" within the meaning of the Act. If he was already wrongfully in custody, and there was proper evidence to justify his apprehension, Sir James Ingham was justified in issuing a warrant for his detention. It is said that the warrant of committal was wrong, because it was not addressed to any particular policeman by name; but in my opinion, when the warrant was handed to a particular policeman for execution, it was as good as if it had been addressed to him by name. I am inclined to think that there was no irregularity in the proceedings. If there was any, it was in the original arrest. But that is immaterial, when the subsequent proceedings have been right.

COTTON, L.J.—I desire in no way to intimate an opinion whether we have or have not jurisdiction to entertain an appeal in such a case as the present. But, assuming that we have jurisdiction, I think no ground has been shown for our interference. I give no opinion on the point whether the original arrest was lawful, or on the point whether, assuming that there was no lawful arrest before the prisoner was brought before Sir James Ingham, there was a valid apprehension. In my opinion the first warrant of the Irish magistrate was, within the meaning of the Act, a warrant for the apprehension of the prisoner. I am of opinion that in substance the requirements of the Act have been complied with.

*Appeal dismissed.*

Solicitor: W. D. Smyth.

## SITTINGS AT WESTMINSTER.

Nov. 30 and Dec. 21, 1882.

(Before BAGGALLAT, BRETT, and LINDLEY, L.JJ.)  
COOMBER (app.) v. THE JUSTICES OF BERKS  
(resps.). (a)

*Revenue—Income tax—Justices—Assize courts—Police stations—5 & 6 Vict. c. 35—16 & 17 Vict. c. 34; Schedules A. and B.*

*The justices of a county, in the due exercise of statutory powers, erected assize courts with the usual rooms and offices, and a county police station with the usual offices and accommodation for constables living there, and for prisoners. The courts and police stations were contained in one building, and were used for the administration of justice, and for police purposes.*

*Parts of the building were also used for holding county and committee meetings and various other occasional purposes, but no rent or profit was received or made in respect of the building or any part of it.*

*Held, that income tax was not payable in respect of the building under schedules A. or B. of the Income Tax Acts.*

*The judgment of Grove, J. and Huddleston, B. affirmed.*

THIS was an appeal from a judgment of Grove, J. and Huddleston, B., upon a case stated for the opinion of the Queen's Bench Division under part 3 of 37 & 38 Vict. c. 16. The justices of the county of Berks having been assessed, under schedule A. of the Income Tax Acts, in respect of certain buildings in the parish of St. Lawrence, Reading, described in the assessment as "assize courts, &c." of the alleged annual value of 300*l.*, appealed against the assessment to the commissioners appointed under the Income Tax Acts, who discharged the assessment subject to a case. Their Lordships were of opinion that the decision of the Income Tax Commissioners was right, and gave judgment in favour of the justices; from this judgment the present appeal was brought.

The material facts stated in the special case were as follows:—

1. There was no separation in the assessment, and no description of the different buildings included therein under the name of "assize courts, &c."

2. The assize courts and the county police station form one block of buildings within the same walls, and covered by the same roof. They were erected at the same time, though under different statutory powers.

3. The erection of the assize courts was considered and resolved upon by the county justices in 1858, and the present site, adjoining land the purchase of which had been already authorised for the erection of constabulary buildings, was then approved. The erection of the buildings was pursuant to public general statutes and not to any private Act.

4. The cost of building the courts was provided for by money borrowed upon mortgage of the county rates, under 7 Geo. 4, c. 63, s. 11, and the maintenance of the building is provided for out of the county rates. The erection took place, and the maintenance and control of the whole block are regulated (if at all) by public general statutes only.

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

5. The ground floor of the block consists of the following premises, namely: two assize courts opening out of a large hall and corridor, with retiring rooms for judges and juries, counsel's robing and consultation rooms, an office for the use of the county treasurer during the sittings of the assize and quarter sessions, offices for the clerks of indictments at assizes, and for other officers attending upon the judges, and also a room for the use of the clerk of the peace, as hereinafter mentioned. There are also on the ground floor offices for the chief constable of the county and the chief superintendent of police and one divisional officer of police. The first floor consists of rooms for the grand jury, for witnesses in waiting, for committees, and for the living and accommodation of the superintendent of police. Over the jury and counsel's robing rooms before mentioned there is a police dormitory with sleeping accommodation for six or seven men. In the basement, and below what has been described as the ground floor, there are cells for the reception of prisoners detained in custody by the police, or kept, owing to the distance from the gaol, immediately before and after trial at the courts. There are a refreshment room for the use of the public at the assizes and sessions, and washing-houses and store-rooms in connection with the refreshment room, &c. A police guard room is situated below the jury rooms and counsel's robing and consultation rooms. This is used by the resident constables for purposes of duty, and for cooking the food of prisoners during their detention. A married constable, as part of his duty, is required to reside in some of the rooms below the offices of the assize courts, having his sleeping accommodation on the second floor over the committee or grand jury rooms, with access by means of the staircase leading to those rooms. Some of the rooms originally designed for the offices of the clerk of the peace during the quarter sessions are occupied by another married constable who performs the duties of hall-keeper. The clerk of the peace has no use whatever, or at any time, of any rooms for his private purposes or business. The one room reserved for him is used by him only as a depository for the statutes and books required in connection with the courts, and for deposited railway plans, and other records in his possession as deputy custos rotulorum of the county. He has no vested interest in his room, and the use he makes of it is official only, and was not considered as of any benefit or value to him in adjusting his salary. He does not, in fact, use the room except at quarter sessions and when attending committee meetings of justices. There are a subterranean passage and several doorways and openings affording complete communication between various parts of the block, so that although the uses to which the parts are applied are distinct the structure is one and entire. Unmarried constables inhabit the dormitory before mentioned, subject to written regulations for discipline. The constables of the division are bound to live upon the premises, but are liable to be removed for duty to any other place, and they are at all hours liable to be called out on service.

6. The courts are used for holding the assizes, and for holding the county quarter sessions and the county divisional petty sessions, and also for the purposes of the County Court. The commissioners of public works pay 1*l.* per month for the lighting,

warming, and cleaning of the courts when used for County Court purposes, as provided by the statutes. Rooms in the building are used for meetings of committees of justices appointed by the Court of Quarter Sessions, and the police committee of justices meet in the chief constable's office.

7. The Recorder of Reading is allowed to hold the borough quarter sessions in one of the courts. The Income Tax Commissioners have occasionally sat in one of the committee rooms. The entrance hall is used as a polling station for the county elections, and the grand jury room for casting up votes by the returning officer. In 1864 the officers of the Berks Militia were allowed, upon special application to the Court of Quarter Sessions, to use the grand jury room as a mess-room and the basement as a kitchen during their month's training. An amateur musical society has occasionally practised in the grand jury room. The committee of management of the Berks Friendly Society has occasionally met in one of the committee rooms. Twice since the erection of the courts general county meetings called by the high sheriff have been held in the entrance hall. The undersheriff has occasionally held writs of inquiry in one of the courts. On no occasion has any payment or remuneration been received for the use of the building, or any part of it, and no profit whatever has been made out of it.

8. Since 1861 the entire charge of the whole block of buildings has been vested in the chief constable by a resolution of the Court of Quarter Sessions. The chief constable provides a hall-keeper to attend to the ventilating, lighting, and warming apparatus, &c., and the county allows one guinea a week to the credit of the police fund to be applied to those purposes at the discretion of the chief constable. The uses of the building mentioned in par. 7 have been by the allowance of the chief constable. On the two occasions when the hall was used for county meetings the chairman of the quarter sessions gave permission on his own responsibility. Except in the case of the militia the justices in quarter sessions have never authorised or sanctioned, nor been asked to authorise or sanction, the use of the buildings in the manner specified in par. 7.

9. The county police station was erected under 3 & 4 Vict. c. 88, s. 12, on lands purchased by the justices. The cost of the land, and of erecting the police station, was provided by money borrowed on mortgage of the police rate. The land on which the assize courts and also the central police station are built was conveyed, under 21 & 22 Vict. c. 92, in 1859, by the direction of quarter sessions (two justices having at a previous sessions been authorised to enter into a contract for its purchase) unto G. B. Morland (the then clerk of the peace) to have and to hold the same premises unto and to the use of the said G. B. Morland and his successors for ever, upon trust to permit a police station-house to be constructed on the premises at the expense of the justices, and otherwise to permit the premises to be used, appropriated, and disposed of, as the justices of the peace of the county should from time to time order.

11. The police station is used as the central police station for the county for the temporary confinement of persons taken into custody by the constables. It is necessary that two superintendents and a certain number of constables should be always on the spot available for duty; and

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COOMBER (app.) v. THE JUSTICES OF BERKS (resps.).

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sleeping and living accommodation is provided for them as hereinbefore mentioned. Their residence on the premises is part of their duty. No rent is paid by them for the accommodation given. Some unmarried constables, who are compelled as part of their duty to sleep at the station, are required to contribute one shilling each per week to cover the expense of gas and fuel for their cooking in the guard room, and for washing. The superintendent and married constables pay for their gas and coals themselves. No more or better accommodation is provided than is absolutely required for the proper maintenance of the constabulary, and no profit or pecuniary benefit is derived from the use of the building.

14. So far as it was a matter of fact for their determination, the commissioners found that neither the justices of the peace, nor the clerk of the peace, nor the members of the constabulary derived any benefit whatever from, nor had they any beneficial nor indeed any occupation of, the premises by reason of their use thereof, and that their use thereof was solely official, and for purposes of duty, and that (except the clerk of the peace as herein appears) they were not the owners, nor were any of them occupiers, thereof; that the buildings were not adapted for any purposes but those for which they were used, and no rent ever had been received for them or any part of them. No evidence was given before or tendered to the commissioners as to the alleged annual value of the assessed premises or any part thereof.

The questions for the opinion of the court were:

1. Whether the buildings were, or any and what part thereof was, properly assessable to income tax?

2. If the buildings were (or any part thereof was) properly assessable to income tax, were the justices of the county for the time being chargeable with income tax in respect of the said buildings under schedule A?

3. If the buildings were (or any part thereof was) properly assessable to income tax, and the justices were not chargeable with income tax in respect thereof, whether the clerk of the peace, or the inhabitants, or ratepayers of the county, or any other person or body of persons, was or were chargeable with such income tax?

4. If part only of the premises were chargeable, what part was chargeable, and who was to be charged, and in what capacity, and under what schedule, and how was the amount to be ascertained?

5. Whether the assessment could in law be maintained, or whether the commissioners' decision was, under the circumstances, lawful?

Upon the case thus stated, the learned judges in the Divisional Court affirmed the decision of the Commissioners of Income Tax, and gave judgment in favour of the respondents. The surveyor of taxes appealed.

Sir F. Herschell, S.G. and A. V. Dicey (Sir H. James, A.G., with them), for the appellant, cited

*Bent v. Roberts*, 3 Ex. Div. 66;

*Clark v. Dumfries Commissioners of Supply*, 7 So. Sess. Cas. 4th Series, 1157.

H. Matthews, Q.C. and Gorst, Q.C. (H. D. Greene with them), for the respondents, cited

*Mersey Docks and Harbour Board v. Cameron* 11 H. L. C. 443;

*Reg. v. St. Martin's, Leicester*, L. Rep. 2 Q. B. 493;

*Reg. v. Justices of Worcestershire*, 11 Ad. & E. 57;

*Reg. v. Overseers of Manchester*, 3 E. & B. 836;  
*Justices of Lancashire v. Overseers of Stretford*, 5 E. B. & E. 225;  
*Justices of Lancashire v. Chetham*, L. Rep. 3 Q. B. 14;  
*Corporation of Worcester v. Droitwich Assessment Committee*, 2 Ex. Div. 49.

A. V. Dicey in reply.

*Our. adv. vult.*

BAGGALLAY, L.J.—'This appeal has been brought under the following circumstances:—The trustees of the county of Berks, having been assessed, under schedule A. of the income tax assessment for the parish of St. Michael, Reading, for the year ending the 5th April 1879, in respect of certain buildings described in the assessment as "assize courts, &c.," of the alleged annual value of 300l., appealed against such assessment to the Commissioners for General Purposes under the Income Tax Acts. The buildings so described as "assize courts, &c." comprised the county assize courts and the county police station, which formed one block of buildings within the same walls and covered by the same roof. The commissioners, being of opinion that the assessment could not be lawfully maintained, discharged it, but, upon the application of the surveyor, stated a special case for the opinion of the Queen's Bench Division of the High Court of Justice. The special case came on to be heard in the Queen's Bench Division, on the 24th March 1882, when the decision of the commissioners was affirmed; from that decision the present appeal is brought. The material statements in the special case are set forth in the report of the proceedings in the Queen's Bench Division, and I deem it unnecessary to refer to them further than to note that it appears from such statements that the assize courts and police station were erected at the same time, though under different statutory powers; that the land on which they were built was conveyed in 1859, under 21 & 22 Vict. c. 92, to the then clerk of the peace, to hold to him and his successors for ever, upon trust for the public uses or purposes of the county; and that no profit or pecuniary benefit was derived from the use of the building. In the course of the arguments on the present appeal, the case of *The Mersey Docks and Harbour Board v. Cameron* (*ubi sup.*) has been much discussed, and the principles enunciated or recognised in the decision of that case have been quoted and relied upon by both sides. Fully recognising the important bearing which the principles so enunciated and recognised have upon the case now under consideration, I propose, in the first instance, to direct attention to the purport and effect of what was then decided. The Mersey Docks and Harbour Board were constituted trustees by Acts of Parliament, and were specially appointed to have the control of certain docks and other property vested in them as such trustees, in order to maintain those docks for the benefit of the shipping frequenting the port of Liverpool: and the question involved in the then appeal to the House of Lords was whether they were rateable to the relief of the poor as occupiers of the docks. The previous decisions upon the statute of Elizabeth had been numerous, and by no means consistent, and the object of the appeal was to obtain a definite declaration of the principles on which the statute was to be construed. In answer to certain questions put to the judges by the Lord Chancellor at the close of the arguments, Lord

Blackburn, then Blackburn, J., on behalf of five of the six judges who attended, traced, in great detail and with great care, the progress of the decisions on the question of the liability to contribute to the relief of the poor of those occupiers of valuable property, who in their own persons derived no benefit from such occupation, or, in other words, occupied in a merely fiduciary character; and, after pointing out that for a long series of years, when Lord Mansfield, Lord Kenyon, and Lord Tenterden presided in the Court of King's Bench, the current of authority was favourable to the exemption of such persons from liability to be rated, but that such decisions had been subsequently to some extent broken in upon, he referred to the case of the *Tyne Improvement Commissioners v. Chester*, decided in the Court of Queen's Bench in 1859, as indicating what in the opinion of himself and the other judges who concurred with him was the principle upon which alone exemption from liability, upon the ground that the occupation was by bare trustees, could be maintained; viz., that the property was occupied for the purposes of the Government of the country. In an earlier part of the answer Lord Blackburn had drawn attention to a long series of cases, which had established that no one was rateable in respect of the occupation of property which was occupied for the purposes of the government of the country, and that under that head were included the police and the administration of justice, and he had gone on to say that this rule applied not only to property occupied for such purposes by the servants of the great departments of State, such as the Post Office, the Horse Guards, and the Admiralty, in all of which cases the occupiers might strictly be called the servants of the Crown, but also to property occupied by local police, and to county buildings occupied for the assizes and for the judges' lodgings, as to which he made the following comment: "In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes of that kind which by the constitution of this country fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though perhaps not strictly servants of the Sovereign, might be considered in *consimili casu*. And the decisions are uniform that the exemption applies so far." The views thus expressed by Lord Blackburn were adopted by the Lord Chancellor and Lords Cranworth and Chelmsford, by whom the appeal was heard. In moving the judgment of the House, Lord Westbury (Lord Chancellor) said: "The only ground of exemption from the statute of Elizabeth is that which is furnished by the rule that the Sovereign is not bound by the statute, and that consequently where valuable property is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown." Upon this point Lord Cranworth expressed himself as follows: "The Crown not being named is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown, for the purposes of the Crown, are not liable to be

rated; and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown that this mistake has arisen. This principle exempts from rates not only Royal palaces, but also the offices of the Secretaries of State, the Horse Guards, Post Office, and many similar buildings. On the same ground police courts, county courts, and even county buildings occupied as lodgings at the assizes for the judges have been held exempt. These decisions have, however, all gone on the ground, more or less sound, that those buildings might all be treated as buildings occupied by servants of the Crown and for the Crown, extending in some instances the shield of the Crown to what might be more fitly described as the public government of the country." Applying the principles thus enunciated and recognised, the House of Lords held that the Mersey Dock trustees were liable to be rated to the relief of the poor in respect of their occupation of the docks on the ground that such occupation did not come within the only class of exemptions which the Act of Elizabeth, when properly construed, recognised. But upon an application of the same principles to the occupation of the Berkshire Assize Courts and police station, the occupiers must be held entitled to exemption from liability to be rated to the relief of the poor, upon the ground that the occupation is for public purposes which, to use the language of the Lord Chancellor, "are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown." That this view has been acted upon appears from the statement in the special case, that the block of buildings comprising the county assize courts and the county police station has not, nor has any part thereof, ever been assessed to the poor rates. If, then, the justices are to be regarded as the occupiers of the assize courts and police station—a view, however, to which they do not assent—and if, as such, they are not rateable to the poor rate in respect of such occupation, on the ground that their occupation is for the purposes of the government of the country, as explained in the Mersey Dock case, the question at once suggests itself, are they to be assessed in respect of the same premises to the income tax? This brings me to a consideration of the provisions of the Income Tax Acts. By the statute 42 & 43 Vict. c. 21, the income tax for the year commencing on the 6th April 1879, is charged upon the property, profits, and gains made taxable by the statute 16 & 17 Vict. c. 34, and by sect. 5 of the latter Act the duties are to be assessed and raised under the regulations and provisions of the statute 5 & 6 Vict. c. 35. Consequently we have to look to 16 & 17 Vict. c. 34, for the subject matters of the tax, and to 5 & 6 Vict. c. 35, for the mode in which it is to be assessed and raised. First, then, as to the subject matters of the charges to be made. For the purpose of classifying and distinguishing the several properties, profits, and gains for and in respect of which the duties are granted by 16 & 17 Vict. c. 34, the duties are classified under five several schedules, marked respectively, A., B., C., D., and E., of which schedules A. and B. are in the following terms: A. "For and in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom and to be charged for every twenty shillings of the annual value thereof."



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B. "For and in respect of the occupation of all such lands, tenements, hereditaments, and heritages as aforesaid, and to be charged for every twenty shillings of the annual value thereof." It is immaterial to our present purpose to refer to the other schedules, save only to note that they, as well as schedules A. and B., indicate that the subject-matters of charge are such as are productive of benefit to the persons who are to bear the charge. Mr. Justice Grove, in the course of his judgment in the Queen's Bench Division, is reported to have said, in reference to these schedules: "The language tends to show that the tax contemplated is a contribution to the revenue of the country in respect of annual profit or benefit;" and again, "the object the statute aims at is to make each person pay the tax according to the aid he may receive either from his property or from his labours in profession, trade, or employment." In the view so expressed I entirely concur. Let us now turn to 5 & 6 Vict. c. 35, and note the mode which is provided for assessing the property thus made chargeable. Sect. 60 provides that the duties on schedule A. are to be assessed and charged under certain rules which are arranged under separate consecutively numbered headings. The heading of No. 1 is in the following terms: "General rule for estimating lands, tenements, hereditaments, or heritages, mentioned in schedule A.;" and the rule is as follows: "The annual value of lands, tenements, hereditaments, or heritages charged under schedule A. shall be understood to be the rent by the year at which the same are let at rack rent, if the amount of such rent shall have been fixed by agreement commencing within the period of seven years preceding the 5th day of April next before the time of making the assessment, but if the same are not so let at rack rent, then at the rack rent at which the same are worth to be let by the year, which rule shall be construed to extend to all lands, tenements, hereditaments, or heritages capable of actual occupation of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value, except the properties mentioned in No. 2 and No. 3 of the schedule." It is immaterial to notice the exceptions. The heading of No. 9 is entitled: "Rules for charging the said duties under schedules A. and B." There are three rules under this heading, the first and second of which are as follows: First, "The said duties, except where other provisions are made, as aforesaid, for estimating particular properties, shall be estimated according to the general rule contained in schedule A., and shall be charged on and paid by the occupier for the time being, his executors, administrators, and assigns." Second, "Every person having the use of any lands or tenements shall be taken and considered for the purposes of this Act as the occupier of such lands or tenements." Sect. 70 of 5 & 6 Vict. c. 35, provides that the several duties shall be assessed on all lands, tenements, and hereditaments, whether occupied at the time of assessment or not, but that the assessment on houses shall be discharged for the period they are unoccupied. The counsel for the appellant insist that the portions of the several Income Tax Acts, to which I have referred, establish the liability of the justices to be assessed to the income tax in respect of their alleged occupation of the assize courts and police station, but I am unable to adopt this view. Even if it is to be assumed, as contended on

behalf of the appellant, that the premises in question were at the date of the assessment in the beneficial occupation of the justices, there is nothing in the Income Tax Acts to negative or even to throw a doubt upon the proposition which I have already advanced, that the purposes for which they were so occupied were public purposes of a kind which, according to the authorities cited by Lord Blackburn and recognised by the Lord Chancellor and Lord Cranworth in the *Mersey Dock* case, entitled them to exemption. The provision in rule No. 1., that it shall be construed as applying to lands or tenements "for whatever purpose occupied or enjoyed," has been relied upon; but, the Crown not being named in the Act, such a provision is inoperative as regards the Crown, or as regards the servants of the Crown strictly so called, or as against those occupiers for public purposes to whom the like benefit of exemption is accorded as is accorded to the servants of the Crown strictly so called. For the reasons which I have assigned I am of opinion that the appellant has failed to establish the liability of the justices to be charged with income tax in respect of the county assize court and the county police station, and that this appeal ought to be dismissed. But some propositions have been pressed upon us in argument, which I desire not to pass over. I assent to the proposition that, in order to establish a liability to the charge, it is not essential that there should be a beneficial ownership or occupation; but, if the ownership or occupation is not beneficial, the property must, in my opinion, be capable of being made a source of benefit to the owner or occupier. Again, as at present advised, I adopt the view which has been pressed upon us, on behalf of the appellant, that the justices might be regarded as the occupiers of the premises within the meaning of the statutes, as having the use of them, but I deem it unnecessary to express a positive opinion upon that point. I am, however, unable to assent to the proposition that there is any beneficial occupation or enjoyment by anyone. In my view of the case it can hardly be disputed that the justices have not any present beneficial occupation or enjoyment of the premises, and inasmuch as by virtue of 21 & 22 Vict. c. 92, and of the conveyance made thereunder in 1859, the assize courts and the police station were on the 6th April 1879, and have been ever since, vested in the clerk of the peace, upon trust for the public uses or purposes of the county, they have been and are incapable of any such beneficial ownership or occupation as would render the owner or occupiers liable to be charged in respect thereof. There is but one more suggestion, it can hardly be called an argument, on behalf of the appellant to which I will advert. It was urged before us, and it was apparently urged in the Divisional Court, that if the Legislature had desired to exempt assize courts and police stations from the operation of the Acts, they would have been included amongst the exemptions mentioned in or provided for by 5 & 6 Vict. c. 35. This suggestion may be met by another of at least equal materiality. If it was intended that justices should be charged in respect of this description of property, it is somewhat strange that, from 1842, when 5 & 6 Vict. c. 35 was passed, until 1879, no attempt was made to enforce or even to assert any such liability. The costs of the appeal must of course follow the event.

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BRETT, L.J.—During the argument I confess I was under the impression that, even if everything else was in favour of the Crown, it was impossible that this assessment could be upheld on the ground that the persons assessed are the justices. I was under the impression that Mr. Dicey had hardly urged that they could be, and that what he asked the court to determine was, not whether the justices could be properly assessed, but whether anybody could—whether this was, in fact, assessable property. The reason why I think it impossible to hold that the justices can be assessed under any view of the case is, that the justices are not a corporation, and that the justices are not an aggregation or association of persons at all unless they be assembled at quarter sessions. The justices have no property on which anything could be levied, and it can hardly be maintained, I should think, that this tax could be recovered from the justices individually and personally, either by action against them or by seizure of their goods. The justices, as justices, are persons not capable of having property belonging to them, therefore it seems to me that this assessment must, in any view of the case, fail, and that the judgment must be for the respondents. But Mr. Dicey asked us to give an opinion as to whether the clerk of the peace or some other person might not be legally assessed for this tax. I am of opinion that nobody can be assessed for this tax in respect of these buildings. It would be impossible now, after the long series of decisions and after the long lapse of years, for any court to hold that buildings in the position of these buildings could be assessed to the poor rate, and it would be impossible to say that it was not a good ground of exemption that they are considered in point of law to be in the nature of Crown property. That was not only determined by a long series of decisions before the case in the House of Lords, but it was enunciated without objection and stated to be the law in the opinion of Blackburn, J., given to the House of Lords, and which was, in terms, as to that point, adopted by the Lords who gave judgment in the case. Now it seems to me that that is the only application which the case cited in the House of Lords has to the present case. The only way in which it can be applicable at all to the present case is with regard to the enunciation of that part of the law in respect of such buildings. Now, if these buildings are to be considered as in the nature of Crown property within the Poor Law Acts, that is to say, that if they are to be exempted from rating to the poor rates on the ground that they are buildings in the nature of Crown property, is it possible to say, with regard to the present statute, that they are not buildings in the nature of Crown property? Is it possible by any logical mode of reasoning to say it is the law that, when you are considering the poor rate assessment, these buildings are to be considered as in the nature of Crown property, but that, when you are considering a land tax, you are to consider that they are not buildings in the nature of Crown property? I cannot follow such an argument so as to adopt it. Therefore I agree upon that ground, not that these are Crown property, but that they are in law considered as in the nature of Crown property, and that, therefore, they are not within but are exempt from the present statute by reason of that privilege. That of itself would be sufficient to decide the case, but

it seems to me that there are other and strong reasons why it ought to be held that this property is not assessable under these statutes. Mr. Dicey ingeniously asked us to divide the argument into two heads, and to consider the matter under one head without any reference to the other. He asked us to consider whether this was assessable property without at the same time considering who it was (if anybody) who could be assessed in respect of it. I admire the ingenuity, but I think I see through the meaning of it. It was in order to avoid the difficulty, which would certainly present itself, of determining who could possibly be assessable in respect of this property. Mr. Dicey asked us to consider whether this property was assessable, and to consider that without reference to anything else. The immediate result of so considering it was laid bare by the Solicitor-General in his proposition, which was, that every foot of land in this kingdom, according to his argument, whatever be the circumstances under which it exists, is assessable to this tax. Of course, if you consider the question without reference to anything else, every foot of land is assessable; but it seems to me, that in order to decide this case, we are bound to consider whether it is possible, under any circumstances which we are entitled to examine, to apply to the buildings in question the machinery of these statutes, and if it is not possible, under any circumstances which we are entitled to examine, to apply the machinery of these statutes, it seems to me that it follows that these buildings are not assessable. Now the statutes, as to the subject-matter, no doubt begin by settling that all lands are to be assessed. If you confine yourself to those words alone, it is true to say that every foot of land in the kingdom is assessable, but then you are immediately thrown upon this—in respect of what is it that all lands are to be assessed? In respect of the annual value thereof. Therefore, if there be any land in this kingdom existing physically—if that land be land which cannot under any circumstances have any annual value, it is obvious that the incidence of the tax fails at once. If the land has no annual value, and cannot have any, there is nothing on which the tax can be imposed. In my opinion these buildings, considered to be lands, are lands which cannot, under any circumstances which we have a right to consider, have any annual value whatever, they are struck with sterility by statute, they cannot by law have any annual value any more than if they were barren rock which could not under any circumstances possibly have any annual value. These buildings are erected under and by virtue of an Act of Parliament which declares that nobody shall legally ever enjoy any benefit from the use of them. It is true to say that some person might take into his possession these buildings and, by breaking the law and disregarding the statute, obtain an annual value from them. If such a person, so breaking the law, were to be in possession of these buildings he could not be heard to say: "Though I obtain a profit from these buildings, yet by an Act of Parliament I have no right to do so, and therefore I shall not pay the tax." He could not set up his own wrongful act, and, therefore, under those circumstances he might be assessable, but as long as these buildings are used legally, according to the Act of Parliament, not only cannot the justices have any benefit from the use of them,

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but nobody can; the statute is express that nobody can have any benefit from the use of them. It seems to me that we are not entitled until the fact actually arises, to consider that anybody will break the law; we must consider these buildings as they are under their legal disability: their legal disability is that nobody can receive any benefit from the use of them. It follows, as I say, that they are by law struck with sterility as to their annual value, and that, as long as the law is observed, they cannot in the hands of anybody have any annual value; if so, then there is nothing upon which the statute can act. But more than this it seems to me that, as long as these buildings are used legally, there cannot be any occupier of them. That there could be any occupier of them in the ordinary sense of the word "occupier," is hardly contended, but it is said that the word "occupier" in this statute is enlarged by the definition clause, which says that "anybody who has the use of them is an occupier." That is a phraseology in an Act of Parliament of so large and indefinite a nature that it immediately gives rise to a difficulty. Now, it cannot mean that anybody who has the use of them is a person who has the use of them within the meaning of that phrase in the Act of Parliament. It cannot mean that the judges who sit in the assize courts—though in one sense they have the use of the courts—are persons who have the use of them within the statute. It cannot be said the witnesses, the public, and the prisoners, who all use these courts, are the occupiers. It is absurd; it does not mean that. It cannot mean that a person who is there as a mere servant is a person who has the use of them, because, if that were true, why then in every house, though the master was living in the house, it might be said that each servant in the house had the use of it within the meaning of this statute, and was a person who could be assessed. The person who within the meaning of the statute is the person who has the use of the house is, though from some technical difficulty he may not be called an occupier, a person who has the same use of the house as the occupier of the house has. Now, the justices have no such use of these buildings; the judges have no such use of them; the inhabitants of the county, the public, have no such use of them; the servant has to take care of them; the policemen who have to sleep in them for the purpose of doing their duty have no such use of them. As long as these buildings are legally used there is no person who can have the use of them within the meaning of the Act of Parliament; there is no person who can be the occupier within the same meaning. Therefore you have these buildings, as long as they are legally used, struck with sterility as to annual value, and unable to have any occupier; if that be so, there is nothing upon which the machinery of this Act can, under any circumstances, be brought to bear. Therefore I decline to consider this case as to the property itself alone. I say that you must consider it with regard to the property itself, and with regard to the persons who could, under proper circumstances, be made liable to assessment, and if you find that, taking these two together, this property is in such a position that the machinery of the Act can never be applied to it, it follows logically that this Act does not apply to it, and that this property cannot be

assessed. Therefore I am of opinion that the judgment of the court below was right, and ought to be affirmed.

LINDLEY, L.J.—I am of the same opinion, and I have nothing to add. With regard to the judgment of Baggallay, L.J., I quite concur in it, as also I do in the judgment of my brother Grove, which I have studied with great attention.

*Appeal dismissed.*

Solicitors for the appellant, *The Solicitor for Inland Revenue.*

Solicitors for the respondents, *Newman, Stretton, Hilliard, and Williams.*

Thursday, Nov. 23, 1882.

(Before BAGGALLAY, BRETT, and LINDLEY, L.JJ.)

SMITH v. LAMBETH ASSESSMENT COMMITTEE. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Poor-rate — Bookstands at railway station — Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67).*

*The London and South-Western Railway Company, in consideration of a yearly rent or sum, by deed granted to W. H. Smith and Son the sole right to sell newspapers, books, &c., at the company's stations for a term of seven years, together with liberty, subject to the approval of the engineer of the company, to erect bookstands, &c., on the platforms.*

*Held, on a case stated, that W. H. Smith and Son were not liable to be rated to the relief of the poor in respect of their bookstands erected under this agreement at Waterloo station.*

*Judgment of Field and Cave, JJ. affirmed.*

ON a return to a *mandamus* to the General Quarter Sessions for the county of Surrey, commanding them to enter continuances, and to hear and determine the merits of certain appeals against a rate or assessment for the relief of the poor of the parish of Lambeth, a special case for the opinion of the Divisional Court was stated by consent under 12 & 13 Vict. c. 45, s. 11.

In the case the present respondents, Messrs. W. H. Smith and Son, are described as "the appellants," and the present appellants, the assessment committee, as "the respondents."

The following are the material parts of the special case:—

1. The appellants are booksellers, librarians, stationers, and news and advertisement agents, carrying on business under the style or firm of W. H. Smith and Son, their principal place of business being at No. 186, Strand.

2. The respondents are the assessment committee for the parish of Lambeth, and the churchwardens and overseers of the poor of that parish, The Waterloo station of the London and South-Western Railway Company, hereinafter mentioned, is situate within the parish of Lambeth.

3. Shortly after the 18th Feb. 1880 the appellants received notices of that date in respect of the several bookstalls hereinafter mentioned, which are situate at the Waterloo station, to the effect that the assessment committee for the parish of Lambeth had had laid before them a provisional list wherein the bookstalls were included for assessment.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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4. These bookstalls had never before been included in any valuation or provisional list, nor had they been rated or assessed to the relief of the poor or otherwise, nor had the names of the appellants appeared in any valuation or provisional list, nor had the appellants been rated to the relief of the poor or otherwise in the parish.

5. On the 26th Feb. 1880 the appellants gave notice to the assessment committee of their objection to the insertion of the bookstalls in the provisional list. On the 9th March 1880 the assessment committee overruled the objections. No copy of such provisional list, or notice thereof, was afterwards served on the appellants.

6. The rate or assessment for the relief of the poor and other purposes, in respect of which the appeals were brought, was made by the respondents, and allowed on the 20th March 1880, and such rate purports to be made in accordance with the provisional list.

7. The bookstalls in question are in possession of and used by the appellants under the terms of an indenture dated the 25th April 1872 (set out in the appendix).

8. The terms of the indenture were in full force and effect at the date of the rate; and, in pursuance of the provisions in the indenture contained, the spaces occupied by the appellants' bookcases were set apart, and so far as the bookstalls are erected and placed upon the platforms of the station, they have been erected and placed with the approval of the engineer and general manager of the company.

9. From the date of the indenture the appellants have exercised their rights thereunder, partly by attendants who have exhibited and vended newspapers, books, &c., carried by hand or carried by such assistants in baskets or other convenient articles to passengers at the stations or in the trains at the station, and partly by means of portable bookstalls or in the spaces so assigned as aforesaid. At the commencement of the grant under and by the indenture, and for some time afterwards, spaces for one movable stall on the main line platform, and for one movable stall on the line then called the suburban line, were assigned by the company to the appellants; but, as the station has from time to time been enlarged and the business and traffic thereat increased, other spaces have been assigned to the appellants. From time to time, at the request of the company, the appellants have closed their stalls and suspended the exercise of their rights and privileges.

[Paragraphs 10, 11, 12, and 13 described the four bookstalls in question, and the mode of placing them. Three of them were fixed to the platform and walls of the station; the fourth rested by its own weight on the platform.]

14. The bookstalls are used exclusively by the appellants and their servants, and only for the purposes authorised by the indenture. They are closed at night with shutters and locked up, and the keys are kept by the appellants' servants.

15. Alterations at the instance of the company have from time to time been made in the position of the bookstalls since the date of the indenture.

16. No rights of ingress and egress to and from the station, or of access to the bookstalls, are exercised by the appellants, or their agents or servants, except under the provisions and for the purposes of the indenture.

17. In or about the year 1871, when the assessment

of the London and South-Western Railway Company was made for the poor rate in respect of the station at Waterloo now under consideration, the assessment surveyor to the parish of Lambeth included in his estimate for such assessment an item of 1000*l.* in respect of annual profit to the railway company arising from bookstalls and advertisement spaces. The company did not admit in their estimate such a source of profit, and appealed against the whole assessment, and upon the hearing of that appeal the assessment sessions, without deciding as to any particular items, fixed a lump sum as the rateable value of the station.

The following are the material parts of the indenture referred to in paragraph 7 of the case, and set out in the appendix, which was dated the 25th April 1872, and made between the London and South-Western Railway Company (hereinafter called "the company") of the one part, and Messrs. W. H. Smith and Son (hereafter called "the tenants") of the other part:

In consideration of the yearly payments hereinafter reserved, and of the covenants and stipulations hereinafter contained, and on the part of the tenants to be observed and performed, the company hereby give and grant to the tenants, as is hereinafter restricted, for the term of seven years, to be computed from the 1st day of April 1872, and thereafter from year to year (subject as hereinafter mentioned), the sole and exclusive licence and privilege (subject only to the reservations, covenants, provisions, restrictions, and agreements hereinafter contained) to vend, sell, lend, and exhibit for sale and loan newspapers, books, periodicals, pamphlets, prints, stationery, travelling caps, wrappers, and such other like articles required for the convenience of passengers by railway as shall be approved by the secretary of the company at all the stations now existing and used, or which shall hereafter, during the continuance of this grant, be made, or existing, or in use for passengers on the several lines of railway belonging to, or leased, or worked by the company, &c., and at the expense of the tenants to canvas for place, post, &c., in proper frames, advertisements, &c., upon such parts of the interior platform and station wall and fences of all the said stations as may be approved of by the company, subject also to the reasonable regulations of the company with respect thereto, &c., not interfering with the space required for any notices, advertisements, &c., which the company may think proper to affix relating to or in connection with the business or traffic of their line of railway, . . . together with full liberty for the tenants, subject to the approval of the engineer of the company, to erect, place, and continue on such part of the platforms of the said several stations of the company, as may be approved by the general manager or engineer of the company, all necessary bookstands, cases, cupboards, and drawers, or other convenient places for exhibiting, keeping, and preserving their stock of papers, books, periodicals, pamphlets, &c., and to remove or alter the position from time to time, if necessary, and also full and free ingress and egress at all reasonable times for the tenants, their servants or agents, to and from the several stations for the purposes of this present grant. And it is expressly understood and agreed that the company shall not be in any way responsible for any stock or other property of the tenants which may be placed or left by them at the said several stations of the company pursuant to the licences and privileges hereby granted, and that such person employed by the tenants at the several stations of the company in the exercise of the licences and privileges hereby granted is, during the time of such employment, to be under the control, and to abide by, obey, and perform all the lawful and reasonable orders and directions of the station master at the station at which such person may be employed, and is to be liable, in case of inebriety or misconduct, to immediate removal from such station. And the tenants hereby covenant with the company, their successors and assigns, that in consideration of the licence and privilege hereby granted by and of the covenants herein contained

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on the part of the company, they the tenants will pay to the company for each and every year of the term the rent or sum of £. by twelve equal monthly payments on the first day of each month in the year, and in addition to the yearly rent or sum of £. hereby reserved, pay or cause to be paid to the company quarterly in each and every year such a sum of money as shall be equal to a clear per cent. of the gross amounts from time to time received by the tenants from the public for placing, affixing, &c., all such advertisements, &c., at the several stations before referred to. . . . Provided always, and it is hereby expressly agreed that in case any monthly payment of the said yearly rent or sum of £. or any quarterly payment of such additional sum as is hereinbefore mentioned shall be in arrear and unpaid for the space of fourteen days after notice in writing, the same shall be recoverable by the company in addition to any other remedies by distress as in the case of rent in arrear. . . . And further, that the tenants will not assign or demise the benefit of the grant, licence, or agreement hereby made, or any part thereof, to any person or persons whomsoever, except to any person or persons who may become a partner or partners with the tenants without the written consent of the secretary or general manager. And further, that the tenants will, in the exercise of the licence and privilege hereby granted, cause all such bookstalls, &c., to be of neat and suitable appearance, &c., and shall abide by, obey, and observe the regulations which may be from time to time made by the company, touching or concerning the placing on the platforms of the said several stations of any of the necessary bookstands, &c., . . . and that such bookstands, &c., shall be of neat and suitable elevation, &c., and shall be constructed in every way to the satisfaction of the engineer." . . . Covenant by the company not to permit other persons to vend newspapers, books, &c., or exhibit advertisements, &c., at their stations (except their own train books, time tables, &c.).

"And the company do hereby warrant unto the tenants the quiet and peaceable enjoyment and benefit of the grant, licence, powers, privileges and benefits hereby granted for the period upon the terms and stipulations and in manner aforesaid according to the true intent and meaning of these presents. Provided always, and it is hereby agreed . . . that if any of the said monthly or quarterly payments of the said yearly rent, or sum of £., or of such additional sum as aforesaid respectively, or any part or parts thereof, shall be in arrear and unpaid for the space of eight days after the same shall have become due, or if the tenants shall wilfully break or neglect to fulfil or observe any of the covenants herein contained on their part to be observed, it shall be lawful for the company to put an end to the grant hereby made" (by a month's notice in writing) "of the intention of the company to put an end to the said grant, and at the determination of such notice the said term hereby granted shall cease and determine, but without prejudice to the rights of the company under the covenants, and agreements herein contained up to such determination. And it is hereby further agreed that on the expiration of the said term of seven years the licence and privilege hereby granted shall" (unless determined at the end of the term by three months' previous notice) "continue in full force and effect and subject to the stipulations and conditions herein contained and provided" (until determined by three months' notice), "and at the expiration of such notice the said licence and privilege shall cease and determine."

The questions for the opinion of the court (who were to be at liberty to draw inferences of fact) were: first, whether the appellants (W. H. Smith and Son) were liable to be rated in respect of the bookstalls, or any of them; secondly, whether the rate was a good and valid rate.

The Divisional Court (Field and Cave, JJ.) gave judgment against the rate, answering both questions in the negative.

From this decision (which is reported 9 Q. B. Div. 585) the Lambeth Assessment Committee now appealed.

E. Clarke, Q.C. and Archibald, for the assessment committee, in support of the appeal.—On

the true construction of the agreement under which the bookstalls are held, Messrs. Smith and Son are liable to be assessed to the poor rate. They are in exclusive possession and occupation of the spaces occupied by the bookstalls, which distinguishes the present case from *Willing v. St. Pancras Assessment Committee* (37 L. T. Rep. N. S. 126; s. c. nom. *Reg. v. St. Pancras Assessment Committee* (2 Q. B. Div. 581)). The stalls are structurally of a character which renders the occupier rateable. In *The Electric Telegraph Company v. The Overseers of the Poor of Salford* (11 Ex. 181; 24 L. J. 146, M. C.) the telegraph company was held liable to be rated in respect of telegraph wires and posts, and the land in which the posts were fixed. In that case Sir Fitzroy Kelly, arguing on behalf of the telegraph company, contended that they had only a qualified right or easement, as in the case of a licence to put a bookstall on a platform, on which Pollock, C.B. said: "Is not a bookstall rateable, like a refreshment room?" (24 L. J. M. C., at page 149). They also referred to

*The London and North-Western Railway Company v. Buckmaster*, 31 L. T. Rep. N. S. 835; L. Rep. 10 Q. B. 70, 444;

*Reg. v. Morrish*, 32 L. J. 245, M. C.;

*Cory v. Bristow*, 32 L. T. Rep. N. S. 797; 33 L. T. Rep. N. S. 624; 36 L. T. Rep. N. S. 594; L. Rep. 10 C. P. 504; 1 C. P. Div. 54; 2 App. Cas. 262;

*Reg. v. Ponsonby*, 3 Q. B. 14;

*Pimlico Tramway Company v. Greenwich*, 29 L. T. Rep. N. S. 605; L. Rep. 9 Q. B. 9.

McIntyre, Q.C. and Prosser, for Messrs. W. H. Smith and Son, in support of the judgment of the Divisional Court, were not called on.

BAGGALLAY, L.J.—This is an appeal from the judgment of the Queen's Bench Division, who have held that Messrs. Smith and Son are not rateable in respect of the bookstalls at Waterloo Railway Station, which are held by them under a grant from the London and South-Western Railway Company, the terms of which have been brought before us in the course of the argument. No question is raised as to whether these bookstalls are rateable, in the sense that a rate must be paid by somebody in respect of them. It is admitted that they are rated as a portion of the station. It is now suggested on behalf of the appellants that Messrs. Smith and Son's possession of the bookstalls is such as to make them rateable. In delivering judgment in the court below, Field, J. stated that the real question to be considered is whether the grant gives exclusive occupation, or exclusive enjoyment. In stating the question in this way, he was following in substance a series of decisions of many judges of great experience in rating cases. Having set before him that as the question to be decided, he does what it is our duty now to do, that is, he proceeds to consider what is the effect of the deed. He says: "From the beginning to the end of this document the parties carefully avoid all expression of intention to create a tenancy." (9 Q. B. Div. at page 594.) I entirely agree with this observation. It is true that, for the sake of convenience, Messrs. Smith and Sons are referred to as "the tenants," but the agreement is in reality a grant of a sole and exclusive licence and privilege. I concur with Field, J.'s criticism, and I think that, on the true construction of the agreement, the railway company does not grant to Messrs. Smith and Son exclusive possession of

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occupation of the bookstalls, but only exclusive enjoyment, so as to enable them to carry on their trade in the most convenient manner. If that is the right view of the construction of the agreement, as I think it is, it follows that Messrs. Smith and Son are not rateable in respect of these bookstalls, and that is Field, J.'s construction. He considers the authorities in the course of his judgment, and I do not think it necessary now to comment on them in detail, but I may observe that the same question has been proposed in each case, and where the judges have come to the conclusion that there was exclusive occupation, they have held that the persons so occupying were rateable, and where they have come to the conclusion that there was no such exclusive occupation they have decided against the rate. For these reasons I am of opinion that the appeal fails, and the judgment of the Divisional Court ought to be affirmed.

BRETT, L.J.—The question in these cases is not always whether there is a demise, for there may be exclusive occupation without a demise, but here the question is whether this agreement is a demise or a licence to sell books and the other articles referred to in the agreement, with subsidiary leave to display such books and other articles on such parts of the platform as may be approved of by the company. This question turns on the construction of the indenture. There are parts of the deed which look like part of an agreement for a tenancy. It is a fallacy to take singly each part of the deed which is opposed to the view that there is a tenancy, and argue that the expressions there used are not absolutely inconsistent with the existence of a tenancy. You must take all these parts of the deed together, and see on the whole whether the deed amounts to a demise or is a mere licence to sell. I find that Messrs. Smith and Son can only go to these stalls at particular times and for a limited purpose. This is consistent with a licence, and inconsistent with a tenancy. Again, the money payable under the agreement is paid for the whole licence, and what is supposed to be a demise of a particular place is more like what might be called a movable demise, for the position of the bookstalls may be changed. It is clear that this is not a demise of a particular place, and consequently that it is only a licence to sell books and other goods, together with an auxiliary right to display such goods at different places upon the railway company's premises. I am therefore of opinion that there is no occupation within the meaning of the Act of Elizabeth (43 Eliz. c. 2). The only way in which these bookstalls are brought within the purview of rating is that the railway company is rated in respect of the increased value of their premises which is caused by the payment they receive for the use of the bookstalls. As to the cases which have been referred to, I do not think it necessary to consider them all in detail, but I wish to say that, with regard to the case of *The Electric Telegraph Company v. The Overseers of Salford* (11 Ex. 181), I reserve my opinion as to whether I agree with that decision or not.

LINDLEY, L.J.—When this deed is looked at carefully, it is impossible to hold that it amounts to a demise. On the contrary, the language is chosen as if for the purpose of excluding that view. It is true that the words "tenants" and

"rent" are used, but there is no *reddendum*, and there are no appropriate words to create a tenancy. Messrs. Smith and Son have the right of going into the station and erecting stalls where the officers of the company point out. This right is movable, and there is no grant of an exclusive right over any portion of the railway company's premises. If this is a grant of an easement and nothing else, there is an end of the case. The cases which have been referred to—*Electric Telegraph Company v. Overseers of Salford* (11 Ex. 181), *Cory v. Bristol* (2 App. Cas. 262) and *Pimlico Tramway Company v. Greenwich* (L. Rep. 9 Q. B. 9)—are all distinguishable. Here the parties have intentionally avoided creating a tenancy. I am therefore of opinion that the judgment of the court below is correct, and the appeal should be dismissed. *Judgment affirmed.*

Solicitors for W. H. Smith and Son, *Harvey, Oliver, and Capron.*

Solicitor for the assessment committee, *G. W. Barnard.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

Dec. 13 and 21, 1882.

(Before HAWKINS and WATKIN WILLIAMS, JJ.)

THE GUARDIANS OF THE POOR OF THE SALFORD UNION v. THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF MANCHESTER. (a)

*Poor law—Settlement—Illegitimate pauper—Idiot—Residence for three years—Divided Parishes Act 1876 (39 & 40 Vict. c. 61), s. 34.*

*By a residence for three years in a parish, an illegitimate idiot above the age of sixteen years acquires a settlement in such parish, notwithstanding that she is incapable of taking care of herself, and that she resides with her mother and her mother's husband as part of their family.*

*A. G., an adult illegitimate idiot, and a person incapable of taking care of herself, resided with her mother and her mother's husband in the appellant union for more than three years. All three then removed to the respondent township, where A. G. (before three years had expired) became an inmate of the workhouse. An order of justices adjudicating the settlement of A. G. to be in the appellant union having been made:*

*Held, that such order was right.*

*Reg. v. The Leeds Union* (40 L. T. Rep. N. S. 521; 4 Q. B. Div. 323) followed.

This was an appeal by way of special case, stated by consent and by the order of North J., in pursuance of 12 & 13 Vict. c. 45 s. 11.

On the 31st July 1882 the respondents obtained an order of the justices of the city of Manchester, adjudicating the settlement of Alice Gerard, an idiot pauper, to be in the township of Pendleton in the county of Lancaster, and in the appellant union.

1. The pauper, a single woman, is the illegitimate daughter of Margaret Gerard (afterwards Margaret Harding), and was born at Warrington, in the said county of Lancaster (not in the appellant union), on the 18th Jan 1854, and she is now, and always has been, an idiot.

2. The mother of the pauper, before the pauper had attained the age of sixteen years, *videlicet* in

(a) Reported by DUNLOR HILL, Esq., Barrister-at-Law.



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1864, intermarried at Warrington aforesaid with one George Harding, a glass cutter, who was born at Birmingham, and served seven years legal apprenticeship there, and is now dead.

3. In the year 1875 the pauper and her mother and the said George Harding came to reside in the said township of Pendleton, where they resided together until Sept. 1881, when they removed to Manchester, where they resided together until the pauper became an inmate of the Manchester workhouse.

4. Previously to and since 1875 the pauper has always resided continuously with her mother and the said George Harding, as part of their family, and has never separated herself therefrom.

5. The pauper is now, and always has been, incapable of taking care of herself, through imbecility of mind.

The respondents contend, and the appellants deny, that the pauper upon the above facts is settled in the township of Pendleton in the appellant union by reason of her residence therein for three years, under the provisions of 39 & 40 Vict. c. 61, s. 34, which provides:

Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court think sufficient.

The question for the opinion of the court is, whether, on the above facts, the legal settlement of the pauper is in the township of Pendleton.

If the court should be of opinion in the affirmative, the order of justices is to stand; if otherwise, to be quashed.

*Marshall* for the appellant.

*Smyley* for the respondents.

The judgment of the court (Hawkins and Watkin Williams, JJ.) was delivered by

HAWKINS J.—The question for our decision is whether the pauper was legally settled in Pendleton and removable thereto. We are of opinion that she was, and that her settlement in that township was acquired by her residence therein for three years, under the provisions of 39 & 40 Vict. c. 61, s. 34. It was not denied by the appellants that the pauper's residence in Pendleton from 1875 to 1881 was such as to confer upon her a status of irremovability from that township from the expiration of the first year of that residence until her removal with Harding and her mother to Manchester in Sept. 1881, under the statutes 9 & 10 Vict. c. 66, s. 1, 24 & 25 Vict. c. 55, s. 1, and 28 & 29 Vict. c. 79, s. 8; nor that such status of irremovability for upwards of three years gave her a settlement in Pendleton, under 39 & 40 Vict. c. 61, s. 34, if under the circumstances of such residence she was capable of acquiring a settlement in her own right; but it was contended that she was not so capable, because during all the time of such residence she was an idiot unable to maintain or take care of herself, and that such residence was a mere residence as a member of the family of Harding and her mother, and conferred upon her no independent status; and that she ought to be looked upon in the same

light as an unemancipated infant of tender years, who could not be removed from her mother. The effect of the argument was to invite us to treat the pauper as legitimate for the purpose of incapacitating her to obtain either a settlement or a status of irremovability, but to treat her, as we are bound to do, as illegitimate for the purpose of preventing her from taking the settlement acquired by Harding by reason of his residence in Pendleton, as she would have done had she been legitimate. In support of his contention, Mr. Marshall cited passages from Nolan, vol. 1, p. 320, and vol. 2, p. 369: *Rees v. Much Cowarne* (2 B. & Ad. 861), and *Reg. v. St. Mary Archdeacon, Exeter* (5 L. T. Rep. N. S. 637; 31 L. J. 77, M. C.). We do not in the least degree dissent from anything which is to be found in either of those passages or authorities; on the contrary, we entirely assent to them; but, in our opinion they have no applicability to the present case, for those authorities had reference to legitimate children, whilst we are dealing with an illegitimate pauper of full age. We take it to be clear law that, so long as a child, legitimate or illegitimate, is within the age of nurture, which covers the whole period from birth to the age of seven years, it cannot be legally, by any order of removal, separated from its mother. "It is entitled to remain with its mother so long as the purposes of nurture require" (per Bayley, J., *Rees v. St. Nicholas, Leicester*, 2 B. & C. 889); and even the consent of the mother cannot justify such a separation, for the rule is made for the benefit of the child: (*E. v. Birmingham*, 5 Q. B. 210; 13 L. J. 1, M. C.). The statute 9 & 10 Vict. c. 66, s. 3, extended this period of non-separation of a child from its parents by enacting that no child under the age of sixteen, whether legitimate or illegitimate, residing in any parish with his or her father or mother, shall be removed in any case in which such father or mother may not lawfully be removed. At this point there is a wide difference between the status of a legitimate and an illegitimate child. In the case of a legitimate child, the liability of its parents to maintain it is not limited to the age of sixteen, but extends to an indefinite period if the child, whether from imbecility of mind or of body, is unable to maintain or provide for itself. So long as it remains an unemancipated member of its father's family, no matter what its age may be, it follows and takes in law its father's settlement; it gains no independent status by reason of any residence in a parish so long as such residence is merely as a member of its father's family; and its right to take such newly-acquired settlement of its father ceases only upon its becoming emancipated or acquiring a new settlement for itself. After the happening of either of those events, even though residing with its father, its residence is for all purposes of settlement and removal an independent residence. See, among other cases, *Reg. v. Everton* (1 East, 526); *Reg. v. Bleasby* (3 B. & A. 377). The case of an illegitimate child is totally different. It is true its maintenance to the age of sixteen is provided for by statute 4 & 5 Will. 4, c. 76, s. 71, enacting that its mother shall maintain it as part of her family till it attains the age of sixteen; and if before that time arrives she marries, the liability to maintain such child as part of his family until it reaches that age is imposed on the husband of its mother. On the arrival, however, of an illegitimate child at the age of sixteen, all legal obligation towards



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it on the part both of the mother and her husband ceases: it is no longer legally attached to, and ceases to be a member of the family, in its legal sense, of either; and though, as an act of kindness, they may permit it to live with them and maintain it as one of the family, in the popular sense of the term, such residence amounts to no more than would the residence of a total stranger to whom food, lodging, and raiment might be voluntarily given as an act of pure Christian charity; and, as regards its settlement, that is by law (until it acquires one for itself) established in the place of its birth or in the place of its mother's settlement, if she have one which the child is capable of taking; but in no case does it take any settlement the mother's husband may acquire, even during the time the child is a legal member of his family: (see 4 & 5 Will. 4, c. 76, s. 71; 39 & 40 Vict. c. 61, s. 35; *Reg. v. St. Mary, Newington*, 4 Q. B. 581; *Manchester v. St. Pancras*, 41 L. T. Rep. N. S. 218; 4 Q. B. Div. 409.) The case of *Rees v. Much Owarns* (2 B. & Ad. 861) would have been in point in favour of the appellants had the pauper in the present case been legitimate; but it is no authority, the pauper being illegitimate. The same observation may be made upon the case of *Reg. v. St. Mary Arches, Exeter* (5 L. T. Rep. N. S. 637; 31 L. J. 77, M. O.), for the doctrine of emancipation is altogether inapplicable to illegitimate children, whose unfortunate position is such that, after arriving at the age of sixteen, they have no title to be ranked as members of any family, and are in law looked upon in no other light than as mere strangers. The case of *Reg. v. The Leeds Union* (40 L. T. Rep. N. S. 521; 4 Q. B. Div. 323) seems to me to be directly in point in favour of the respondents. We are unable to distinguish it from the present. In each case the pauper was illegitimate; in each case it was in fact separated from its mother. In the Leeds case it was away from its mother and was in the hands of strangers to it; in the present it was an inmate of the Manchester workhouse. In each case it was unable to choose a residence for itself, the one pauper being a mere infant, the other being an idiot. If any distinction can be pointed out, it is the fact that in the Leeds case the pauper was within the age of nurture, whilst here the pauper is upwards of twenty-one years old. In principle the cases are identical. Our judgment, therefore, is for the respondents.

*Judgment for the respondents.*

Solicitors for the appellants, *Ohester and Co.*, for *Hulme, Foyster, and Waddington*, Salford.

Solicitors for the respondents, *Johnson, Wetherall, and Co.*, for *Lings*, Manchester.

Thursday, Jan. 25, 1883.

(Before POLLOCK, B. and MANISTY, J.)

Ex parte PIOT. (a)

*Extradition—Foreign warrant—Warrant of committal—Sufficiency of description of offence—"Fraud by an agent"—Extradition Act 1870 (33 & 34 Vict. c. 52), s. 10—Treaty with France 1876—24 & 25 Vict. c. 96, s. 75.*

*A French subject and fugitive criminal was apprehended in England upon a warrant issued by the chief metropolitan police magistrate, after notice from the Home Secretary that a requisition had been made for his extradition under the*

*treaty with France (1876) for the surrender of fugitive criminals, and he was committed under sect. 10 of the Extradition Act 1870.*

*In the foreign warrant issued in France the prisoner was accused of the crime of "abus de confiance;" and by Article 3 of the treaty one of the crimes for which extradition is to be granted is "abus de confiance ou détournement par un banquier, commissionnaire, administrateur, &c."*

*In the police magistrate's warrant of committal the offence was described as "fraud by an agent."*

*Held, that the description of the offence in the warrant was sufficient, and that the facts upon the depositions disclosed a prima facie case of fraud by an agent within the meaning of 24 & 25 Vict. c. 96, s. 75, to justify the prisoner's committal for trial if the offence had been committed in England, and therefore the magistrate was right in committing him under the Extradition Act.*

**HABEAS CORPUS.**

A rule nisi for a writ of *habeas corpus* was granted on the 22nd Jan. directed to the Governor of the Middlesex House of Detention at Clerkenwell, commanding him to bring up the body of one Felix Auguste Piot (who had been committed under the Extradition Act 1870) with a view to his discharge from custody.

On the 22nd Nov. 1882 the Home Secretary had, under sect. 7 of the Extradition Act, signified to Sir James Ingham, the chief magistrate of the Metropolitan Police Courts, that a requisition had been made to him by the diplomatic representative of the French Republic, for the surrender of Piot, accused of the commission of the crime of fraud within the jurisdiction of the French Republic, and thereupon Piot was arrested, and subsequently committed.

In the French warrant which was issued for the arrest of Piot he was accused of the crime of fraud (*abus de confiance*), and in the warrant of committal by Sir James Ingham the offence was described as "fraud by an agent."

Piot had formerly carried on the business of a banker at Reims, and had been adjudicated a bankrupt by the Tribunal de Commerce of Reims. The case for the prosecution was that one Maulère, a commercial clerk residing at Elbœuf, had purchased through Piot twenty-five shares in the Société des Immeublées, and that Piot had misappropriated the sum of 3000*fr.*, which Maulère had sent to him after writing the following letter:

Reims, June 1, 1881.

Mons. F. Piot,—I pray you to be so good as to come to be taken up at the next settling day the twenty-five Immeublées of which I am buyer through you (*chez vous*). I will forward to you the funds either to-morrow or the day after.—Accept, Sir, my friendly greetings.

(Signed)

MAULÈRE.

The receipt of this letter was denied by Piot, who also denied that he had acted as the agent of Maulère.

By the Extradition Act 1870 (33 & 34 Vict. c. 52), s. 10, it is enacted that:

In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this

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Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

By the treaty with France for the mutual surrender of fugitive criminals, article 3, one of the crimes for which extradition is to be granted is as follows:

18. Abus de confiance, ou détournement par un banquier, commissionnaire, administrateur, tuteur, curateur, liquidateur, syndic, officier ministériel, directeur, membre ou employé d'une société, ou par toute autre personne.

By 24 & 25 Vict. c. 96, s. 75, it is enacted that:

Whosoever having been entrusted either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively, &c., shall be guilty of a misdemeanour.

Sir Henry James, A.G. (A. L. Smith with him), for the Crown, showed cause.—There are three objections raised to the prisoner being held in custody: First, it is said that the French warrant is insufficient in form for not disclosing with certainty the offence for which extradition can be maintained; secondly, that the depositions before Sir James Ingham disclose no offence cognisable by our law, and therefore neither by the treaty nor the Act can the extradition be supported; and thirdly that the form of the warrant of committal under the hand of Sir James Ingham is insufficient for not disclosing with certainty the offence with which the prisoner is charged. The second objection is of course the substantial one upon which my friend will be disposed to rely. As to the form of the French warrant in which Piot is accused of fraud, the French words being *abus de confiance*, I submit that the case is concluded by authority and it is quite sufficient statement of the offence. It is a mistake to suppose that the foreign warrant need disclose any of the details of the offence; it is simply an authority for arrest. There is nothing in the Extradition Act requiring the foreign warrant to be in any particular form, or that it should enter into any particulars of the offence. In the case of *Ex parte Terras* (39 L. T. Rep. N. S. 502; 4 Ex. Div. 63) the warrant was in the most general form, describing the offence as being the commission of a crime against the bankruptcy law, and that warrant was held to be good. Then there are two cases, one of which is almost identical: one is *Reg. v. Ganz* (46 L. T. Rep. N. S. 592; 9 Q. B. Div. 93; 51 L. J. 419, Q. B.), and the other *Reg. v. Jacobi*, reported in the same place in the Law Times Reports as a note to *Reg. v. Ganz*. *Jacobi's* case is almost identical with this on the point of the sufficiency of the foreign warrant. There is also the case of *Reg. v. Weil* (47 L. T. Rep. N. S. 630; 9 Q. B. Div. 701), where it was held that a fugitive criminal already in custody may be detained for an offence within the Act, even though he was originally arrested without any warrant. Then as to Sir James Ingham's warrant, the words are, that the

prisoner was accused of "fraud as an agent." There is no authority for saying that the warrant of committal should set out the nature of the crime with particularity; there is nothing in the statute to that effect, the form of warrant of committal given in the schedule leaves it in blank. But after the judgment of Pollock, B. in *Jacobi's* case I do not think it is necessary to discuss this point any further. As to the other objection, which is the only substantial one, the only point is whether there is any evidence to put this man upon his trial, upon the depositions before Sir James Ingham. I submit that there was ample evidence to show that this accused person had been guilty of an offence which was parallel to the offence that would have been committed under the Act of 1861 (24 & 25 Vict. c. 96), s. 75. The letter written by Maclère before he sent the money for the payment of the twenty-five shares in the Société Immeublée which he had purchased through Piot, is a sufficient direction in writing within the meaning of this statute. The direction to apply the money need not be in express and formal terms, and in support of this proposition I will refer to *Reg. v. Christian* (L. Rep. 2 C. C. R. 94). It may be said by my friend that the amount sent was only 3000 francs, whereas the price of the shares was 3271 francs; but that could not make any difference and allow the person who receives it to appropriate the money to his own use. The receipt of the letter is denied, but there is strong evidence to show that it was received, and all that is necessary is to show some evidence. There is clearly a *prima facie* case which ought to be inquired into, and this court will not look beyond that. I submit that the prisoner is lawfully in custody, and all the objections raised on his behalf must fail.

Besley (W. A. Metcalfe with him) in support of the rule.—It should not be forgotten that, before the treaty with England, France insisted upon the right to try a man for anything, and if a French subject was once extradited he might be tried for any number of crimes. By Article 6 of the treaty it is provided that, "the ambassador or other diplomatic agent of Her Britannic Majesty in France shall send to the Minister for Foreign Affairs, in support of each demand for extradition, an authenticated and duly legalised copy either of a certificate of conviction or of a warrant of arrest against a person accused, clearly setting forth the nature of the crime or offence on account of which the fugitive is being proceeded against." There must be sufficient indication of the nature of the offence to show that it is an extradition crime before the English court can say that the person shall be surrendered. The treaty shows that there is no such crime as *abus de confiance*. The terms are, *Abus de confiance, ou détournement par un banquier, commissionnaire,* &c. What the treaty says, therefore, is that persons are to be delivered up who have committed the offence of *abus de confiance* in a particular capacity, and the man is not to be tried for any other than the extradition crime. The treaty does not include the crime of fraud in a general sense, but only when committed by persons in a particular position. In the case of *Reg. v. Jacobi*, which is relied upon by the Attorney-General, Stephen, J. clearly lays down that the whole proceeding must be begun with reference to the law of England, that it must be followed by proof that it is accord-

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ing to the law of England, and that it must be concluded by a warrant according to the law of England. Then I say that this commitment is a violation of the treaty, and of our laws as contained in the Acts of Parliament. Persons are not committed in this country without the depositions naming the actual charge which is made, which they may verbally answer themselves or call witnesses to answer; there is no such thing as a general commitment. It would be a most serious violation of the liberty of the subject. "Fraud by an agent" is not a description of one crime, but it is a description of a dozen different crimes. It is the most general term that can possibly be applied, and it is not competent for a magistrate to send abroad upon an extradition warrant a person to be tried there under the authority of the treaty, for any general offence. In the case of *Reg. v. Gans* the question was not so much as to the character of the warrant, as whether there was any warrant at all. When the depositions are looked at narrowly, it will appear that no offence has been disclosed. The money was never ordered to be applied specifically to the purchase of the twenty-five *Immenblés*. It was taken in current account. In England there could be no committal for trial, because there is no such thing as giving a direction in writing six days before you have the money. [POLLOCK, B.—I entirely dissent from that.] I submit there must not be an interval of time and a change of circumstances to enable a person to couple with a letter of the 1st June a payment on the 7th June, where the person paying on the 7th June pays 270 francs short of the object with which he wrote the letter on the 1st June, and accepts that by a receipt taken on account. [POLLOCK, B.—I cannot assent to that unless you give me very strong authority.] With regard to the case of *Reg. v. Christian*, it really supplies the strongest possible evidence that where money is sent on general account you cannot charge a person with violation of good faith unless the money is sent specially with reference to the particular purchase that is made. [MANISTY, J.—Suppose the letter had been, "I will send money which you will apply towards taking up these shares," and it had been short of the exact amount and the broker appropriated the money to his own use, would you say he was not guilty of the offence?] I say it would not do. You cannot legally force a man to put his hand into his pocket and provide money. [MANISTY, J.—No; but you can if the man puts the money into his own pocket and uses it for another purpose.] It comes to this, that to give effect to the statute the money must accompany the direction, and I venture to say that there has never been a case decided to the effect that you can send a direction one day and the money the next. There is no proof of appropriation. There is no suggestion throughout the case that this man squandered the money upon himself, or used it for his own purposes. I hope that the court, looking at the depositions, will come to the conclusion that no magistrate has a right to commit him for trial in England for any such offence; and I submit, therefore, that the magistrate, having exceeded his jurisdiction—and he has assuredly exceeded it if there was no ground for committing him for trial—this man ought to be discharged.

POLLOCK, B.—This is an application made to

the court by way of *habeas corpus* in order to test the validity of proceedings that were taken before Sir James Ingham, in London, first upon an extradition summons, and then upon an extradition order made by him. Now the first two questions that were raised very clearly by Mr. Beasley are questions no doubt to some extent of form, but they are questions upon which every person, whether a subject of this country or a foreigner, is entitled to have a clear decision of the court in favour of the liberty of the subject, and the two questions are these: First, it is said that the foreign warrant which was issued in France for the detention of the prisoner does not disclose any offence sufficient to bring him within the extradition statute. Next it is alleged that the form of warrant made by Sir James Ingham also discloses no offence known to the law of England, so as to make it a good warrant in respect of something that the prisoner was going to be indicted for in this country. Now with regard to the first of these two points there is, I think, very little indeed to be said in favour of it, because both by the extradition treaty and also by the statute itself, it is quite clear that a distinction is preserved throughout between the substance of the offence committed and the form of the warrant whereby the prisoner is apprehended. The prisoner was charged by the foreign warrant, and apprehended for simply an *abus de confiance*. Sitting in an English court of law it is no part of our duty to say what is meant by those words, because we do not know the foreign law except as a question of fact. It seems to me perfectly clear that neither under the Extradition Act nor under the treaty can it be supposed that the matter should not be all dealt with by such a warrant. The Extradition Act provides this, "that the ambassador or other diplomatic agent of Her Britannic Majesty in France shall send to the Minister of Foreign Affairs in support of each demand for extradition an authenticated and duly legalised copy either of a certificate of conviction, or of a warrant of arrest against a person accused, clearly setting forth the nature of the crime or offence." That is *abus de confiance*, but whether that is a crime or an offence within the extradition treaty is another matter. Now we go to the next point, namely, what was done by Sir James Ingham. When the prisoner is brought before him, not only the warrant, but the depositions are brought before him, which according to the articles of the treaty must clearly set forth the acts relied on, contain a description of the person claimed, and any other information which may serve to identify him. Now the only question is, had Sir James Ingham before him depositions clearly setting forth the said acts? I will allude to that presently, but so far as the form of Sir James Ingham's warrant is concerned it seems to me to be abundantly sufficient. The form of the warrant of Sir James Ingham is this, "Fraud by an agent." Mr. Beasley argues that there ought to be contained in the warrant a specific description of the offence as if the prisoner were about to be indicted in this country. Now the terms of the Act of Parliament, on which of course Sir James Ingham alone could act, are these: Sect. 10 of 33 & 34 Vict. c. 52, which is the Act of 1870, provides, "In the case of a fugitive criminal accused of an extradition crime if the foreign warrant authorising the arrest of such

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criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged." The first question is, what was the nature of the evidence brought before Sir James Ingham? If there was enough to satisfy him that the crime of which the prisoner was accused, if committed in England, justified his committal, then he is to commit the prisoner to abide the order for his surrender. Now comes the question whether Sir James Ingham should do more than say, "Fraud as an agent." No doubt fraud as an agent might or might not, according to the particular facts proved, constitute a crime which would justify the committal of the prisoner for trial in this country; but there is nothing in the statute which requires that the crime which would justify his committal in this country should be stated specifically in the warrant of detention. It seems to me that in this case the warrant was perfectly sufficient for the purpose which was intended by the statute, and, if any decisions were necessary to sustain that view, those cited by the Attorney-General go to my mind the whole length, because we find that by the chief case decided on this point, of *Ex parte Terras* (*ubi sup.*), it was decided that a commission of crime against bankruptcy laws is a sufficient description in a warrant for the apprehension of a prisoner under the extradition treaties. In *Reg. v. Jacobi*, reported in the note to *Reg. v. Gans* (*ubi sup.*), one of the prisoners was detained upon a warrant which only charged him as "Suspected of fraud," and nothing could be more in violation of good faith, according to our notion of English law, than to say, not that he was guilty of fraud, but suspected of fraud. There it was unnecessary to insert the legal definition of such a crime. Again in *Reg. v. Weil* (*ubi sup.*) the Court of Appeal held that the prisoner might be detained even where there was no warrant. On these grounds, so far as those two points are concerned, I think this rule ought to be discharged. Then comes what no doubt is a much more serious matter, namely, were the facts which were brought before Sir James Ingham sufficient to enable him to arrive at the conclusion that he was justified, or would be justified, in the committal for trial of this prisoner if the crime of which he was accused had been committed in England? That opens the whole facts of the case before Sir James Ingham, always remembering that he had not to consider what might be the ultimate result of the trial, or in any way to take upon himself such a responsibility, but simply to sit there and to see whether upon the *prima facie* evidence laid before him there was sufficient to justify the committal of this prisoner if he was to be tried in England. Now, the words of 24 & 25 Vict. c. 96, s. 75, so far as they are material to this case, are these: "Whosoever having been intrusted either solely or jointly with any other person as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money with any direction in writing to apply, pay, or deliver such money or security, or any part thereof respectively, or the

proceeds, or any part of the proceeds of such security for any purpose or to any person specified in such direction, shall, in violation of good faith and contrary to the terms of such direction, in any case convert to his own use," and so on, shall be guilty of an offence. Now, had the prisoner Piot in this case committed an offence within that statute? It was proved before Sir James Ingham, upon the depositions, that the prosecutor had paid to Piot, who kept a bank in Reims, on the 7th June, 3000f., and that the same had not been paid over by Piot according to the directions given to him, and the mode in which it was sought to show that Piot, as regards this 3000f., came within the meaning of the statute was in this way: It was shown, as is now admitted on the affidavit of Piot himself, that he received instructions to deal with certain shares. He says that those shares had been sold by him as a principal; the prosecutor Maucière says, "No, you were dealing with those shares for me as a broker, and I paid you this money in order to take up those shares on settling day." Piot received the money in pursuance of a letter which was in these terms, written on the 1st June 1881: "I beg you to be good enough to take up at the next settling day the twenty-five Immeubles, the purchase of which I concluded with you" (I believe the words are *chez vous*, and whether that would make any difference or not it is not necessary to say). "I will forward you the cash either to-morrow or the next day." Now Maucière asserts, and Piot admits, that there was paid in pursuance of that letter, within a few days, 3000f.; the only question is whether in the first place that letter was a direction in writing to apply or pay this particular sum for any purpose specified in the direction; and secondly, whether the money had been converted to the use and benefit of Piot. As to the first point I can have no manner of doubt that, if I was called upon to state what was the effect of this evidence under the statute in an English court of justice—if a direction of this kind had been given to a banker in respect of money about to be paid into his hands, that it would be amply sufficient to satisfy the statute. That being so, in this case I have no doubt whatever that there was a sufficient direction to bring it within the statute. The next point is, did Piot, within the provisions of the statute, convert the money to his own use or benefit? Sir James Ingham had ample evidence to make out a *prima facie* case to show that Piot had received the money under the terms of this letter, and that he had not applied it in taking up the shares. That seems to me sufficient to show that during the month of June, without going any later, there was *prima facie* evidence of an improper appropriation of that money to the use of Piot himself. Under these circumstances I think this rule ought to be discharged, and the prisoner must be remitted to custody.

MANISTY, J.—I am of the same opinion. I shall not go over the ground so fully gone over by my learned brother, but I shall just make one or two additional observations. Mr. Besley contends strenuously that the particular crime for which the prisoner is detained must appear upon the warrant, for this reason, that it is that crime alone for which he can be tried. As I understand the argument it is, that the crime must be so specified in the warrant that the man can be in-

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dicted for no other. Now, if you look at the Act of Parliament you will find that it is not the warrant that is to be looked to for ascertaining what the offence or crime is for which the man is to be detained. Sub-sect. 2 of sect. 3 is in these terms: "A fugitive criminal shall not be surrendered to a foreign state, unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender other than—" Other than what? Not other than the offence stated in the warrant, but, "other than the extradition crime proved by the facts on which the surrender is grounded." Now, where do you find the facts? You find the facts in the depositions and not in the warrant. I think it is unnecessary to repeat the observations which my learned brother has made with regard to the form of either of the two warrants. If it were necessary I would refer to the judgment of Huddleston, B., in the case of *Ex parte Terras*, because there the definition is clearly pointed out, but this is not the case of a warrant of commitment after trial, but a warrant for detaining a person until trial. I think, if authority were necessary, there is authority for holding that these warrants were sufficient. As to the other point on the depositions, I think there is abundant evidence on which Sir James Ingham was justified in issuing his warrant.

*Rule discharged.*

Solicitor for the prisoner, *S. B. Abrahams.*

Solicitor for the Crown, *Solicitor to the Treasury.*

## HOUSE OF LORDS.

Dec. 6, 7, and 13, 1882.

(Before Lords BLACKBURN, WATSON, BRAMWELL, and FITZGERALD.)

MEWS v. THE QUEEN. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.  
*Maintenance of criminal lunatic—Prison Act 1877 (40 & 41 Vict. c. 21), ss. 4 and 57.*

*The effect of sect. 4 of the Prison Act 1877 is to transfer the liability for the maintenance of a criminal lunatic from the county to the Consolidated Fund.*

*Judgment of the Court of Appeal reversed.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Selborne, L.C., Lord Coleridge, C.J., and Brett, L.J.), reported in 6 Q. B. Div. 47, and 43 L.T. Rep. N. S. 403, affirming on appeal a decision of the Queen's Bench Division (Denman, J. and Pollock, B.) making absolute a rule for a *mandamus* to two justices of the county of Surrey to make an order on the treasurer of the county for the maintenance of a prisoner who had become insane, pursuant to the statutes 3 & 4 Vict. c. 54, s. 2, and 27 & 28 Vict. c. 29, s. 2.

The justices had refused to make such order, contending that the liability for the maintenance of the lunatic was removed by the Prisons Act 1877 (40 & 41 Vict. c. 21).

The *Solicitor-General* (Sir F. Herschell, Q.C.) and *Baggallay* appeared for the appellants.

The *Attorney-General* (Sir H. James, Q.C.) *Poland*, and *A. L. Smith* for the respondent.

The argument turned on the wording of the sections of the Acts of Parliament which are set out in the reports in the court below, and also in the judgment of their Lordships. The following cases were referred to:

*Mullins v. Treasurer of Surrey*, 7 App. Cas. 1; 45

L. T. Rep. N. S. 625;

*Prison Commissioners v. Corporation of Liverpool*, 5 Q. B. Div. 332; 42 L. T. Rep. N. S. 838.

At the conclusion of the argument their Lordships took time to consider their judgment.

Dec. 13.—Their Lordships gave judgment as follows:

LORD BLACKBURN.—My Lords: In this case a rule was obtained for a *mandamus* to the appellants, two justices of the county of Surrey, commanding them to proceed to hear and determine, pursuant to the statutes in that behalf, the matter of an application for an order on the treasurer of the county of Surrey for the maintenance of Mary Bray, a lunatic confined in the Surrey Lunatic Asylum. Mary Bray was convicted of felony in 1879, and was sentenced to imprisonment in the House of Correction at Wandsworth, in the county of Surrey. While undergoing her sentence she became insane, and was, by order of the Secretary of State, made under the provisions of the 27 & 28 Vict. c. 29, amending the 3 & 4 Vict. c. 59, removed from the prison to the County Lunatic Asylum. Mary Bray had no settlement in England, and no property applicable to her maintenance. The provision in the 2nd section of 3 & 4 Vict. c. 54, is that in such a case "two justices shall make an order upon the treasurer of the county, borough, or place where such persons shall have been imprisoned, to pay "all reasonable charges for inquiring into such persons' insanity, and for conveying him or her to such county lunatic asylum or receptacle for insane persons, and to pay such weekly sum as they or any other two justices shall, by writing under their hand, direct for his or her maintenance in such asylum in which he or she shall be confined." The appellants did not dispute that they were bound to make the order unless the Prisons Act 1877 made a difference. They maintained that by that Act these expenses were to be defrayed out of moneys to be provided by Parliament. And if they were right in this contention it necessarily followed that they were no longer to make an order on the treasurer of the county to pay those expenses, that portion of the Act of 3 & 4 Vict. being abrogated by subsequent inconsistent legislation, though the Act was not repealed. The answer to the question thus raised depends on the construction of a very ill-penned Act (40 & 41 Vict. c. 21), and chiefly upon that of two sections, the 4th and 57th. The Queen's Bench Division made the rule absolute, and the Court of Appeal affirmed their decision on the 8th Nov. 1880, giving a very short judgment, reported in 6 Q. B. Div. 47 and 43 L. T. Rep. N. S. 403. Shortly afterwards, on the 7th Dec. 1880, the case of *Mullins v. The Treasurer of Surrey* came before the Court of Appeal, and in that case an elaborate judgment was pronounced as to the construction of the Prisons Act 1877, with reference to expenses of a different kind, which it was held were no longer to be borne by the treasurer of the

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county (6 Q. B. Div. 156; 43 L. T. Rep. N. S. 786); and that was affirmed in this House (7 App. Cas. 1; 45 L. T. Rep. N. S. 625). The Court of Appeal had no power to overrule the decision in *Mews v. The Queen*, and, as two of the members of the court were the same, I think they cannot have forgotten their former decision, and must have thought that the two decisions could well stand together, but they do not explain how they were different. In this House *Mews v. The Queen* was not cited or considered at all. Now, when the question comes to be decided, I think (not certainly without great doubt and difficulty, but with as much certainty as can ever be felt in construing such draftsmanship as that in 40 & 41 Vict. c. 21) that the meaning of the enactments is what the appellants contend for, and consequently that the rule should have been discharged, and, therefore, that this appeal must be allowed. I think that the decision in *Mullins v. The Treasurer of Surrey* decides that, notwithstanding the very awkward way in which the word "therein" is inserted in sect. 4, the enactment is not confined to the maintenance of prisoners while actually in the prison, and further that when it is established that the expenses are such as fall within the description of maintenance of a prisoner as defined in sect. 57, they are brought within the phrase "as would if this Act had not been passed have been payable by a prison authority," if they were such as would have been payable by the treasurer of the place to which the prison belonged, and for which the prison authority acted. And consequently, if the expenses now in question are within the definition of "maintenance of a prisoner," they were formerly payable by the prison authority. The question therefore is, as it seems to me, reduced to this, whether the lunatic still detained under her sentence, and not entitled to her discharge, though she becomes sane, but relieved from suffering punishment, is while she is insane within the meaning of sect. 57, "a prisoner in custody, and in a place of confinement." I do not doubt that, in the ordinary sense of the words, all these things are true of her case. This is fortified by the language of 27 & 28 Vict. sect. 21, where such a lunatic is spoken of as being in custody, but I put no more stress on this than as showing that such is the natural language to use in such a case. I therefore move that this appeal be allowed, with costs, and that the rule appealed against should be discharged.

Lord WATSON concurred.

Lord BRAMWELL.—My Lords: If I thought that the consideration on which I have founded my opinion in this case had been present to the minds of those whose judgment is appealed from, I should entertain the greatest doubt as to the soundness of that opinion. As it is, I am, with great hope that I am right, compelled to say that I cannot agree with that judgment. I advise your Lordships to allow this appeal. One would think that when the local prisons were taken from the prison authorities they would be relieved of their expense. No doubt it might have been otherwise provided, but one would certainly suppose that, if the bulk of those expenses was undertaken by the State, the whole would be, and I am at a loss to see why the expense of a criminal pauper lunatic, and no other, should continue to be borne by the prison authorities. It seems to

me that the Legislature has enacted what, as I say, I should expect, because it seems to me that the words in sect. 57, "or otherwise," are not to be read in connection with "place of confinement," but generally with the whole sentence—thus, expenses of "food, &c., or otherwise." I think so as a mere matter of construction, but I think so also because otherwise many expenses, which doubtless are to be borne by funds to be provided by Parliament, are not provided for, the doctor and medicines, burial, the chaplain, materials for prisoners to work on, tools, &c. If so, there seems no difficulty in saying that the expenses now in question are within the enactment, because it is clear by the interpretation clause, and has been decided by this House, that "prisoner" does not exclusively mean a person who at the time spoken of is in prison, but it means a prisoner as interpreted—viz., a person who has been committed, &c. I should come to the same conclusion if the words "or otherwise" were limited to a "place of confinement," for, as I have said, this lunatic is a "prisoner" as interpreted. Then, as to the first item—namely, the expense of the inquiry as to the prisoner's sanity—I think the argument of the Solicitor-General irresistible—viz., that if the prisoner is not found a lunatic the expense of the inquiry must be borne by the Consolidated Fund, and it cannot have been intended otherwise when the prisoner is so found. Then, the conveyance is clearly to a place of confinement, "or otherwise," if those words are so limited, and the food is undoubtedly within sect. 57. Now, what is the objection to this? It is said that it would be piecemeal legislation. Now, to my mind, that is precisely what it is not; on the contrary, the construction of the Crown makes piecemeal legislation. On the construction I submit, the Legislature has dealt with all expenses to which the prison authority as such is liable. It has not dealt with all cases of lunatics, nor with all county expenses, because the subject-matter of the legislation was not lunatics generally, nor county expenses, but prisons. But then some objection is taken, which, I honestly confess, I do not understand, to the effect that there will be no machinery for getting these expenses from the estate of the lunatic or his parish, and that a petition of right against the Crown will be necessary to get the expenses which may be incurred. I cannot see that the machinery that existed before will not continue. If not, so much the worse for the Consolidated Fund. It is not a reason for misconstruing the Act. As to the petition of right objection, it is not practical. The Secretary of State will do his duty or will have to pay ready money. Moreover, your Lordships have already disregarded this objection. As to the judgments delivered in the court below, I think it right to make some respectful comments. It is said that this is not strictly an expense paid by the justices as a prison authority, because it is not an expense incurred on the part of or by persons who are being treated in prison. But if I am right in my application of the interpretation clause as to a prisoner, the statute is not limited to expenses incurred in a prison. It is said that the Act of 177 is not inconsistent with the prior Act, and that it is still in force. But this is to beg the question. If it provides for a new mode of paying the expenses, it abrogates the former on a well known principle. To say that the statute deals with the whole

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question of prisons and prisoners, leaving the criminal lunatics aside, is really to say that it does not deal with the whole question of prisoners, as it omits to deal with lunatic prisoners. I think that it is unreasonable to read the statute of 1877 as applicable only to the case of prisoners who remain sane. Its language is comprehensive enough to include all prisoners, and, if I am right, the reason of the thing is this—that it should do so. In the Queen's Bench Division the decision proceeded mainly on the ground that the lunatic was not a prisoner. On this I have already expressed my opinion. I advise your Lordships to allow this appeal.

Lord FITZGERALD concurred.

*Appeal allowed—Rule discharged with costs.*

Solicitor for the appellants, *H. H. Smallpeice.*

Solicitor for the respondent, *Solicitor to the Treasury.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

#### SITTINGS AT WESTMINSTER.

Nov. 3, 4, and 6, 1882.

(Before BAGGALLAY and BRETT, L.JJ.)

REG. on the prosecution of THE PENARTH LOCAL BOARD OF HEALTH v. THE LOCAL GOVERNMENT BOARD AND GEORGE TAYLOR. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 150, 257, 268—Expenses of paving street—Appeal to Local Government Authority—Prohibition.*

*By the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 150, the urban sanitary authority may give notice to the owners of premises to pave the street, and if such notice is not complied with may execute the works required, and recover the expenses of so doing from the owners in default, according to frontage, in the proportion settled by the surveyor of the urban authority, or (in case of dispute) by arbitration, or may declare the expenses to be private improvement expenses.*

*By sect. 257 the surveyor's apportionment is binding on the owner unless disputed by written notice within three months from the service on him of notice of the amount settled.*

*By sect. 268: "Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may within twenty-one days after notice of such decision address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said board may seem equitable, and the order so made shall be binding and conclusive on all parties."*

*An urban sanitary authority gave notice to an owner of premises under sect. 150 to pave, and on his default did the work. Afterwards the sur-*

*veyor served a notice of apportionment. After this a notice was served demanding payment of the sum apportioned, and stating that unless the amount was paid within fourteen days proceedings would be taken for its recovery.*

*Within twenty-one days after the service of the last notice, but more than twenty-one days after the service of the notice of apportionment, the owner addressed a memorial to the Local Government Board under sect. 268 complaining that some of the work was unnecessary, and the claim excessive.*

*A rule nisi was obtained to prohibit the Local Government Board from proceeding further in the matter of the owner's appeal.*

*Held, that notice of a decision within the meaning of sect. 268 was first given to the owner when the notice demanding payment was served on him, and therefore his memorial to the Local Government Board was in time, and, assuming that prohibition to the Local Government Board would lie (which the court did not decide), there was no ground for a prohibition.*

*Judgment of Grove and North, JJ. discharging the rule affirmed.*

APPEAL by the Penarth Local Board of Health from the judgment of Grove and North, JJ. discharging a rule calling on the Local Government Board and George Taylor to show cause why a writ of prohibition should not issue directed to them to prohibit them from further proceeding in the matter of a certain appeal by George Taylor against a demand made upon him by the Penarth Local Board for payment of several sums amounting in the aggregate to 252l. 10s. 9d., alleged to be due from him for private improvement works in respect of premises in Bradford-lane and certain other streets within the parish of Penarth in the county of Glamorgan.

On the 4th May 1881 the Penarth Local Board of Health served a notice in writing under sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55) (a) on George Taylor and certain other per-

(a) By the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 150: Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway, footway, or any other part of such street is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good or to provide proper means for lighting the same within a time to be specified in such notice.

If such notice is not complied with the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses.

By sect. 257: Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding 5 per cent. per annum from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are com-

(a) Reported by F. B. HUTCHINS and H. LEIGH Esqrs., Barristers-at-Law.



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sons, as the owners and occupiers of premises fronting, adjoining, or abutting upon a street called Bradford-lane, requiring them to level, pave, metal, flag, kerb, and channel the same within twenty-one days.

This notice was not complied with, and the Penarth Local Board executed the works themselves; the expenses incurred amounted to 375*l.* 0*s.* 11*d.*

On the 21st Sept. 1881 a written notice of apportionment, dated 19th Sept. 1881, and signed by the surveyor of the Penarth Local Board, was served on George Taylor; this notice contained the following words:

Wherefore take notice that I the undersigned, being the surveyor of the said urban sanitary authority, in pursuance of the 150th section of the Public Health Act 1875, do hereby apportion the sum of 75*l.* 11*s.* 3*d.* as the proportion of the said sum of 375*l.* 0*s.* 11*d.* to be paid by you as such owner as aforesaid, such apportionment being according to the frontage of your said premises fronting, adjoining, or abutting upon the said lane. Further take notice, that the aforesaid apportionment will be binding and conclusive upon you, unless within the expiration of three months from the day of the date of this notice you shall by written notice to the urban sanitary authority dispute the same.

No notice disputing the apportionment was given by George Taylor.

On the 20th Dec. 1881 the collector of the Penarth Local Board made a demand in writing, signed by the collector, on George Taylor; the following were the words of the demand:

I hereby demand payment of the sum of 75*l.* 11*s.* 3*d.* due from you to the Penarth Local Board, for private improvement works in respect of premises in Bradford-lane, in accordance with the apportionment made by the surveyor of the said board, notice of which has been duly served upon you, and I am directed to inform you that, unless the amount be paid before the expiration of fourteen days from the date hereof, proceedings will be taken for the recovery of the same. I also demand interest on the said sum from the date hereof until payment at the rate of 5 per cent. per annum.

Within twenty-one days from the 20th Dec 1881 George Taylor presented a memorial to the Local Government Board, objecting to the above demand and other similar demands, and stating that some of the work was unnecessary, and that

pleted for which such expenses have been incurred, and until recovery of such expenses a d interest, the same shall be a charge on the premises in respect of which they were incurred. In all summary proceedings by a local authority, for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand. Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner he shall by written notice dispute the same.

By sect. 268: Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said board may seem equitable, and the order so made shall be binding and conclusive on all parties.

the total sum was extremely heavy; the demand concluded in these words:

Under the above circumstances I address this memorial to the Local Government Board, so that I may learn whether the local board consider that it is equitable that I should pay the heavy sums sought to be enforced against me, which I submit for the foregoing reasons are excessive.

Cause was shown against the rule for a prohibition by the Local Government Board and by Mr. Taylor.

The *Solicitor-General* (Sir F. Herschell, Q.C.) and *Channell* for the Local Government Board, and *Hannen* for the defendant Taylor, showed cause against the rule, and submitted that prohibition would not lie here, as the Local Government Board was not a "court," in the proper meaning of that term, at all, but if it would lie the question would then be—was the appeal in time? They contended that, under sect. 268 of the Public Health Act 1875, it was, and that until notice of demand on the 20th Dec. 1881 there was no "decision" of the urban authority which could be appealed against; nor were the two previous notices, notices of any such decision at all. The Local Government Board had very wide powers and discretion in such matters, and were empowered to make an "equitable" order in the case of an appeal brought before them under sect. 268, and might then enter into a consideration of the whole matter.

*Charles*, Q.C. and *A. T. Lawrence*, for the Penarth Local Board, *contra*, supported their rule, and argued that the appeal was clearly out of time, and should have been brought, if at all, within twenty-one days from the date when notice to do the work, or at all events when notice of the expense incurred, was served on Taylor. The Local Government Board was a tribunal with judicial functions and discretion, as was shown by sect. 268, and therefore prohibition would lie to them as in the case of an ordinary inferior court.

During the arguments the following authorities were cited:

*Hesketh v. The Atherton Local Board*, 29 L. T. Rep. N. S. 530; L. Rep. 9 Q. B., 4; 43 L. J. 37, Mag. Cas.;

*Greco v. Hunt*, 36 L. T. Rep. N. S. 404; 2 Q. B. Div. 389; 46 L. J. 202, Mag. Cas.;

*Simcox v. The Handsworth Local Board*, 8 Q. B. Div. 39; 51 L. J. 168, Q. B. Div.;

*The Tottenham Local Board v. Rowell*, 35 L. T. Rep. N. S. 887; 1 Ex. Div. 504; 46 L. J. 432, Ex.;

*Cook v. The Ipswich Local Board*, 24 L. T. Rep. N. S. 579; 40 L. J. 169, Mag. Cas.; L. Rep. 6 Q. B. 451;

*Bayley v. Wilkinson*, 10 L. T. Rep. N. S. 543; 16 J. B. N. S. 161; 33 L. J. 161, Mag. Cas.;

*Wilson v. The Mayor of Bolton* (the judgment of *Hannen*, J. there), 25 L. T. Rep. N. S. 597; L. Rep. 7 Q. B. 105; 41 L. J. 4, Mag. Cas.;

*The Mayor, &c., of London v. Cox* (in the House of Lords), L. Rep. 2 F. & I. App. 239; 36 L. J. 225, Ex.

GROVE, J.—The rule nisi in this case asks the court, in very general terms, to prohibit the Local Government Board and George Taylor from proceeding by way of appeal against a demand of the Local Board of Penarth, for payment by George Taylor of an aggregate sum of 252*l.* 10*s.* 9*d.* Now, if we were to grant a prohibition in the terms of the rule, it is clear that we should prohibit Taylor from any appeal at all. I am of opinion, however,

that this rule should be discharged. In the first place, I think the rule, if made absolute in the terms asked for, would amount to an absolute prohibition against Taylor's proceedings in any way. Now he has, and it was admitted by the learned counsel in support of the rule that he has, a right of appeal under sect. 268 of the Public Health Act 1875. That section says, "Where any person deems himself aggrieved, &c. [His Lordship read the section and proceeded:] Now Taylor has complied with the requirements of that section. He has, within twenty-one days after notice given to him of some decision (I will not at this moment say what decision) of the Local Board of Penarth, addressed a memorial to the Local Government Board, and therefore he has brought himself within that clause. It has been admitted that he undoubtedly has a right of appeal, and that he was within time as to that appeal, upon the question whether the Penarth Board could recover the amount of the apportionment from him, as they say they can do, in a summary manner, or whether they should declare the expenses to be "private improvement expenses," in which case they would be a charge upon the land, and the repayment of them would be spread over a great many years. We are asked to grant this prohibition because, in his memorial to the Local Government Board, he has not stated—either has not stated at all, or at all events not with sufficient accuracy—that the ground upon which he seeks to appeal against these expenses is, that the amount of them is not recoverable from him in a summary manner. I am of opinion, however, although perhaps it may be unnecessary to go so far, that the memorial is not conclusive against him in that respect, and that if he is within the proper time for appealing, and has a right to appeal, he is not bound by the fact that he may not have stated with perfect accuracy in his memorial the right ground of appeal, or even may have stated it incorrectly. Nothing has been brought before us during the arguments in this case to show that, if any mistake has been made in the memorial, the appellate tribunal, if I may so term it, might not allow him to amend such mistake. The memorial is necessary in order to fix the time within which the appeal has been brought; it is in fact a notice of appeal, and the appealing party must give that notice, as it were, within twenty-one days after notice to him of the decision appealed against. After that, as it appears to me, the memorial is a matter of procedure only, and is not binding and conclusive upon the person memorialising; nor is it always to be taken as the only matter upon which the Court of Appeal can decide. To hold otherwise would be very dangerous, and liable to cause great hardship and injustice, for we might, in the present and other cases similar to it, deprive persons of their right to appeal unless their memorials were so skilfully and technically drawn that the statement of their grounds of appeal should be able to stand the critical examination of an astute lawyer—a state of things which would be a most unreasonable hardship upon persons having otherwise a clear and good right of appeal. I am therefore of opinion that the Local Government Board would not have been prevented from allowing Taylor to go into the matter, even although he had altogether omitted to state in his memorial the true ground of appeal, if he were able to satisfy

them that he was fairly entitled to go into it; but it is not necessary for us to decide that point here, and for two reasons: first, because I think his memorial, though not perhaps in the best possible terms, does include the admitted ground of appeal; because, at the conclusion of it, having given a detailed narration of the facts, he says, "Under the above circumstances I address this memorial to the Local Government Board, so that I may learn whether they consider that it is equitable that I should pay the heavy sums sought to be enforced against me, which, I submit, for the foregoing reasons, are excessive." Now that, no doubt, coupling the last part, would seem to show that he objects to the excess of the sums; but it seems equally, I think, to be a complaint that he is called upon to pay the heavy sum of 252*l.* 10*s.* 9*d.*, and that, under sect. 268, he may fairly ask the Local Government Board, even if they should not deem the total amount excessive, to allow him to pay it by instalments, or, alternatively, to declare the amount to be "private improvement expenses," as he would then not have to pay the whole sum down, but would have the payment of it spread over a number of years. Then, secondly, upon the main point which has been argued before us in this case, with regard to the construction of sects. 257 and 268, upon which that point turns, I do not read sect. 257 quite in the same way as the learned counsel in support of their rule construe it. But here it is necessary to refer to that portion of sect. 268 which applies to this case. It says: "Where any person deems himself aggrieved by the decision of the local authority, in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board." Now it is observable that there is nothing in this procedure which can be called a "decision" in the ordinary sense of the word. The whole matter is a series of consecutive steps. First, the local board have to give notice to the owner of the property that he is to do certain repairs. That may be in some sense of the word a "decision," but it is not done by anything like an order or judgment of a tribunal. It is merely to give him notice to do the work; but that perhaps may be said to import a decision that he shall do it; but it is very difficult to say that it does necessarily do so, because they may give him a notice to do certain repairs, and the next day or week afterwards that they want either more or less repairs, and so each of these would be a "decision," if we are to count the former a decision. Then again, they are to give him notice of apportionment, that is to say of the share of the repairs to which his property is liable, because, if he does not do the work upon their notice, they are empowered to do it themselves, and of that, too, they may give him notice. Now, is each of these steps a "decision" or a notice of a "decision?" It is indeed very difficult to say what the particular "decision" referred to in the section is, when there is nothing in the Act, except perhaps the order which is spoken of with regard to private improvement expenses, which in ordinary legal construction can be called a "decision." The Act, however, must mean something, and therefore we must take it that there is something

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which imports a decision. Now, certainly, with regard to the first of the three notices which were given in this case, the first was a notice to do the paving work, the second was a notice that the surveyor had apportioned a certain sum as Mr. Taylor's share of doing that work, and the third was a demand for payment of the amount of the surveyor's apportionment, and a notice that in default of payment they would proceed summarily to recover the amount. Now this last notice is a notice of some "decision," and it is the first time that he received any notice that he was required to pay the sum with which they alleged him to be chargeable. Now, within twenty-one days from that last notice Mr. Taylor appealed, and addressed a memorial to the Local Government Board, and as to that he is in time. It has been argued by counsel for the local authority before us that each of these steps is a "decision," and that, in order to entitle him to appeal, he should have appealed against each of such steps, but more particularly against the apportionment, within twenty-one days, and the learned counsel have contended, in support of their rule, that he cannot now appeal in any way against either the apportionment—that is the decision of the sum which is apportioned as his share—or against the total sum for expenses, for which all the different contributors, if I may so call them, would be liable, because, under sect. 257, the time has expired for any possible appeal, because not only is the surveyor's apportionment binding and conclusive, but the actual sum upon which he does apportion is also binding. The words of the portion of the section referring to this are: "Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive upon such owner, unless within three months from service of notice on him by the local authority, or their surveyor, of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same." Now, it has been argued that these words "shall be binding and conclusive" apply not only to the apportionment—that is to say, to the relative share which is apportioned to the particular owner—but also to the total amount of expenses out of which the sum so apportioned is applied to him as the share upon which he is to pay. I have, I own, felt some doubt as to the meaning of this clause, but I have come to the conclusion that all that the clause does mean is, that it is binding as to the apportionment, but that it is not binding, at all events, as to the total sum. He must take the apportionment as final, and if the total sum be admitted and the apportionment is proper, then of course the share of the sum also becomes binding. But, in my judgment, the section is not applicable to the assessment of the total expenses for the district, but only to the relative proportion which all owners will have to pay, assuming that such expenses for the work to be done are correct, and the works themselves proper to be done. Now, if the words "such apportionment shall be binding and conclusive upon such owner" stood alone, there could be no doubt, at least in my mind, that such apportionment would mean the apportionment, and that alone. But then is that altered by the subsequent words of the section,

which say, "unless within three months from service of notice on him by the local authority, or their surveyor, of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same?" In my judgment that only refers to the provisions of what the notice must contain, because the notice of apportionment must give him notice of what sum is claimed, otherwise he would not know what was demanded of him, and therefore it is necessary that it should give him notice of the amount of the sum claimed; but it does not alter the previous part of the clause, which says, not that such apportionment shall be binding both as to the apportionment and as to the sum, but only that such apportionment shall be binding; and it seems to me, therefore, that the latter half of the section does not alter the grammatical meaning of the term "such apportionment," but is only a proviso of what the notice shall contain. In other words, the notice is not to be, "I hereby give you notice that you are apportioned to pay one-tenth of the total expenses incurred," but "that you are required to pay 200*l.*," or whatever other sum it may be, being one-tenth of the total expenses, and being, in fact, a proviso that the notice shall be explicit as to the sum as well as to the apportionment. Now, if we look at the actual notice of apportionment, it certainly does not look like a "decision." It is framed as follows: "Whereas the expenses incurred by the said urban sanitary authority in levelling, paving, metalling, making, flagging, and channelling the said lane, amount to the sum of 375*l.* odd." There is no "decision" there, nor any statement how the amount is arrived at. All that is said is, "We have incurred these expenses; we have paid this money." It is extremely difficult to say that this is a decision from which Mr. Taylor is to appeal within twenty-one days. What is he to appeal from? The only question upon such an appeal would be, "Have you or have you not incurred expenses?" The local board would say, "We have incurred expenses to the amount of 375*l.*, and here are the vouchers, and therefore this appeal must be decided in our favour." According, therefore, to the terms, it is only a notice that they have spent those sums of money. It then goes on to say, "I, the undersigned, being the surveyor, in pursuance of the 150th section, do hereby apportion" so much. Possibly that may be a "decision." It may be a notice that the surveyor, at all events, has decided that he apportioned the sum named to the particular owner. It does not touch the rectitude or otherwise of the first clause, viz., whether the expenses incurred are proper expenses or not. It is a notice of, and in that sense may be, and I think is, a "decision" of the apportionment. Now, that the term "apportionment" bears the meaning that I have put upon it, and which was my first impression on the subject, though I confess it was somewhat shaken by Mr. Charles's argument, is clear, *prima facie* at all events from the opinion of the learned judges in the case of *Hesketh v. The Atherton Local Board* (29 L. T. Rep. N. S. 530; L. Rep. 9 Q. B. 4; 43 L. J. 37, Mag. Cas.). In that case the owner disputed his liability, and said that the highway was repairable by the inhabitants at large, and therefore the question was undoubtedly not quite the same as in the present case; but in giving judg-

ment there, and speaking of sect. 63 of the Local Government Act 1858 (21 & 22 Vict. c. 98), which was then under discussion, and which I may take it is in the same words as sect. 257 in the present Act,—the word "proportion" is used, but the section is really admitted by the learned counsel in argument to be substantially the same as sect. 257 here,—Blackburn, J. says: "Sect. 63 is confined to the apportionment, and it is that, and that alone, that is made conclusive and binding. The justices were therefore wrong in deciding that it was not open to the appellant to prove that the street was an ancient highway." But the words of Quain, J., in the same case, are stronger still. He says: "I am quite of the same opinion. It is clear that by sect. 63 all that is made binding and conclusive upon the owners is the apportionment according to their frontages. And if a notice had been given by the appellant that he disputed the apportionment, and the matter had gone before an arbitrator, it is clear that this question of highway or no highway could not have been raised before him." Then Archibald, J. said: "The language of the section is quite clear. It is the apportionment only that is made conclusive and binding on the owner, assuming the liability to exist." All those learned judges say that the apportionment is binding only as to the apportionment, but Archibald, J. adds, "assuming the liability to exist." Now, without taking that as a judgment binding upon me, it is to my mind a very strong authority to show that those learned judges construed the section in that case as I construe the similar section in the present case, and that the only binding and conclusive qualification of the section is as to the apportionment, the words being, "such apportionment shall be binding and conclusive." There are, many parts too, of the Act of Parliament which make it very improbable that it could have been intended to be made binding not only as to the apportionment, but also as to the actual expenses which the local board may have thought fit to incur; and there is also a very grave doubt, to my mind, whether, if that be so, there is any decision in this case to that effect. There is the surveyor's decision as to his apportionment, but there is no decision of the board, and no notice of demand upon Taylor bearing upon the total amount of the expenses which they say they have incurred, of which they do not even say they "have decided to be the proper expenses for these repairs," but merely that they are expenses which they have incurred. There are other cases which have been cited before us in argument, which bear perhaps, more or less, directly upon the matter. There is, for instance, the case of *Grees v. Hunt* (36 L. T. Rep. N. S. 404; 2 Q. B. Div. 389; 46 L. J. 202, Mag. Cas.), to which I called Mr. Charles's attention yesterday. What was decided in that case was that, "Where works are executed by a local authority for the improvement of a street under 11 & 12 Vict. c. 63, s. 69, and 21 & 22 Vict. c. 98, s. 63, and the expense is charged upon the owners fronting the street, it is necessary, before summary proceedings can be taken for the recovery of the amount apportioned upon any such owner, that a demand of payment of the sum so apportioned should be served upon him, and the six months within which the summary proceedings must be taken under the 11 & 12 Vict. c. 43 are to be reckoned from such notice of demand." Now, there was no notice of demand in

the present case until within three weeks of the time when this memorial of appeal was presented; and in a subsequent case (*Simcos v. The Handsworth Local Board*, 8 Q. B. Div. 39; 51 L. J. 168, Q. B. Div.), where an earlier notice had been served upon the appellant, stating that the board surveyor had settled that a certain sum was due from him in respect of his premises, and that the board required payment of that amount, such notice was held not to be in fact a notice of demand under this very same sect. 257. I see I said in my judgment in that case: "The notice of demand is made three months after the service of the notice, and an unnecessary demand made before this period has elapsed is immaterial." In the present case, until the third notice was given Mr. Taylor had not had any notice of demand served upon him, and he had not been called upon to pay this money. I am of opinion that that is the "notice of a decision" in this case, and the only one which has been given. The others, in my opinion, do not really amount to a "decision" for the purpose of this appeal. Upon these two grounds therefore: first, that he is undoubtedly entitled to some appeal, and is not precluded by this memorial from stating the admitted grounds; and secondly, upon the construction of the section. I am of opinion that this prohibition should not issue. Of course, if, *ex debito justitiæ*, the party aggrieved is entitled to the writ, we could not refuse it, however injurious we might think it to be to the general interests of justice; but certainly I am not sorry that we can come to the conclusion at which we have arrived, seeing that the tribunal in question, the Local Government Board, is a valuable and important one, and one having wide powers to look equitably into the matter; and it is of great importance to persons who are saddled with considerable expenses, all depending practically upon the surveyor who has to look into these expenses, and who probably is frequently not the most economical person, that their power of appealing should not be restricted. Upon the question whether prohibition would lie to an equitable tribunal of this nature, I entertain grave doubts, but it is not necessary that I should express any more definite opinion on that point.

NORTH, J.—One of the points in this case appears to me to be an important one, viz., the construction of the Public Health Act 1875; and inasmuch as our decision here may possibly affect other cases besides the present one, I will briefly state the view which I take of it. The first important section is sect. 150. That, read shortly, provides that, where any street within an urban district, not being a highway repairable by the inhabitants at large, or the carriageway, footway, or any other part of such street is not sewered, levelled, paved, &c., to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, and so on, "require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same, within a time to be specified in such notice." Before giving that notice certain plans are to be prepared, but that is not material here. Then comes this important part of the section, "If such notice is not complied with the urban authority may, if

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they think fit, execute the works mentioned or referred to therein, and may recover, in a summary manner, the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses." Now, in proceeding under that section, what "decision" has the board to arrive at? It is only suggested, in the present case, that there are three, or at most four points on which any "decisions" are come to at all. The first is a decision said to be arrived at on notice of it being given to Mr. Taylor, the owner, when notice was given to him in the first instance requiring him to do the work. But is that a "decision" of anything? The notice recites, first of all, that the street is not levelled, paved, &c., to the satisfaction of the board. If that be a decision of any sort, it is simply that the street is not paved, &c., to their satisfaction, and I do not think that any appeal could possibly lie from that. That is a matter of which they are the persons to judge, and if they say that it is not levelled or paved to their satisfaction, it would be impossible for any court to whom an appeal is directed to say that it was levelled or paved to the board's satisfaction. The notice then goes on, "Whereas your premises front, adjoin, or abut on certain parts of the said street which require to be levelled," &c. That is no decision, but a mere statement of a fact as to which there could be no possible appeal. It then proceeds, "and therefore the said local board give you notice to level, pave, &c., within twenty-one days from the date hereof," and it then goes on to recite, in full detail, the exact nature of the works that are required to be done under the notice. But, I may remark, there is nothing whatever in this notice indicating any "decision" by the board that they would do the necessary work if the owner did not do it. Not a word is there about that at all. At that time of course they could not tell whether or not they would have to do it, or whether or not the owner would do it. But there is no decision there, in any sense of the term, that he should do it. It is quite optional on his part to do it or leave it alone, and if he does not do it there is no penalty which they can enforce against him. He cannot be compelled to do it, and the only alternative is that the local board may, in particular cases, do the work themselves, if they so please, instead of leaving it undone. So far, therefore, as this notice goes, it seems to me to be no notice of any "decision" on any point whatever, except that the street was not paved, &c., to the board's satisfaction, as to which point nobody has suggested that there could be an appeal. The next thing that happens is that, Mr. Taylor not having done the work, the board proceed to do it themselves; and the work having been done, they then, some little time afterwards, by their surveyor, give Taylor the notice to which my brother Grove has referred. I notice, with regard to this, that sect. 150 gives no power to the surveyor to settle anything whatever except the proportion which each owner is to pay out of the total amount. He is not to settle what works are to be executed; that is to be done by the board; and all that he has to do is a matter which is

deputed to him and not to the board, viz., to settle the proportions which owners in default are to pay according to the frontage of their premises. He is to settle that. In the notice here given all that he did was, in my opinion, that which was, under the section, exactly his duty, and in that notice there is only one thing which can be called a "decision" of any sort. There is no decision there as to what the expenses incurred would be, but only a mere statement of what they had been; but there is a decision by him of what Taylor's proportion of the total sum actually incurred was, and that, in my view, is the only thing the surveyor could possibly settle. Such then being the 150th section, the question arises as to its effect under sect. 257 of the same Act. That section says, "Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner"—and there "settled and apportioned" means such settlement and apportionment as is mentioned in sect. 150; that is to say, not a settlement of what expenses shall be incurred, but merely of what the particular proportion of that expenditure is out of the total amount—"that apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authorities or their surveyor, of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same." Now, all the words in that section which I have read seem to me to indicate one thing. What the surveyor has to do is simply to settle the apportionment of the amount; and nothing, except what he has so to settle, is dealt with by this section at all. But then it is said that, although no doubt that is the patent meaning of the section and the notice given under it, yet the notice given by him operates in two ways: First of all, there is the patent notice of the exact proportion which Mr. Taylor has to pay; but there is also another notice latent in that, viz., a notice that the board has arrived at the conclusion that the total expense is 375*l*. Now, I cannot find any such notice at all of such a decision contained in the notice that was delivered. In the next place, I do not think that the surveyor is the person on whom the duty of giving any such notice lies. It is to be given, if at all, by the board. This is a notice of the surveyor's having performed his duty, and he has nothing to do with giving notice on behalf of the board. Then, further, I find that, in this particular case, notice is to be given by the surveyor of apportionment, and an express time for appeal is given if any party considers himself aggrieved by that notice, or wishes to complain of it, viz., three months in which he may dispute it. Had it been intended that the surveyor's notice was to operate in a double way—first to be binding unless notice were given to the local authority within three months, and also to operate directly by being binding in another respect unless notice were given within three weeks to a different tribunal—I do not think that this section would have dealt with both these matters; but, inasmuch as I find that sect. 257 deals simply with an appeal by way of arbitration in case of the surveyor having settled the amount wrongly, I do not think that it contemplates in any way whatever a notice being given under it which is to have the effect of bringing into operation the commencement of the three weeks

necessary for an appeal under a totally different section. It further strikes me as being improbable that the Legislature ever intended to give three weeks only to appeal on the important question of liability, and three months on the far less important question of whether the proportion of the charge were correct or not. And further than that, the notice itself is, to my mind, very significant, for it ends by saying, "Take notice, that the aforesaid apportionment will be binding and conclusive upon you, unless within the expiration of three months from the day of the date of this notice you shall, by written notice to the urban authority, dispute the same." Therefore, if it were intended to operate as a notice which would bring the three weeks' time into operation as well as the three months, it would, I think, be a most unfair thing to the person to whom the notice was given that his attention should not be expressly called to that point. I read the notice as showing clearly that the intention and understanding of the parties who gave it was simply that it should have the effect of making the three months' time for appeal given under sect. 257 begin to run, and was not intended to affect in any way the time for appealing within twenty-one days given by sect. 268. As I have already said, I do not consider that it amounts to any "notice of any decision" by the board that the total amount of the expenses is 375*l*. Further, again, sect. 268, which deals with the question of appeal, says: "Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such to be private improvement expenses," he may address a memorial in the way which has already been pointed out. With regard to that I do not think that there has been any decision in respect of which Mr. Taylor can say that he was aggrieved in this case, until the final notice was given to him on the 20th Dec. requiring him to pay his apportioned aliquot proportion of the 375*l*. In my opinion, therefore, sect. 257 does not apply to this case at all; but sect. 268 does apply to it, and Taylor had three weeks from the 20th Dec. when that third notice was given him within which to memorialise the Local Government Board, on the ground that he was aggrieved by what had been done by the local board; and the only thing, so far as I can see, which could prevent his going back beyond a certain time in respect of his appeal would be to show that, antecedently to that notice, some other notice had been given to him which gave him a right of appeal within twenty-one days, and no more, from the service of such other notice. Now I find no such "other notice" here, because, as regards the two only documents which have been suggested as notices, viz., the notice requiring him to do the work, and the notice of the surveyor's apportionment, neither of them, in my opinion, is a notice coming within the provisions of sect. 268. But, assuming that I am wrong in that view, and that the notice to do the work and the notice of apportionment were good notices of a decision from which Taylor ought to and should have appealed, the question arises, is there, or is there not, any right of appeal now? It seems to me that there is, because the memorialist has a right, where, as here, a notice is given, to complain of being aggrieved by a decision

that the 252*l*. odd is to be paid by him in a summary manner. It is said that the memorial which he presents to the Local Government Board does not raise that case at all; but, in my opinion, it does. Looking at the memorial, it seems to me that, even if it were to be construed strictly, it does suggest and does ask relief on the ground that the sum which he is required to pay at once (for an immediate demand for payment is made) is excessive in amount; and although I think from the memorial itself that the grounds which he wishes to raise particularly are not simply that the sum ought to be charged by way of "private improvement expenses" instead of by a summary demand for a total sum down, yet it would be perfectly open to him to say that he was aggrieved by reason of the sum being required to be paid by him at once instead of being spread over an extended period of time. That appears to me to be specially raised by the memorial, and to be a ground perfectly open to him to dispute, and certainly for an appeal at any time. Assuming the view which I have taken as to the appeal to be wrong, yet, inasmuch as there was a memorial presented upon which the memorialist can get some relief in case he makes out a case for it, it seems to me to be impossible for us to grant the order for a prohibition which is now asked for, which would be a prohibition restraining the operation of that appeal altogether. As to the point whether the Local Government Board is a body to which, assuming them to be a kind of inferior court, prohibition would lie, I have not formed any opinion, and do not intend to express any at present, nor is it necessary now that I should. Before doing so I should require to have the matter more fully argued, and to take time to consider it.

The Penarth Local Board appealed.

*Charles, Q.C.* and *A. T. Lawrence*, for the Penarth Local Board, in support of the appeal.—The entertaining of the memorial by the Local Government Board is a judicial proceeding, and therefore prohibition will lie. It is apparent from the provisions of sects. 150, 257, and 268 of the Public Health Act 1875 (38 & 39 Vict. c. 55), that the Local Government Board had no jurisdiction to entertain that memorial. The apportionment, not having been disputed by a written notice within three months from the 21st Sept. 1881, is binding and conclusive by sect. 257. If, however, the effect of this memorial is not to dispute the apportionment within the meaning of sect. 257, then by sect. 268 Mr. Taylor should have appealed within twenty-one days after notice of the decision of the local board that he was liable to pay, that is, within twenty-one days after the 21st Sept. 1881. This being so his appeal was out of time, and ought not to be entertained.

*Sir F. Herschell, S. G. (O'hannell with him)*, for the Local Government Board, in support of the decision of the court below.—Prohibition does not lie except to a tribunal deciding legal rights and exercising the functions of a court. Here the Local Government Board were not exercising judicial functions. The notice of decision within the meaning of sect. 268 was the notice demanding payment which was served on the 20th Dec. 1881. Until that notice was served there was no decision by the local board to



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appeal from. The apportionment is not such a decision; it is made, not by the local board, but by the surveyor.

*A. L. Smith* for George Taylor.—Until service of the notice of the 20th Dec. Mr. Taylor was not a person "aggrieved by the decision of the local authority" within the meaning of sect. 268. He had, therefore, twenty-one days from that date within which to address his memorial to the Local Government Board.

*A. T. Lawrence* replied.

The following further authorities were referred to:

*Dryden v. The Churchwardens and Overseers of Putney*, 34 L. T. Rep. N. S. 69; 1 Ex. Div. 223;  
*Attorney-General v. Wandsworth District Board of Works*, 6 Ch. Div. 539;  
*Tunbridge Wells Local Board v. Akroyd*, 42 L. T. Rep. N. S. 640; 5 Ex. Div. 199;  
*Comyn's Digest*, "Prohibition;"  
*Breedon v. Gill*, 5 Mod. 289;  
*Hammersmith Railway Company v. Brand*, L. Rep. 4 H. L. 171;  
*Ex parte Death*, 18 Q. B. 647;  
*Cooper v. Wandsworth Board of Works*, 18 C. B. N. S. 180;  
*Reg. v. Local Government Board*, 2 L. Rep. Ir. 316;  
*South-Eastern Railway Company v. Railway Commissioners*, 44 L. T. Rep. N. S. 203; 6 Q. B. Div. 586.

BAGGALLAY, L.J.—In this case a question arises under the Public Health Act 1875 (38 & 39 Vict. c. 55), and it depends on the construction of sects. 150, 257, and 268. By sect. 150, if the notice requiring the owners or occupiers to repave or repair the streets is not complied with, power is conferred (not an obligation imposed) on the urban authority, if they think fit, to execute the works mentioned and referred to in the notice; and if they execute the works they can either recover in a summary manner the owner's proportion of the expenses incurred by them in so doing, or they can declare such expenses to be private improvement expenses, and they may also by sect. 257 declare any such expenses to be payable by annual instalments. In the present case the Penarth Local Board of Health gave notice to Mr. Taylor under sect. 150 to do certain works; he did not do the works, and the board had the works done, and gave him notice to pay. Within twenty-one days after service of the notice demanding payment Mr. Taylor appealed to the Local Government Board under sect. 268. Sect. 257 makes this provision, that where the expenses have been settled and apportioned by the surveyor as payable by the owner, "such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him . . . of the amount settled . . . he shall by written notice dispute the same." By this clause power is given to the owner within three months to dispute the amount; if he does so, there is to be an arbitration to settle the amount which he is to pay; if he does not do so within the time limited, then the amount apportioned is binding on him. Then there is a general clause as to appeal contained in sect. 268, by which a person aggrieved by the decision of the local authority may, "within twenty-one days after notice of such decision," appeal by memorial to the Local Government Board. In this case, after the works had been done and the amount ascertained, a demand of

payment was made on Mr. Taylor on the 21st Dec. Then he first moves in the matter. He sends in a memorial to the Local Government Board, and particularises his grounds of complaint, alleging that there was no necessity for the paving which had been done, and that too much expense has been incurred. A rule *nisi* was obtained for a prohibition to the Local Government Board to prohibit them from proceeding in the matter of the appeal; that rule was discharged by the Divisional Court, and the present appeal is from this decision. The rule was resisted partly on the ground that no prohibition would lie to the Local Government Board, and partly because it was said that there were no grounds for a prohibition in the present case. I am of opinion that the argument of the respondents must prevail, because there are no grounds for a prohibition. It therefore becomes unnecessary to say anything as to whether prohibition lies or not. It is said here on behalf of the appellants that there were three decisions by the urban authority: the first when they gave notice to Mr. Taylor requiring him to pave; the second when they gave him notice of the amount apportioned; and the third when they demanded payment, at the same time threatening to proceed in a summary manner. I cannot take the view suggested as to the two first of the alleged decisions. On the construction of the sections, I think there is no decision until the urban authority have decided whether they will proceed in a summary manner to recover the expenses incurred or declare them to be private improvement expenses. There is no decision when the owner is called on to execute the works, for the urban authority are not bound to do what he has neglected to do; therefore there is no decision from which he can appeal. I pass on to the notice of the amount settled. That is no decision by the urban authority, for the notice is a notice of the amount settled by the surveyor; therefore it is no decision from which there could be an appeal under sect. 268. An argument was forcibly addressed to us by Mr. Charles and Mr. Lawrence, that, inasmuch as there could have been an appeal from the apportionment of the expenses, and the time for that appeal had expired, there could be no appeal now. Also it might be urged that on the 21st Sept. there was a decision by the urban authority, but, for the reasons which I have already assigned, I think this is not so. The three months having expired, the apportionment is absolutely binding as to the proportion of the total sum which the owner is to pay. Then there is a decision as to the mode in which payment of the amount claimed is to be enforced, and that decision is communicated to Mr. Taylor by the notice of the 21st Dec. demanding payment of the sum apportioned by the surveyor. This seems to me to be a decision by the urban authority as to whether they would enforce payment of the expenses incurred by summary proceedings, or would declare them to be private improvement expenses. From the time of the receipt of that notice I think Mr. Taylor had a right of appeal, and I am unable, having regard to the terms of sect. 268, to see that the subject of the appeal is restricted. I have felt a little doubt as to whether the board should travel beyond the grounds of complaint stated in the memorial; but I gather from the argument that the only questions to be raised are whether



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the work should be done, and as to the amount. For these reasons I am of opinion that the appeal ought to be dismissed.

BRETT, L.J.—I agree that no writ of prohibition should issue, but I do not agree with the grounds of the decision of the court below. Mr. Taylor had a notice, on the 4th May 1881, from the urban authority that they were dissatisfied with the way in which the street was paved, and requiring him to pave the portion of the street adjoining his premises. I am inclined to think that notice expressed a decision on the part of the urban authority, for they must have decided that the condition of the street was unsatisfactory. It seems to me, therefore, that he then had notice of a decision, and a demand was then made that he should pave the street. On the 21st Sept. 1881 he received a second notice from the urban authority stating that they had expended a sum of 375*l.* 0*s.* 11*d.* in executing the works, and that his proportion was 75*l.* 11*s.* 3*d.*, and the apportionment would be binding on him unless he disputed it within three months. He received a notice, therefore, on that occasion, but it was not a notice of a decision, for they had not decided that they had paid the money, nor had they decided that they apportioned a certain amount to Mr. Taylor, for that apportionment was made not by the urban authority but by the surveyor. Then on the 20th Dec. he receives a third notice. Now it seems to me that the collector, in serving that notice, is giving notice as the servant and on behalf of the board, and therefore this is a notice by the board. It is a notice of a decision, for it is a notice that the urban authority had decided that the expenses incurred were not to be treated as private improvement expenses, but were to be recovered summarily. Within twenty-one days from the receipt of this notice, but long after twenty-one days from the receipt of either of the former notices, Mr. Taylor sent in a memorial addressed to the Local Government Board, to the effect that the demand made upon him was inequitable, on the grounds that the work which had been done was unnecessary, and the amount expended unreasonable. He did not claim in the memorial that the apportionment as between him and the other owners was wrong. I think we must take it that the Local Government Board were prepared to consider the two questions set out in the memorial, and intended to consider both those questions in order to see whether the demand made on Mr. Taylor was equitable. The appellants ask for a prohibition to the Local Government Board to prohibit them from proceeding further in the matter of Mr. Taylor's appeal to them. Now it is said that the appellants ought to have limited the grounds of their claim, and that because their application was too large, therefore no rule ought to be granted. As I understand the judgment of the court below it went on that ground. Assuming that the decision proceeded on that ground, I cannot agree with it, for it seems to me that, if a person asks for too much in applying for a prohibition, the court should mould the prohibition, and limit it to those points as to which the applicant is entitled. I think the Solicitor-General did not contest this. It is said on behalf of the appellants that there were three successive decisions, and against each of these, as they arose, Mr. Taylor had a right of appeal, but he did not appeal against the first

two decisions in time, and therefore his right of appeal is gone. It is said that on the last decision there is only one ground on which he has a right of appeal (namely as to whether these expenses ought to be recovered summarily, or ought to be declared private improvement expenses), and that this ground of complaint is not stated in his memorial, and therefore the Local Government Board has no power to hear his appeal. It was said by the Solicitor-General that, if it were wrong on the part of the Local Government Board to entertain an appeal on two of the questions, still they are not persons against whom prohibition will lie. In my view it is not necessary to determine this question. I am sorry it is not to be decided, because it is very important, and if the Lord Chief Justice were here, possibly we might have thought it right to give our opinion on the question, but in his absence, (a) as the court consists of only two judges, I think it is right not to enter into the consideration of the question. My own view is, that the court should not be chary of prohibition, and where the Legislature has intrusted power to a public body to impose an obligation, the court should exercise their discretion widely if such public body exceed the jurisdiction so intrusted to them. Then, on the assumption that a prohibition might go, is there any ground for it in this case? The question arises on the construction of the sections of the Public Health Act, and we have to determine what appeal lies, and what matters may be gone into. This depends mainly on sect. 268. I cannot agree with the Solicitor-General that the heading of the group of sections is not part of the Act of Parliament. I take it that the word "appeal" at the head of sect. 268 is part of the Act, and may be used for the purpose of construing the two sections forming that part of the Act at the head of which it stands. I take it there is an appeal given by sect. 268. It is said that it is not an appeal against a judicial decision, and that the proceedings of the local board are not judicial. It is not necessary to decide this, but I have a strong opinion that the proceedings are judicial, and that it is the duty of the Local Government Board to hear the party presenting the memorial. It is obvious that the Local Government Board are bound to hear the other board against whose decision the appeal is brought, because the section directs the delivery of a copy of the memorial to the local authority. It is not necessary to say whether the Local Government Board are bound to hear the parties to the appeal orally, but that they are bound to give the appellant an opportunity of answering the answer of the local authority to his memorial, to my mind, is obvious. Now, against what decision is the right of appeal given by sect. 268? The words are, "The decision of the local authority" in certain cases, not "any decision," and the appeal is to be brought "within twenty-one days after notice of such decision." The decision is "in any case in which the local authority are"—not "shall be"—empowered to recover expenses summarily, or declare them to be private improvement expenses. The wording of the section shuts out cases of notices given before any expenses have been incurred; therefore it shuts out cases where notice

(a) Lord Coleridge, C.J., who had heard part of the argument, was prevented by illness from taking part in the decision.

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is given to do the work. Also it must be where they are empowered to recover in a summary manner, and to see how this provision affects the question we must look at sect. 150, and see the effect of the notice there mentioned; after that notice the urban authority are not in a position to recover any expenses summarily, for there is nothing to recover. Next take the case where they procure the work to be done. They are not then in a position to recover anything, and the next act is done not by them but by their surveyor, whose decision is as to the proportion only, and the board cannot determine this, but it has to be determined by the surveyor; he gives notice of his apportionment, and for what purpose is this notice served on the owners? In order that, if they are dissatisfied with the apportionment, they may complain to the local authority, and if they do not so complain within three months the rate of apportionment is binding. The decision of the surveyor has nothing to do with the amount expended, but only settles the apportionment if the amount expended is right. Therefore there is then no appeal under sect. 268, because, if there has been any order of the board, it is an order of a board which is not in a position to recover any expenses summarily. Then what are they to do in order to get into a position to recover the expenses summarily? This is not expressly enacted. Sect. 257 is the only enactment as to the necessity for notice of demand. What is the necessary inference to be drawn from the words of that section? That they must proceed by notice of demand, and that until then they are not in a position to recover the expenses. On that notice being given there is an appeal, but there is none before; there is none when it is determined that the street is to be paved, and there is none when the amount payable by each owner is determined. The right arises only on the making of the demand, after the expenses have been incurred and the apportionment has been made, because not until then is it a case in which the local authority are empowered to recover the expenses summarily. After the demand the memorial can be presented within twenty-one days. Here it was presented, and the only question then is, what questions could the Local Government Board inquire into? What words are there in the Act to oblige us to come to the narrow conclusion that there could be no appeal as to either the necessity for the work or the reasonableness of the expenditure? Yet it is said that the local board of health have no control over these matters. According to this argument there is only one complaint which the owner can make; then why should he state it as sect. 268 says he shall? That section says "the grounds of his complaint" (in the plural), and, if there can only be one ground of complaint, what is the necessity for this provision? The section assumes that there may be several grounds of complaint, and that they may be grounds which could not be anticipated by the local authority. I think the construction suggested is too narrow, and would lead to absurd, inconvenient, and unjust results. It seems obvious that, on the true construction of sect. 268, the Local Government Board has power to inquire into every circumstance connected with the subject of the appeal. They may take into

their consideration the former matters, not as decisions, but as facts, in order to inquire whether the sum demanded is equitable. I should be loth to fetter the Local Government Board in the exercise of the powers conferred upon them. Therefore it seems to me that, assuming prohibition will lie, there is no reason for assuming that the Local Government Board are about to inquire into matters beyond their jurisdiction. I cannot see that they would be exceeding their jurisdiction if they were to inquire into all the matters which relate to the question in dispute. I think therefore that there is nothing which we ought to prohibit. I do not agree with one of the grounds of the decision in the court below, but I agree that the rule was rightly discharged, and this appeal ought to be dismissed.

*Judgment affirmed.*

Solicitors for Penarth Local Board, *Torr and Co.*, for *Griffiths and Corbett*, Cardiff.

Solicitors for Local Government Board, *Sharpe, Parkers, and Pritchard*.

Solicitors for Mr. Taylor, *Ingledeu and Ince*, for *Ingledeu, Ince, and Vachell*, Cardiff.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

Wednesday, Dec. 6, 1882.

(Before FIELD and STEPHEN, JJ.)

HARBOTTLE (app.) v. TERRY (resp.). (a)

*Fishery district—Certificate of Secretary of State—Tributary—Waterworks reservoir—River Tyne—Salmon Fisheries Acts 1861-1873 (24 & 25 Vict. c. 109; 28 & 29 Vict. c. 121; and 36 & 37 Vict. c. 71)—The Freshwater Fisheries Act 1878 (41 & 42 Vict. c. 39).*

*Under the Salmon Fishery Act 1865 (28 & 29 Vict. c. 121), s. 5, the fishery district of the river Tyne was described by a Secretary of State's certificate to be "so much of the river Tyne and its tributaries as is situate within the counties of Cumberland, Northumberland, Durham, &c." Before 1845 the Whittle Dean Burn in the county of Northumberland was a tributary of the Tyne. In that year 8 & 9 Vict. c. lxxi. empowered a local water company to take the water of this stream, and under that and two subsequent Acts a reservoir was formed by placing a dam across it, an outlet from the reservoir communicating by an artificial watercourse with the ancient watercourse of the stream. Sometimes all the water of the stream flows direct to the Tyne, sometimes a part flows through the reservoir into the Tyne, sometimes (frequently in summer) all the water is impounded in the reservoir. Salmon and trout can only pass into the reservoir when the stream is in flood, and the sluices drawn up. On an information charging the respondent with attempting to take trout in the reservoir by means other than a properly licensed instrument: Held, that the justices were right in dismissing the information, as the reservoir was not a tributary of the Tyne within the meaning of the certificate of the Secretary of State.*

THIS was a case stated under 20 & 21 Vict. c. 43 by justices for the county of Northumberland

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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on the hearing of an information preferred before them, under the Salmon Fishery Acts 1865 to 1873 (24 & 25 Vict. c. 109; 28 & 29 Vict. c. 121; and 36 & 37 Vict. c. 71) and the Freshwater Fisheries Act 1878 (41 & 42 Vict. c. 39), by one George Harbottle against William Terry, for an offence against the 22nd section of the Salmon Fishery Act 1873. Upon the evidence then brought before them the justices dismissed the information, but stated the following case for the opinion of the court:—

1. Upon the hearing of a certain information preferred by the appellant against the respondent charging for that "on the 29th May last, at the parish of Ovingham, in the division of Tindale Ward, in the county aforesaid, and within the fishery district of the river Tyne, in which said district licences are payable under the provisions of the Salmon Fishery Acts 1865 to 1873 and the Freshwater Fisheries Act 1878, the respondent unlawfully did attempt to take trout by means other than a properly licensed instrument for catching trout—to wit, a stick and two lines—contrary to sect. 22 of the Salmon Fisheries Act 1873."

2. The following facts were either proved or admitted by both parties:

3. That by a certificate under the hand of Sir George Grey, one of Her Majesty's Principal Secretaries of State, dated the 1st May 1866, the fishery district of the river Tyne was formed, and the limits of the district were described to be so much of the river Tyne and its tributaries as is situate within the counties of Cumberland, Northumberland, Durham, and the town of Newcastle-upon-Tyne, and also the "estuary of the said river, and so much of the coast as lies between Souther Point, in the county of Durham, and Cray Point, in the county of Northumberland, and all rivers flowing into the sea between the said points and being within the said counties, as laid down on the annexed map deposited in the office of the clerk of the peace in the county of Northumberland."

4. That a board of conservators for the said district had been duly appointed, and that a scale of licences had been duly approved by the Secretary of State in pursuance of the Salmon Fisheries Act 1865, s. 34, which is incorporated in the Freshwater Fisheries Act 1878, by sect. 7 of the last-mentioned Act.

5. That a stream of water, locally called the Whittle Dean Burn, was, previous to the year 1845, a tributary to the Tyne.

6. That on the 30th June 1845 the Act of Parliament of 8 & 9 Vict. c. lxxi. was passed, and on the 2nd June 1854 the Act of Parliament of 17 & 18 Vict. c. lx. was passed, both of which Acts the respondent relied on. The Act of 26 & 27 Vict. c. xxxiv. also bears on this case.

7. That by virtue of the powers conferred by the said two Acts of Parliament several reservoirs, one of which is called "The Great Southern Reservoir," have been formed, which are supplied with water from the said stream.

8. That the Great Southern Reservoir was formed by placing a dam across the stream.

9. That an outlet from the said last-mentioned reservoir has been formed by which the said last-mentioned reservoir communicates by an artificial watercourse with the ancient watercourse of the said stream.

10. That at the present date all the water of the said stream sometimes flows directly to the river Tyne, partly by an artificial watercourse and partly by the ancient watercourse; at other times a portion of such water flows through the said reservoirs into the Tyne, and at other times all the water of the said stream is impounded in the said reservoirs, and no water flows into the river.

11. That no waste water had been passed out of the said reservoirs since 27th April last.

12. That it is a frequent occurrence in summer for no waste to be passed out of the said reservoirs.

13. That when the said reservoirs are full all the surplus water is sent into the river Tyne.

14. That salmon, the young of salmon, and trout can pass from the river Tyne into the Whittle Dean Burn, and thence into the said reservoirs; but the stream must be in flood and the sluices drawn up.

15. That trout have been caught in the said stream, and trout, bull trout, kelts, and smelt (the young of salmon) have been caught in the said reservoirs.

16. That the respondent did, on the 29th May 1882, fish for trout in the said reservoir, called the Great Southern Reservoir, with a stick and two lines, an instrument not properly licensed by the Board of Conservators of the fishery district of the river Tyne.

17. That the stream called the Whittle Dean Burn, both above and below the said Great Southern Reservoir, is at present a tributary to the river Tyne.

18. That fishing in the said reservoirs has gone on for twenty years; that the witness on the part of the respondent who proved this had been superintendent of the said reservoirs for that period, and had never seen any salmon, or the young of salmon, in the reservoirs, or taken out, except one, caught on the 23rd June 1882.

19. Upon these facts the counsel for the appellant contended that, it being admitted that the stream called the Whittle Dean Burn was once a tributary to the river Tyne, it remains so still; that the Great Southern Reservoir, through which the said stream is permitted to flow at certain times, and out of which trout and fish of the salmon kind have been taken, is also a tributary to the river Tyne within the meaning of the said statute.

20. It was contended by the counsel for the respondents, that there is a difference in law between water which flows past land and water which is impounded by Act of Parliament; and, while admitting that there was a stream of water called Whittle Dean Burn, which was at one time a tributary to the river Tyne, he contended that the Legislature had altered the character of the stream and taken away all rights. He referred to the preamble of the Act of 1861 as evidence that the Act extended only to public waters, or quasi-public waters, and not to private fishponds. He defined the term "tributary" as that which pays tribute, and contended that, under the said statutes, the said water company were not bound to contribute any of the water flowing in the said stream to the river Tyne; that the said company had power to impound all the water flowing in the said stream; and that, if the Great Southern Reservoir is a tributary, it is a tributary to a tributary, inasmuch as it contributes to the natural and ancient stream called Whittle Dean

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Burn, in its course between the latter reservoir and the river Tyne, between which points it is a tributary to the river Tyne; and he summed up his case into two points: first, that the Great Southern Reservoir is private water, and not a tributary within the meaning of the said certificate; second, that a tributary must be "frequented" by trout.

Upon the evidence above set forth we decided that a stream, locally called the Whittle Dean Burn, was, previous to the date of the first statute put in evidence by the respondent, a tributary to the river Tyne; that by the operation of the said two last-mentioned statutes (8 & 9 Vict. c. lxxi. and 17 & 18 Vict. c. lx.) and of the 26 & 27 Vict. c. xxxiv the reservoirs formed under the provisions of those statutes are no longer tributaries to the river Tyne, and therefore not within the jurisdiction of the Tyne Salmon Conservancy, and thereupon we dismissed the information.

The question for the decision of the court is, whether the said Great Southern Reservoir is a tributary to the river Tyne within the meaning of the said certificate.

If the court should be of opinion that the Great Southern Reservoir was not such a tributary, then the order of the justices dismissing the information was to stand. If the court should be of the contrary opinion, then the case was to be remitted to the justices to be dealt with according to the decision of the court.

The 3rd and 5th sections of the Salmon Fishery Act 1865 (28 & 29 Vict. c. 121) so far as they are material, are:

3. In this Act the word "river" shall include such portion of any stream or lake, with its tributaries, and such portion of any estuary, sea, or sea coast as may from time to time be declared, in manner hereinafter provided, to belong to such river.

5. The limits of a river shall be defined for the purposes of this Act, and a fishery district shall be formed, by a certificate under the hand of one of Her Majesty's Principal Secretaries of State, describing the limits of the river or district.

The 22nd section of the Salmon Fisheries Act 1873 (36 & 37 Vict. c. 71), is:

22. In all fishery districts in which licences are payable under the provisions of the Salmon Fisheries Act 1865, or this Act, any person fishing for, taking, killing, or attempting to take or kill, salmon by any means whatsoever other than a properly licensed fishing weir, fishing milldam, fixed engine, instrument, net, or device for catching or facilitating the catching of salmon, or assisting any person in so doing, shall be liable to a penalty not exceeding five pounds.

The material sections of the Freshwater Fisheries Act (41 & 42 Vict. c. 39), are:

2. This Act shall, so far as is consistent with the tenor thereof, be read as one with the Salmon Fishery Act 1861 to 1876.

6. The provisions of the Salmon Fishery Acts 1865 and 1873, which relate to the formation of fishery districts and to the appointment, qualification, proceedings, and powers of conservators, shall extend and apply to all waters within the limits of this Act, frequented by trout or char.

7. In any fishery district, subject to a board of conservators, the conservators shall have power to issue licences for the day, week, season, or any part thereof, to all persons fishing for trout or char, and, in the event of the power being exercised in any fishery district, the provisions of the thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, and thirty-seventh sections of the Salmon Fishery Act 1865, and of the twenty-first, twenty-second, twenty-fourth, and twenty-fifth sections of the Salmon Fishery Act 1873 (relative to licences) shall, with respect to such district, be construed as if the words "trout

or char" were inserted throughout after the word "salmon."

The Act of Parliament 8 & 9 Vict. c. lxxi., relied upon by the respondent, is a local Act for supplying the borough and county of Newcastle-upon-Tyne, and the borough of Gateshead, in the county of Durham, and the neighbourhoods thereof, with water from Whittle Dean, in the parish of Ovingham, and other places in Northumberland; the Act 17 & 18 Vict. c. lx. is for enabling the Whittle Dean Water Company to extend their works and to obtain a further supply of water from certain rivers and streams; and the Act 26 & 27 Vict. c. xxxiv. is the Newcastle and Gateshead Waterworks Act 1863.

*Willis Bund* for the appellant.—The Whittle Dean Burn was formerly a tributary to the Tyne, and is stated in the case to be so at present both above and below the reservoirs. By the Waterworks Acts the waterworks company were authorised to place a dam across the stream, and so turn the water into (among others) a reservoir called the Great Southern Reservoir, and this was done before the Salmon Fisheries Acts were passed. Under them the Secretary of State formed the fishery district of the Tyne, which was described to include so much of the river Tyne and its tributaries as was situate within certain counties. The fact that the stream is dammed across, and the water by these means held up in a reservoir for the use of the waterworks company, does not cause the water so held up to cease to be tributary. In *Merricks v. Cadwallader* (46 L. T. Rep. N. S. 29) the wording of the certificate of the Secretary of State was different, and the decision is based on a rule of construction which does not apply here. In *Hall v. Reid* (a)

(a) HIGH COURT OF JUSTICE.—QUEEN'S BENCH DIVISION.

Monday, June 12, 1882.

(Before FIELD and CAVE, JJ.)

HALL (app.) v. REID (resp.).

THIS was a case stated under 20 & 21 Vict. c. 43 by justices for the county of Derby on the hearing of an information preferred before them at Bakewell on the 21st April 1882 by the appellant, a water bailiff to the Board of Conservators of the Trent Fishery District, against the respondent for unlawfully attempting to take trout in the river Wye at Bakewell, in the county of Derby, by means other than a properly licensed instrument for catching trout, contrary to the 22nd section of the Salmon Fisheries Act 1873.

The Trent Fishery District is a fishery district duly formed under the provisions of the Salmon Fishery Acts, by a certificate under the hand of one of Her Majesty's Principal Secretaries of State, and the limits of the district are therein described to be "so much of the river Trent and its tributaries" as is situate within the counties of Stafford, Nottingham, Derby, &c.; and the Board of Conservators for the district was duly appointed, and a scale of licences duly approved under the provisions of the said Acts.

The respondent had, as a fact, fished for trout without a licence in the river Wye, which is a river flowing into the Derwent, which flows into the Trent.

The justices were of opinion that the word "tributaries" in the Secretary of State's certificate meant direct tributaries, and did not include the tributary of a tributary, the case of *Merricks v. Cadwallader* (46 L. T. Rep. N. S. 29) being conclusive on that point; and they therefore dismissed the information, but stated a case for the opinion of the court, the question being whether the respondent required a licence from the Board of Conservators to fish in the river Wye.

*Willis Bund* for the appellant.

*Woolf* for the respondent.

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"tributary" was defined by Field, J. as "that which contributes to." [STEPHEN, J.—The question there was as to whether a tributary of a tributary was itself a tributary, and it was decided that it was.] In this case the reservoir is a tributary of the stream which is found to be a tributary of the Tyne. [STEPHEN, J.—Would the Serpentine and Hendon reservoir be tributaries of the Thames?] Yes; but the Secretary of State has full powers in the formation of the districts, and it would be for him to consider whether he would include them in the Thames district or not:

*Reg. v. Sir George Grey*, 14 L. T. Rep. 477; L. Rep. 1 Q. B. 469.

[FIELD, J.—Is not the definition in *Hall v. Reid* too wide? If pressed it would include water taken from a stream for domestic purposes, and afterwards returned through the drains, and licences would be required for private fish ponds in all cases where the water is derived from, and the surplus returned to, a tributary in a fishery district. Must not a tributary be *ejusdem generis* with its parent river? A mountain stream dry in summer is most important for fishing purposes for breeding, and this is an exactly similar case; the reservoirs take all the water in summer, and when there is too much the sluices are opened and a part is allowed to flow away. [STEPHEN, J.—Does not this case differ from that of a stream across which dams have been placed so as to form ponds, the water flowing in at the top and out at the bottom? In this case there are watercourses on each side, and the reservoir between impounds the water, and it is only when it becomes too full that the sluices are opened and some of the water let off.] The tributary watercourses at the side are artificial like the reservoir. The company has received no rights from the Legislature beyond that of taking the water for the purpose of supplying the town,

FIELD, J.—I see no necessity whatever for putting any limitation, as it is suggested that we ought, upon the word "tributary." What we have to do is to construe the language of the certificate and see what it means. The general object of the Act is that persons fishing for fish within certain districts shall be under the control of boards of conservators, who shall grant licences so as to preserve the fish for consumption to the use of the inhabitants at large. The Home Secretary is to state what the limits of these districts are. In this case he says they are "the Trent and its tributaries." Why are we to put a limitation on this word and not read it in its natural sense? A tributary is that which contributes to; and can anyone doubt for a moment that the Wye is a tributary of the Trent. If you did not turn on in aid the water of the Derwent, it would be the whole and sole tributary of the Trent, and would be the Trent; and if this were the case, the whole difficulty would be got over. The magistrates appear to have thought that the decision in the Severn case (*Merricks v. Cadwallader*, 46 L. T. Rep. N. S. 29) was decisive on this point; but really and truly it is not so, because that was a judgment upon the construction of the certificate in that case, applying the well-known maxim that, if you find an Act of the Legislature or document describing a particular case, and other cases as the alternative of that case, it must be taken to include only the same class of case. The certificate there named the rivers Teme and Vyrynaw, which are direct tributaries of the Severn, and then went on, "and all other tributaries of the river Severn;" and the court held that the words must be confined to "all other tributaries like the Teme and Vyrynaw," and that it was the intention of the Secretary of State that all tributaries other than those which, like the Teme and Vyrynaw, flow direct into the Severn, should be excluded. CAVE, J. concurred.

Case remitted.

and there is no reason why the right of fishing the water they take for this purpose should be given to them, especially when the result will be to throw great difficulties in the way of carrying out the objects of the Act. The case of *Lyne v. Leonard* (18 L. T. Rep. N. S. 55; L. Rep. 3 Q. B. 156) shows the strictness with which, in the opinion of Blackburn, J., these Acts ought to be construed, and the inconvenience of holding that this reservoir is no part of the district, and that no licence is required to fish for trout in it.

J. Edge, for the respondent, was not called upon.

FIELD, J.—I am unable to say that the conclusion at which the justices arrived in this case is wrong, and am of opinion that the appeal must be dismissed. The question submitted to us is purely one of the construction of the statute. Now, this is one of those statutes for the construction of which it is necessary to look at the objects the Legislature had in view in passing it, and the consequences of the powers they gave under it. We may then be able to see whether they intended to include under the name of "tributary" such a piece of water as that under consideration in this case. The object of this statute, as stated in the preamble, was to prevent the destruction of migratory fish. These fish go to the sea, and then come up at a certain season to deposit their spawn, and then the young fish come down in their turn, and they form a sort of food supply, which the statute was intended to preserve for the good of the community against the cupidity of particular owners of land or others, who might prevent the young fish from getting out of the river, or otherwise destroy them. To carry out this object a fishing district of the river Tyne was duly formed with certain limits, as set out in the case, and a board of conservators was appointed, and powers to enter on the land and various other powers were given to their water bailiffs. Then the facts of this case are that, previous to the year 1845, the stream in question was a tributary to the Tyne. In that year the waterworks company obtained an Act empowering them to appropriate the water of the stream for the purposes of their undertaking. Under the powers of this Act the undertakers formed a series of reservoirs, and various connections between them and the stream, and took all the water they wanted from the stream. They also formed a channel for the surplus water, and if they want all the water the stream supplies they take all; if some only, they take what they want, and allow the rest to flow down the surplus channel. During some summers no water passes down this channel, and at the time of the circumstances on which the information is laid no water was passing down. Of course I agree that the mere circumstance that at one time the stream is full and at another empty does not prevent it from being a stream; but at the same time I cannot help thinking, without laying down any precise definition, that a tributary must be something in the nature of a stream. I should have some hesitation, for instance, in saying that an artesian well was a tributary. The question, however, to be decided in this case is, whether this reservoir is a tributary or not. The justices have come to the conclusion that it is not, and I am not satisfied that they are wrong. On the contrary, if I had had to

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decide the point in the first instance, I should have said that it was not a tributary. Otherwise, if reservoirs such as this are to be tributaries within the meaning of the Act, I do not know where I should be able to stop in the definition of the word. I think that the language I used in *Hall v. Reid* was too broad, and cannot be applied to the present case. I cannot say that all water which has once been in a tributary stream continues to be tributary. If so, I should be obliged to say that all fishponds constructed on private properties, and fed by tributary streams, are tributaries. The primary object of the Legislature was to protect migratory fish, but these fish can only get into the reservoir in question when the stream is in flood and the sluices are drawn up. Besides, the water is impounded in this reservoir for a commercial purpose, to be supplied to the town of Newcastle for domestic and other purposes, and the great bulk of the water impounded is so supplied, and only returns to the Tyne after passing through the water company's pipes and the houses of the town, and I can hardly think that it was intended to bring water impounded in this manner and for this purpose under the operation of the statute, or that it falls within the natural meaning of the word tributary; and on these grounds I think that the appeal must be dismissed.

STEPHEN, J.—In this case the question is whether this reservoir is a tributary of the Tyne or not. The magistrates are of opinion that it is not, and I am of the same opinion. The question is a very simple one. Is a pond, inclosed by and fed from a stream which runs into a larger stream, to be considered a tributary of that larger stream? Now, if you were to ask anyone, without reference to the Act, whether it were so, any person, speaking in ordinary language, would say that it was not. When one speaks of a tributary in ordinary conversation, one means a stream which runs into another stream. It is not an exact word, and no technical meaning has been assigned to it; but, on the other hand, its popular meaning is not very indefinite or profound, and it requires much ingenuity to support the interpretation which the appellants desire to put upon it. I should be sorry, however, to attempt to lay down a complete definition of the word. There are many circumstances which might distinguish other cases from this, and it would be very difficult to frame a definition which would apply to all cases. I think, for instance, that where a stream is dammed across so as to form a succession of pools, through all of which the stream runs, flowing into the upper one and out at the bottom of the lowest, or where a stream widens into lakes at no great distance from the sea, with a strong stream running through them and out to sea, it might very well be that all the pools and lakes would be "tributary." But these reservoirs are quite differently situated. Two streams which are tributary run round the reservoirs, and by means of pipes part of the water is impounded, and turned into the reservoirs; but, according to the ordinary usage of language, I do not think that these reservoirs can, under these circumstances be called tributaries of the Tyne. My opinion is that this case is more like that of private fishponds in private grounds. It would be a strong use of language to say that the Serpentine or the Round Pond at Kensington are tributaries of the Thames, and the only difference between them and this reservoir is, that in one case the

connection is slightly clearer than in the other. There are reservoirs also by the side of the Thames above Kingston, into which the Thames runs, and I have no doubt most of the water comes back into the river; but it would be absurd to say that they are tributaries of the Thames. I think, therefore, that the decision of the magistrates is correct, and must be upheld.

*Appeal dismissed.*

Solicitors for the appellant, *E. Flux and Lead-bitter*, for Gibson, Hexham.

Solicitors for respondents, *Pattison, Wigg and Co.*, for *G. Armstrong*, Newcastle-upon-Tyne.

Friday, Dec. 8, 1882.

(Before FIELD and STEPHEN, JJ.)

THE LOCAL BOARD OF HEALTH FOR THE DISTRICT OF BISHOP AUCKLAND (apps.) v. THE BISHOP AUCKLAND IRON AND STEEL COMPANY LIMITED (resps.). (a)

*Nuisance—Injurious to health—Iron company—Accumulation of cinders—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 91, sub-sect. 4.*

*By the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 91, sub-sect. 4, "any accumulation or deposit which is a nuisance or injurious to health shall be deemed to be a nuisance liable to be dealt with summarily."*

*Held, that an accumulation destructive of the personal comfort of the neighbourhood came within the section, although not injurious to health.*

*The Great Western Railway Company v. Bishop (26 L. T. Rep. N. S. 905; L. Rep. 7 Q. B. 550) distinguished.*

THIS was a case stated under 20 & 21 Vict. c. 43, by justices for the county of Durham, and was, so far as material, as follows:—

1. At a petty session holden at Bishop Auckland in and for the north-west division of the Darlington ward, in the county of Durham, on the 10th July 1882 a complaint was preferred by the Local Board of Health for the district of Bishop Auckland, hereinafter called the appellants, against the Bishop Auckland Iron and Steel Company Limited, hereinafter called the respondents, under sub-sect. 4 of the 91st section of the 38 & 39 Vict. c. 55 (Public Health Act 1875), charging that in or upon the premises of the said respondents, situate at Bishop Auckland aforesaid, in the district of the appellants, the following nuisance existed, namely, "An accumulation or deposit of cinders, ashes, and refuse," which was a nuisance or injurious to health, and which nuisance was caused by the act and default of the respondents, and was determined by us, the said parties respectively being then present or represented, and upon such hearing we dismissed the said complaint.

4. Upon the hearing of the said complaint the following facts were either proved before us or admitted by both the parties: That the respondents are the occupiers of certain premises within the appellants' district in which the manufacture of iron and steel is carried on. The works are in the town of Bishop Auckland, and are surrounded by dwelling-houses on three sides. In the course of carrying on their business the respondents pro-

(a) Reported by J. SMITH, Esq., Barrister-at-Law.



duce or make large quantities of cinders and ashes, which are not removed from the premises, but which are deposited there and allowed to accumulate. The heaps so accumulated are on fire and continually smouldering, and from them are thrown off in large quantities fumes, or effluvia.

The appellants called their surveyor, who stated that he had had complaints of the nuisance caused by the effluvia. He also stated that a portion of the burning heaps stand upon certain sewers belonging to the said appellants, and the fumes from such heaps found their way into and along the said sewers, through the water-closets, into the dwellings of certain of the inhabitants of the said appellants' district. The appellants also called their medical officer, who stated that although he had no doubt of the effluvia complained of being a nuisance to some people, he had never known the health of any of the inhabitants to suffer therefrom, and further, that it was not a nuisance injurious to health.

5. At the close of the appellants' case it was contended for the respondents, that, as the medical evidence had failed to prove injury to health, the prosecution must fail, and *The Great Western Railway Company v. Bishop* (26 L. T. Rep. N. S. 905; L. Rep. 7 Q. B. 550) was cited in support of such contention.

6. For the appellants it was contended that it was not necessary to prove that the nuisance complained of was injurious to health, and that if we were satisfied there was a nuisance caused by the effluvia we ought to convict the respondents. *The Malton Local Board v. The Malton Farmers' Manure Company* (40 L. T. Rep. N. S. 755; L. Rep. 4 Ex. Div. 302) was cited in support of this view. We, however, found as a fact that, although the effluvia from the smouldering ashes might be a nuisance, it was not injurious to health, and we accordingly dismissed the said complaint in manner before stated.

The question of law arising from the above statement for the opinion of the court is "Was it necessary for the appellants to prove not only that a nuisance was caused by the effluvia in question, but also that such nuisance was injurious to the health of the inhabitants of the district?"

The court is humbly solicited according to the power vested in the court by the said statute (20 & 21 Vict. c. 43), to remit the case to us the said justices, with the opinion of the court thereon, or to make such other order as the court may deem fit.

The following statutes and sections became material in the course of the argument:—

The 8th section of the Nuisances Removal and Diseases Prevention Act 1855 (18 & 19 Vict. c. 121), is:

8. The word "nuisances" under this Act shall include. . . Any accumulation or deposit which is a nuisance or injurious to health.

Part 3 (ss. 13-143) of the Public Health Act 1875 (38 & 39 Vict. c. 55) is entitled "Sanitary Provisions." The 47th section, belonging to the group (ss. 42-50) entitled "Scavenging and Cleansing," is:

47. Any person who in any urban district (1) Keeps any swine or pigstye in any dwelling house, or so as to be a nuisance to any person; . . . shall for every such offence be liable to a penalty, &c.

The 91st section, belonging to the group (ss. 91-111), entitled "Nuisances," is:

91. For the purposes of this Act. . . (4) Any accumulation or deposit which is a nuisance or injurious to health. . . shall be deemed to be nuisances liable to be dealt with summarily in manner provided by this Act.

The 114th section, belonging to the group (ss. 112-115) entitled "Offensive Trades," is:

114. Where any candle house, melting house, melting place, or soap house, or any slaughter house, or any building or place for boiling offal or blood, or for boiling, burning, or crushing bones, or any manufactory, building, or place used for any trade, business, process, or manufacture causing effluvia, is certified to any urban sanitary authority by their medical officer of health, or by any two legally qualified medical practitioners, or by any ten inhabitants of the district of such urban sanitary authority, to be a nuisance or injurious to the health of any of the inhabitants of the district, such urban authority shall direct complaint to be made before a justice . . . and . . . the person so offending . . . shall be liable to a penalty, &c.

*W. A. Meek* for the appellants.—The magistrates were wrong in dismissing the complaint in this case on the ground that the matter complained of was not shown to be injurious to health. The case of *The Great Western Railway Company v. Bishop* (26 L. T. Rep. N. S. 905; L. Rep. 7 Q. B. 550) is distinguishable from the present. In that case the information was laid under the 8th section of the Nuisances Removal Act 1855 (17 & 18 Vict. c. 55), and, although the words are nearly the same, the object of the earlier Act was much narrower than that of the Public Health Act. The Act of 1855 was purely sanitary, and the nuisance complained of in *The Great Western Railway Company v. Bishop* being a mere common law nuisance, the court held that the Act did not apply. In the present case the complaint is laid under the Public Health Act 1875 (38 & 39 Vict. c. 55), which certainly deals with other matters than those directly injurious to health. One group of sections (ss. 112-115) is entitled "Offensive Trades," and it has been decided in *The Malton Board of Health v. The Malton Manure Company* (40 L. T. Rep. N. S. 755; L. Rep. 4 Ex. Div. 302), which was brought under the 114th section, that it is not necessary to prove injury to health under that group. The 91st section is one of a group (sects. 91-111) entitled "Nuisances," and there can be no reason for limiting the meaning of the word to nuisances injurious to health. The *ratio decidendi* in the case of *The Great Western Railway Company v. Bishop* (*ubi sup.*) was that any other decision would lead to absurd consequences, and bring in obstructions to highways, and other offences not intended to come within the scope of the Act, and that it was therefore necessary to draw a line somewhere, and this was done by reference to the title of the Act. Under the present Act there is no reason why the words "nuisance or injurious to health" should not be construed literally.

*B. Henn Collins* for the respondents.—This case is undistinguishable from *The Great Western Railway Company v. Bishop* (*ubi sup.*). The words of the Act are practically the same in that case as in this. Further, that case was not affected by the decision in *The Malton Local Board v. The Malton Manure Company* (40 L. T. Rep. N. S. 755; 4 Ex. Div. 302). The last-mentioned case is in favour of the respondents, inasmuch as it was brought under sect. 114 of the Act



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of 1875, one of the group headed "Offensive Trades," and nevertheless both judges rest their judgments on the fact that sick persons were made worse by the matter complained of. Even in the "Offensive Trade" sections it is provided that the certificate of the medical officer of health shall set the urban sanitary authority in motion. [STEPHEN, J.—I think the words used by the court in *The Great Western Railway Company v. Bishop* have a larger meaning than was intended by the court. I should feel obliged to follow that case under the same Act, but not in the case of another Act.] I contend that the construction adopted in that case is the correct and natural construction to put upon the words.

FIELD, J. delivered a judgment to the effect that he was unable to find a valid distinction between the case of *The Great Western Railway Company v. Bishop* (*ubi sup.*) and the case before him, and that he could not say that the justices were wrong in following that case, but having, during the time Stephen, J. was delivering judgment, read the case of *The Banbury Urban Sanitary Authority v. Page* (45 L. T. Rep. N. S. 759; 8 Q. B. Div. 97), he afterwards said that, as Grove, J. had in that case taken the view held by Stephen, J. in the case under discussion, he no longer felt himself bound by *The Great Western Railway Company v. Bishop*, and therefore concurred entirely in the judgment of Stephen, J.

STEPHEN, J.—I am of opinion that the justices were wrong in dismissing this information. I stand by the judgment which I gave in the case of *The Malton Board of Health v. The Malton Manure Company* (40 L. T. Rep. N. S. 755; 4 Ex. Div. 302), and I do not feel that the earlier case of *The Great Western Railway Company v. Bishop* (26 L. T. Rep. N. S. 905; L. Rep. 7 Q. B. 550) is in point in this case. In both these Acts of Parliament which it has been necessary to examine in this case a definition of "nuisance" is given. Under the Nuisances Removal Act 1855 (18 & 19 Vict. c. 121), it is provided that the word "nuisances" (sect. 8) "shall include any premises in such a state as to be a nuisance or injurious to health." Now the particular nuisance under consideration in the case of *The Great Western Railway Company v. Bishop* (*ubi sup.*) was not only not injurious to health, but in no kind of way related to the health or comfort of any person in the neighbourhood, but was simply a common law nuisance, similar, for instance, to a neglect to repair a highway. It was, in fact, the nuisance of having a railway bridge out of repair, so that water dripped on to those who happened to be passing underneath, and the decision there was to the effect that such a nuisance as that did not come within the words of the Nuisances Removal Act, which was a sanitary Act dealing with nuisances which were injurious to health. That is what that case says, but it does not say what the court would have done had the nuisance been, not precisely injurious to health, but one which interfered with the comfort of the neighbourhood. There is a great difference between a railway bridge out of repair, so that the water dripped from it, and heaps of cinders throwing off fumes and effluvia in large quantities. On looking closely into the circumstances of the two cases, that seems to me to be the difference between *The Great Western Railway Company v. Bishop* and this

case. The nuisance, in fact, in that case was of an entirely different kind from that to which the Act referred. In the case of *The Malton Board of Health v. The Malton Manure Company* (40 L. T. Rep. N. S. 755; 4 Ex. Div. 302) the nuisance was distinctly injurious to health, inasmuch as it made sick people worse; but, apart from that, as I put it in my judgment in that case, even if it were not shown to be injurious to health, yet if it were destructive of the present comfort of the neighbourhood and very near to being injurious to health, it seemed to me exactly the thing to which both the present and the old Act referred. I do not find in the case of the *Great Western Railway Company v. Bishop* an authority which governs this case. On the contrary, the proper mode of interpreting the Act is, in my opinion, to take the natural sense of the words. I understand them as meaning not a common law nuisance, but something destructive of present comfort or something injurious to health without interfering with present comfort. A man, for instance, may catch diphtheria without being exposed to any present loss of comfort, and it is also possible to destroy a man's comfort in his home without injury to his health, on the same principle that consumptive patients used to imagine that their health was benefited by exposing themselves to the disagreeable smells of a tanner's yard. This seems to me to be the only method of interpretation which gives a proper sense to the words of the Act, and it is at the same time not inconsistent with the case of the *Great Western Railway Company v. Bishop*. The case of *Banbury v. Page* (45 L. T. Rep. N. S. 759; 8 Q. B. Div. 97), which was handed up after the close of the argument, is also in agreement with this view. It was there held that keeping swine so as to be a nuisance to any person, in the ordinary sense of the word, came within the meaning of the 47th section of the Public Health Act 1875 (38 & 39 Vict. c. 55), although it was not proved that the keeping of the pigs was injurious to health. When, that is to say, you complain of a man's pigs as a nuisance, he is not at liberty to say, "You have had no typhoid, therefore do not interfere with my pigs." "It appears to me," says Grove, J., "that the word 'nuisance' here is used in the ordinary legal sense, and includes, in addition to matters injurious to health, matters substantially offensive to the senses," and Lopes and Bowen, JJ. agree. I feel, therefore, especially now that my brother Field agrees with me, that this is the correct interpretation of the statute.

*Case remitted.*

Solicitors for appellants, *Harvey, Oliver, and Capron*, for *J. T. Proud*, Bishop Auckland.

Solicitors for respondents, *Van Sandau, Cumming, and Armitage*, for *Bell and Farrington*, Middlesbrough.

Q.B. Div.]

HISCOCKS v. JERMONSON.

[Q.B. Div.]

Wednesday, Feb. 14, 1883.

(Before MANISTY and MATHEW, JJ.)

HISCOCKS v. JERMONSON. (a)

*Industrial Schools Act 1866 (29 & 30 Vict. c. 118), s. 14, and Industrial Schools Amendment Act 1880 (43 & 44 Vict. c. 15), s. 1—Child under fourteen—Living with her mother—House resided in and frequented by prostitutes.*

*By the Industrial Schools Act 1866 and the Industrial Schools Amendment Act 1880, a magistrate has power to send a child, under the age of fourteen, to an industrial school in certain cases, one of which is if the child is "lodging, living, or residing with common or reputed prostitutes, or in a house resided in or frequented by prostitutes for the purpose of prostitution, or that frequents the company of prostitutes."*

*Held, that the fact of a child living with her mother in a house within the meaning of the statute, made no difference, and such child might be taken from the custody of her mother and sent to an industrial school.*

THIS was a case stated by one of the metropolitan police magistrates, the material part of which was as follows:—An officer of the School Board of London, named William Hiscocks, applied for an order under the Industrial Schools Act 1866 (29 & 30 Vict. c. 118), s. 14, and the Industrial Schools Amendment Act 1880 (43 & 44 Vict. c. 15), s. 1, that one Minia Jermonson should be sent to the Alresford Industrial School, and the magistrate declined to make such order, believing that the facts as stated did not bring the case within the Acts above mentioned.

The school board officer, accompanied by a police officer, went to the house where the girl was living with her mother, and in a room in which the mother and girl were alone he took possession of the girl, although the mother objected to her daughter being taken away.

The mother of the said girl was not a party to the proceedings, nor was she summoned or had notice to appear, neither was she present in court, nor was there any evidence that she was aware of the proceedings.

Upon the application the said William Hiscocks and a police sergeant deposed that the girl lived with her mother in a room in a house which they knew as a brothel; that the mother was then a lodger there, and that seven other women of the lowest character lived in the same house. No evidence was given of any act of prostitution on the part of the mother, or that she was conducting herself as a prostitute.

It was contended on the part of the applicant that the child in question was within the words and meaning of the 1st section of the Industrial Schools Amendment Act 1880 (43 & 44 Vict. c. 15) as "living or residing in a house resided in or frequented by prostitutes for the purpose of prostitution."

The magistrate was of a contrary opinion, and thought, first, that the section was meant to meet the case of a child referred to in the second description contained in the Industrial Schools Act 1866, who, though having a home or settled place of abode or proper guardianship, nevertheless has that home, abode, or guardianship with common or reputed prostitutes, or in a house

frequented by prostitutes for the purpose of prostitution, and that it does not apply to a child living with and under the care and protection of its mother, who is its lawful guardian; and, secondly, that the section does not contemplate the taking of a child from the custody of its mother for the purpose of sending it to an industrial school without her consent, or without giving her an opportunity of showing cause to the contrary.

By the Industrial Schools Act 1866 (29 & 30 Vict. c. 18), s. 14, it is enacted that

Any person may bring before two justices or a magistrate any child apparently under the age of fourteen years that comes within any of the following descriptions, namely: That is found begging or receiving alms (whether actually or under the pretext of selling or offering for sale anything) or being in any street or public place for the purpose of so begging or receiving alms: That is found wandering and not having any home or settled place of abode or proper guardianship, or visible means of subsistence: That is found destitute, either being an orphan or having a surviving parent who is undergoing penal servitude or imprisonment: That frequents the company of reputed thieves.

The justices or magistrates before whom a child is brought as coming within one of these descriptions, if satisfied on inquiry of that fact, and that it is expedient to deal with him under this Act, may order him to be sent to a certified industrial school.

By the Industrial Schools Amendment Act 1880 (43 & 44 Vict. c. 15), s. 1, it is enacted

That sect. 14 of the Industrial Schools Act 1866, and sect. 11 of the Industrial Schools Act (Ireland) 1868, shall be respectively read and construed as if after the four several descriptions therein respectively contained there were added the following description, namely: That is, lodging or residing with common or reputed prostitutes, or in a house resided in or frequented by prostitutes for the purpose of prostitution: That frequents the company of prostitutes.

*Jeune* for the appellant.—There is nothing in the statutes to show that the child may not be taken from the custody of the mother under the circumstances. If the child is living in a place frequented by prostitutes, it makes no difference whether the mother lives there also. The intention of the Legislature was to afford protection to young children; that is to say, children under fourteen years of age, in certain cases described in the Act, one of which is where the child is living, lodging, or residing in a house resided in or frequented by prostitutes. There is clear evidence that the house was within the meaning of the Industrial Schools Act 1880, and I think this was just one of these cases contemplated by the Legislature. I submit that the magistrate ought to have made the order.

No cause was shown.

MANISTY, J.—This case must be remitted to the magistrate, and we are of opinion that he ought to have made the order asked for. We are to give effect to the plain and ordinary meaning of language used in Acts of Parliament. The Industrial Schools Act of 1866 provided protection for young children in several cases described in the 14th section, and "the justices or magistrate before whom a child is brought as coming within one of these descriptions, if satisfied on inquiry of that fact, and that it is expedient to deal with him under this Act, may order him to be sent to a certified industrial school." In 1880 the Legislature thought that the Act of 1866 should be extended, and by the Industrial Schools Amendment Act of that year, sect. 14 of the Act

(a) Reported by H. D. BONAST, Esq., Barrister-at-Law.

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of 1866 is "to be read and construed as if after the four several descriptions therein contained there were added the following description, namely, that is, lodging living, or residing with common or reputed prostitutes, or in a house resided in or frequented by prostitutes for the purpose of prostitution; that frequents the company of prostitutes." Here there is abundant evidence that the child was living in a house "resided in or frequented by prostitutes," and she was under fourteen; she was nine years of age. It is said that the child was living with her mother, and therefore that makes a distinction. But I can see no exception in the Act to that effect. The case must be remitted, with an intimation that we think the order should have been made.

MATHEW, J.—I am of the same opinion. It is quite clear that the magistrate attributed to the Legislature an intention to make an exception in the case of children living with their parents, but I see no such exception in the statutes.

*Case remitted accordingly.*

Solicitors for the appellant, Gedge, Kirby, Millett, and Co.

Wednesday, Feb. 14, 1883.

(Before MANISTY and MATHEW, JJ.)

GAGE v. ELSEY. (a)

*Adulteration—Gin—More than 35 degrees under proof—Notice posted up—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 6, 8—Sale of Food and Drugs Act Amendment 1879 (42 & 43 Vict. c. 30), s. 6.*

*The appellant sold to the respondent three pints of gin, which was found, when analysed, to be 40½ degrees under proof. At the time the appellant sold the gin he drew the attention of the respondent to a notice hanging up in the room to the effect that all spirits sold in the establishment were sold as diluted spirits.*

*Held, that the magistrates were wrong in convicting the appellant under the Sale of Food and Drugs Acts, as the purchaser knew at the time, from the notice, that the gin was diluted.*

CASE stated by justices, the material part of which is as follows:—

The respondent Thomas Elsey, who was a superintendent of police and inspector under the Sale of Food and Drugs Act 1875, laid an information against William Gage, of Braintree, inn-keeper, the appellant, for unlawfully selling to the said Thomas Elsey, to the prejudice of the purchaser, three pints of gin which was not of the nature, substance, and quality of the article demanded.

It was proved that the respondent went to an inn kept by the appellant, and asked for some gin. The appellant said, "What sort do you want?" Respondent said, "The same as you sell to the public." Appellant said, "I have different sorts." Respondent pointed to a cask, and said, "What is that?" Appellant said, "Gin." Respondent said, "I will have three pints of that." Appellant said, "That is what we sell to the public, and there is our notice." The appellant thereupon pointed to a notice

hanging up in the room, which was to the following effect:

NOTICE.

All spirits sold in this establishment are of the same superior quality as heretofore, but to meet the requirements of the Food and Drugs Adulteration Act they are now sold as diluted spirits, no alcoholic strength guaranteed.

Appellant then supplied three pints of gin, and respondent paid 5s. for it. The gin was analysed by the county analyst, who stated that it contained 59½ per cent. of proof spirit, and was therefore 40½ degrees, under proof; that is, it had been diluted with water so as to reduce its strength to 5½ degrees under the minimum strength allowed by the sale of Food and Drugs Act Amendment Act 1879. It was contended on behalf of the appellant, that inasmuch as at the time the respondent purchased the gin a notice to the effect that it was sold as diluted spirit was hanging up in the room, and the attention of the purchaser was specially directed to it, the sale was not to the prejudice of the purchaser, and the appellant was entitled to have the information dismissed.

The magistrates held that the notice hanging in the room and defendant's statement with regard to it did not justify the sale, and convicted the appellant.

By 38 & 39 Vict. c. 63, s. 6:

No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; provided that an offence shall not be deemed to be committed under this section in the following cases, that is to say:

(1) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof:

(2) Where the drug or food is a proprietary medicine, or is the subject of a patent in force, and is supplied in the state required by the specification of the patent:

(3) Where the food or drug is compounded as in this Act mentioned:

(4) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation.

By sect. 8:

Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food, or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed.

By 42 & 43 Vict. c. 30, s. 6:

In determining whether an offence has been committed under sect. 6 of the said Act by selling to the prejudice of the purchaser spirits not adulterated otherwise than by the admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than 25 degrees under proof for brandy, whisky, or rum, or 35 degrees under proof for gin.

*O. E. Jones* for the appellant.—The magistrates decided that the appellant was guilty of an offence under sect. 6 of the Act of 1875 (38 & 39 Vict. c. 63), but the 8th section of that Act expressly provides that no person shall be guilty of an offence in respect of the sale of an article of food or a drug mixed with any matter or ingredient not

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injurious to health if at the time he supplies to the purchaser a notice by a label distinctly or legibly written or printed to the effect that the same is mixed. In the case of *Sandys v. Small* (39 L. T. Rep. N. S. 119; 3 Q. B. Div. 449) it was held that a notice put up on the wall was sufficient. Cockburn, C.J., in giving judgment, said: "I do not think that the affixing of the label is to be the only mode of bringing knowledge home to the purchaser. I think, for instance, if a man puts up in a conspicuous position a notice in large letters, as was done here, and it is clear that it must have come under the observation of the customer, that the 6th section would not apply." In the present case the notice was not only put up in a conspicuous place, but the purchaser's attention was called to it. I submit that the conviction is wrong.

*Grubbe* for the respondent.—The law has been altered since the case of *Sandys v. Small* (*ubi sup.*) by the Act of 1879 (42 & 43 Vict. c. 30). By the 6th section of that Act the seller has a good defence if the gin is not less than 35 degrees under proof, but it is found in the case that it was 40½ degrees under. The purchaser did not get what he asked for. The mere fact of putting up a notice cannot allow the seller to sell a mixture of gin and water without regard to the Act of 1879, which fixes the minimum at 35 degrees under proof. He cited

*Pashler v. Stevenitt*, 35 L. T. Rep. N. S. 162;  
*Horder v. Huggins*, 44 J. P. 284.

MANISTY, J.—This is an appeal against the decision of the magistrates, who convicted the appellant for selling adulterated gin. Now it is necessary to look at what the magistrates acted upon. The county analyst found that the gin sold to the respondent was forty and a half degrees under proof, and that it was diluted with water so as to reduce its strength five and a half degrees under the minimum strength allowed by the amending Act of 1879. I think it is very plain the magistrates thought that upon that finding of the county analyst Gage had no defence. Now, what has been the course of legislation? By sect. 6 of the Act of 1875, "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser." And by sect. 8 of the same Act it is provided, "that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice by a label distinctly and legibly written or printed on or with the article or drug to the effect that the same is mixed." It was decided in the case of *Sandys v. Small* (*ubi sup.*) that where the seller of an article brings to the purchaser's knowledge the fact that the article sold to him is not of the nature, substance, or quality of the article he demands, it is not a sale to the prejudice of the purchaser, and therefore no offence within the meaning of the 6th section of the Act of 1875. By sect. 6 of the Act of 1879 it would be a perfectly good defence in a case of this kind to show that the gin was not reduced to more than

thirty-five degrees under proof; but here the analyst has found that it was forty and a half degrees under proof, and therefore the appellant could not avail himself of this defence. But he is not deprived of any defence which he might have shown under the Act of 1875. I am of opinion that the conviction cannot stand.

MATHEW, J.—I am of the same opinion. Sect. 6 of the Act of 1879, which says that in the case of gin it shall be a good defence to prove that the adulteration has reduced the spirit to more than thirty-five degrees under proof, does not say that there shall not be a good defence on other grounds, and in this case the purchaser cannot say the gin was sold to his prejudice. I think the magistrates were wrong, and the conviction must be quashed.

*Conviction quashed.*

Solicitor for the appellant, *Randall and Angier*; agents for *Jones and Son*, Colchester.

Solicitors for the respondent, *the Clerk of the Peace for Essex*.

Tuesday, Dec. 19, 1882.

(Before LORD COLERIDGE, C.J., FIELD, HAWKINS, STEPHEN, and WATKIN WILLIAMS, JJ.)

WINYARD (app.) v. TOOGOOD (resp.).

HANCE (app.) v. FORTNUM (resp.). (a)

*Elementary Education Act 1876* (39 & 40 Vict. c. 79), s. 11, sub-sect. 1, s. 8—*Child prohibited from full-time employment—Child above the age of thirteen—Attendance order—Construction of statute—41 Vict. c. 16, s. 102.*

By sect. 5 of the *Elementary Education Act 1876* the employment of any child is forbidden who (1) is under the age of ten years, or (2) who being of the age of ten years or upwards, has not obtained any certificate either of proficiency in education or attendance at school, or is not employed and attending school under the *Factory Acts*. By sect. 48 a child is defined to be a child between the ages of five and fourteen years. By sect. 11, sub-sect. 1, if the parent of any child above the age of five years, who is under this Act prohibited from being taken into full-time employment, habitually and without reasonable excuse neglects to provide efficient elementary instruction for his child, a court of summary jurisdiction may order such child to attend school.

It was proved that the respondent had habitually and without reasonable excuse neglected to provide instruction for two of his children aged nine and thirteen respectively, and that the latter had not acquired any exemption under sect. 5.

Held, that sect. 11, sub-sect. 1, applies to children who are by sect. 5 prohibited either wholly or partially from being taken into employment, and is not intended to be limited to children who were by sect. 8 prohibited only from being taken into full-time employment; and that attendance orders ought therefore to be made.

*Saunders v. Crawford* (46 L. T. Rep. N. S. 420; 9 Q. B. Div. 612) dissented from.

*Winyard v. Toogood* was a case stated by one of the metropolitan police magistrates sitting at Southwark, for the opinion of the High Court, under 21 & 22 Vict. c. 43.

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

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A complaint was made by the appellant, an officer of the London School Board, to the magistrate of the Southwark Police Court, under sect. 11 of the Elementary Education Act 1876 (39 & 40 Vict. c. 79), that the respondent had habitually and without reasonable excuse neglected to provide efficient elementary instruction for his two children aged nine and thirteen respectively.

At the hearing of the summons it was proved that neither of the children had received certificates of proficiency in reading, writing, and elementary arithmetic, or of previous due attendance at a certified efficient school, as would exempt them partially or wholly from the obligation to attend school. It was also proved that neither of them were in any employment, and that the respondent habitually and without reasonable excuse had neglected to provide efficient elementary instruction for both of them. The magistrate held that he was unable to make an attendance order, being bound by the decision in *Saunders v. Crawford* (46 L. T. Rep. N. S. 420; 9 Q. B. Div. 612); but, inasmuch as the School Board desired to have the whole question re-argued, he consented to state a case for the opinion of the Superior Court.

If the magistrate had power to make an order with respect to both or either of the children, he would have done so.

The questions for the court were:

First, Had the magistrate the power to make an attendance order in respect of the elder child?

Secondly, Had he the power to make an attendance order in respect of the younger child?

If the court was of opinion that he had the power in respect of either or both of such children, the case was to be remitted to him for him to make such order or orders.

*Hance v. Fortnum* was also an appeal by case stated by the justices of the city of Liverpool upon dismissing a complaint of non-compliance with an attendance order made under sect. 11, sub-sect. 1, of the Act 1876, in respect of a child of the respondent. As the facts and the questions raised were substantially the same as in *Wingard v. Toogood*, it was agreed that both appeals should be argued together.

The following are the provisions of the sections of the Acts of Parliament referred to in the argument, and which it is necessary to set out:—

The Elementary Education Act 1876 (39 & 40 Vict. c. 79), reciting by its preamble that "it is expedient to make further provision for the education of children, and for securing the fulfilment of parental responsibility in relation thereto, and otherwise to amend and to extend the Elementary Education Acts:—"

Sect. 4. It shall be the duty of the parent of every child to cause such child to receive efficient elementary instruction . . . and if such parent fail to perform such duty, he shall be liable to such orders and penalties as are provided by this Act.

Sect. 5. A person shall not . . . take into his employment (except as . . . in this Act mentioned) any child—(1) who is under the age of ten years; or (2) who being of the age of ten years or upwards, has not obtained "a" certificate either of . . . proficiency in reading, writing, and . . . arithmetic, or of previous due attendance at . . . school . . . unless such child, being of the age of ten years or upwards, is employed and is attending school in accordance with the . . . Factory Acts or . . . and by law . . . made under sect. 74 of the Elementary Education Act

1870 as amended by the Elementary Education Act 1873, and this Act.

Sect. 6. Every person who takes a child into his employment in contravention of this Act shall be liable . . . to a penalty . . .

Sect. 7, enacting that the "provisions of this Act respecting the employment of children" are in general to "be enforced" by a school board or a school attendance committee, incidentally speaks of "every such school board and school attendance committee" as being "in this Act referred to as the local authority."

Sect. 8. Whereas by sects. 14 and 15 of the Workshop Regulation Act 1867 provision is made respecting the education of children employed in workshops, and it is expedient to substitute for the said sections the provisions respecting education of the Factory Acts 1844 and 1874: Be it . . . enacted that sects. 31, 38, and 39 of the Factory Act 1844 and sects. 12 and 15 of the Factory Act 1874 shall apply to the employment and education of all children employed in factories subject to the Factory Acts 1833 to 1871, and not subject to the Factory Act of 1874 or in workshops subject to the Workshop Acts 1867 to 1871. . . .

Sect. 8 is repealed, with the enactments referred to in it, by sect. 107 of the Factory and Workshop Act 1878 (41 Vict. c. 16), which, however, enacts by sect. 102, that any enactment referring to the repealed enactments shall be construed to refer to that Act and to the corresponding enactment thereof. Sect. 12 of the Factory Act 1874 enacted " . . . in the case of a factory to which this Act applies, a person of the age of thirteen years and under the age of fourteen years shall be deemed to be a child, and not a young person, unless he has obtained" a certain certificate of proficiency.

Sect. 9. A person shall not be deemed to have taken any child into his employment contrary to . . . this Act if . . . (1) . . . there is not within two miles . . . from the residence of such child any . . . school open which the child can attend; or (2) . . . such employment by reason of being [while] the school is not open, or otherwise does not interfere with [child's] instruction . . . ; or (3) the employment is exempted by a notice of the local authority as to temporary employment of children above the age of eight years in husbandry.

Sect. 11. If either (1) the parent of any child above the age of five years, who is under this Act prohibited from being taken into full-time employment, habitually and without reasonable excuse neglects to provide efficient elementary instruction for his child; or (2) any child is found habitually wandering, or not under proper control or in the company of rogues, vagabonds, disorderly persons or reputed criminals, it shall be the duty of the local authority, after due warning to the parent . . . to complain to a court of summary jurisdiction; and such court may . . . order that the child do attend some certified efficient school . . . being . . . if "the parent" do not select any . . . such public elementary school as the court think expedient, and the child shall attend that school every time that the school is open, or in such other regular manner as is specified in the order. An order under this section is, in this Act referred to as an attendance order." It "shall be a reasonable excuse (1) that there is not within two miles . . . from the residence of such child any public elementary school open which the child can attend; or (2) that the absence of the child from school has been caused by sickness or any unavoidable cause."

Sect. 12. Where an attendance order is not complied with, without any reasonable excuse . . . a court of summary jurisdiction, on complaint made by the local authority, may, if it thinks fit, or as follows: (1) In the first case of non-compliance, if the parent . . . fails to "show" that he has used all reasonable efforts to enforce compliance . . . the court may impose a penalty . . . but if the parent does show that,

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the court may without inflicting a penalty, order the child to be sent to "an industrial school;" and (2) in . . . any subsequent case of non-compliance, the court may order the child to be sent to "an industrial school, and may further inflict a penalty;" or it may for each such non-compliance inflict a "penalty . . . without ordering the child to be sent to an industrial school."

Sect. 48. A child in this Act means a child between the ages of five and fourteen years . . . The term "Factory Acts" in this Act, where the Factory Act of any particular year is not referred to, means [the Factory Acts 1833 to 1874 as amended by this Act, and includes the Workshop Acts 1867 to 1871, as amended by this Act, and] any Acts for the time being in force regulating factories and workshops.

The words within brackets are repealed by sect. 107 of the Factory and Workshop Act 1878, of which see sect. 102 already mentioned.

The Elementary Education Act 1880 (43 & 44 Vict. c. 23):

Sect. 4. . . . Proceedings may, in the discretion of the local authority or person instituting the same, be taken for punishing the contravention of a bye-law, notwithstanding that the . . . alleged . . . contravention constitutes habitual neglect to provide efficient elementary education for a child within the meaning of sect. 11 of the Elementary Education Act 1876. . . .

Sir F. Herschell, S. G. (*Jeune* with him) for the appellant in *Winyard v. Toogood*.—The case of *Saunders v. Crawford* (46 L. T. Rep. N. S. 420) was no doubt binding on the magistrate, and had it not been for the decision of that case, he would have made the attendance orders applied for. It is submitted that that case was wrongly decided, and should, if possible, be overruled. Both of the children in this case were within the terms of sect. 11, sub-sect. 1, of the Elementary Education Act 1876, viz., any child above the age of five years who is under this Act prohibited from being taken into full-time employment. They were both also within the definition of child as provided by sect. 48, viz., between the age of five and fourteen years. Further, both of them were children who could not by sect. 5 have been taken into employment—the younger because he was under the age of ten years, and the elder because he had not obtained a certificate of proficiency in the subjects mentioned therein or of previous attendance at school, and was not employed and attending school in accordance with the Factory Acts, or with the bye-laws under the Elementary Education Acts. It is submitted that sect. 11, sub-sect. 1, clearly refers to sect. 5, and that the words "any child above the age of five years who is under this Act prohibited from being taken into full-time employment," must refer to the class of children mentioned in sect. 5. In *Saunders v. Crawford* (sup.) it was held that sect. 11, sub-sect. 1, refers to sect. 8. Now it is important to observe that there formerly existed three classes of statutes dealing with the employment of children. There were: (1) the Textile Factory Acts; (2) the Non-Textile Factory Acts; and (3) the Workshops Acts. The Textile Factory Acts dealt with children up to fourteen all alike. The Non-Textile Acts and Workshops Acts dealt with children up to the age of thirteen only. Above the age of thirteen they became young persons. The effect of sect. 8 is to repeal the provisions contained in the Non-Textile and Workshops Acts, and to substitute the laws relating to textile factories, and so in the case of all three Acts to put the children upon the same foot-

ing. That section has been repealed by the Factory and Workshop Act 1878, but its provisions are in effect re-enacted by the present Factory Act, so that, even if repealed, and the decision of the court in *Saunders v. Crawford* is right, it may be contended that sect. 11, sub-sect. 1, can be held to refer to such re-enacting section. The main point, however, is that sect. 11 is clearly intended to apply to all children between the ages of five and fourteen. Does sect. 11 refer to sect. 8? Suppose that it does, then it can only apply to those children who are by the 8th section put into the general factory class, and does not relate to the general factory class itself. This would lead to an absurd result, and one that could not possibly have been intended. The sole intention and object of sect. 8 is to put all children employed in factories of any kind in one category, whether textile, non-textile, or workshop. Sect. 11 is correlative to sect. 4, and applies to all children, unless they have arrived at such an age and received such instruction as to entitle them to be taken into full-time employment, in which case the law no longer insists on any education. So long as children cannot be taken into full-time employment, that is, so long as the education duty exists upon the parent, then every parent who neglects to cause such children to receive education, that is, neglects to perform the duty in terms imposed by sect. 4, comes under sect. 11. This is the natural construction of the Act. Sect. 11, sub-sect. 1, cannot be read as confined to children prohibited only from being taken into full-time employment. The words "full-time" are to be read as having been used (though they might well have been omitted), so as to include a child prohibited from being taken into full-time, though permitted to be taken into half-time employment, and not in order to exclude a child prohibited from being taken into half-time as well as from being taken into full-time employment. A child prohibited from being taken into employment at all is necessarily prohibited from being taken into full-time employment. If the construction contended for by the respondents, and adopted by the court in *Saunders v. Crawford*, viz., that sect. 11 only applies to children who are prohibited under sect. 8, and that sect. 8 being repealed, sect. 11, sub-sect. 1, is gone also, is right, this absurdity necessarily follows, that sect. 11 only applies to children between the ages of thirteen and fourteen who, by sect. 8, are put into the same position as Factory Act children, and does not apply to Factory Act children themselves. By sect. 8 all children in non-textile factories and workshops are put into the same position as Factory Act children; and then sect. 11 is held to relate only to those children who are put into the same position as the others, and not to those into whose position they have been put. There could be no conceivable object or purpose in such legislation. Another reason for holding that sect. 11 should, if possible, apply to all children within the age of fourteen is, that prior to the Education Act 1876 the only remedy against a parent who neglected to send his child to school, was by summoning him before the magistrate and imposing a fine. This was found to be practically useless, as the parent often defied the authorities, and since the Summary Jurisdiction Act the payment of the fine could not be enforced by distress.

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But now by sect. 11 the ultimate power that exists in the case of a parent who habitually neglects his duty in providing education for his child is to send such child to an industrial school. The possession by the magistrate of such a power as a last resort has had the effect in many cases of enforcing the attendance of the child. In the case of *Re Murphy* (36 L. T. Rep. N. S. 698; 2 Q. B. Div. 397) a point arose whether after the Act of 1876 was passed the option of proceeding under the bye-laws under the Act of 1870 still continued, or whether the new remedy had taken away the old remedy. The Queen's Bench Division (Cockburn, C.J. and Mellor, J.) held that "where upon application to a magistrate by a school board for a summons against the parent of a child for not causing it to attend school, contrary to bye-laws made by the board under the Elementary Education Act of 1870, it appears that the parent has habitually neglected to provide instruction for the child within the meaning of the Elementary Education Act 1876, s. 11, the magistrate is entitled, and it is his duty, to refuse to grant the board a summons under the bye-laws, and to require them to take out a summons under sect. 11; for the option given by the Elementary Education Act 1876, s. 50 of proceeding either under the statute or the bye-laws applies only to offences 'punishable' under the Act, and the offence of habitual neglect is not so punishable." In consequence of that decision, and because it was found that it would be a convenient practice for the School Board to have the option left to them of resorting to either remedy, the Act of 1880 was passed, sect. 4 of which expressly declared that proceedings might be taken for punishing the contravention of a bye-law, although there was habitual neglect within the Act of 1876. Further, the court, in *Saunders v. Crawford*, in holding that sect. 11, sub-sect. 1, only applies to sect. 8, and that sect. 8 having been repealed, therefore sect. 11, sub-sect. 1, was gone also, was clearly wrong upon this ground: Sect. 8 was repealed by sect. 107 of the Factory and Workshop Act 1878 (41 Vict. c. 16), and yet, sect. 11 being gone, the Legislature in 1880 declared that school boards may take their option between the section and the bye-laws. Lastly, it is submitted that, even if *Saunders v. Crawford* is right, and sect. 11, sub-sect. 1, applies to sect. 8, which is repealed, yet sect. 8, having been re-enacted as it were by sect. 102 of the Act of 1878, sect. 11, sub-sect. 1, applies to such re-enactment. The Factory Act 1878, which is a consolidation Act, repeals the whole of the Factory Acts. Sect. 102 provides that any enactment or document referring to the Acts repealed by this Act, or any of them, or to any enactment thereof, shall be construed to refer to this Act, and to the corresponding enactment thereof. Now, sect. 11, *ex hypothesi*, according to *Saunders v. Crawford*, referred to the enactment contained in sect. 8. Then why does not sect. 11 refer to the corresponding enactment of the new Factory Act, which does what sect. 8 did before? This, however, is a minor point.

*W. B. Kennedy*, for the appellant in *Hance v. Fortnum*, did not desire to be heard.

*Danckwerts* (Sir *H. James*, A.G. and *A. L. Smith* with him) for the respondents in *Winyard v. Toogood*.—By reason of the repeal of sect. 8 there is now no child prohibited from being taken

into full-time employment, and therefore there is no parent upon whom an order can be made. If, however, this view should be considered erroneous, then it is submitted that an order cannot be made, because the two children in question are not in any employment whatever, and the Factory Act 1878 only applies to children where they are employed in a factory. Sect. 11 is substantially only a step in the procedure, the ultimate result of which is the landing a child in an industrial school. Industrial schools are those provided for by 29 & 30 Vict. c. 118. By sect. 14 the class of children which may be sent to such schools is defined, and includes those children under fourteen who are found wandering and begging in the streets, and destitute, and also those who are either orphans, or whose parents are undergoing penal servitude or imprisonment, or those children who frequent the company of reputed thieves and criminals. Therefore the utmost application which sect. 11, sub-sect. 1, can reasonably be supposed to have been intended to have is to factory children and children in workshops. It is a strong measure to send any child, even if it is idle and not properly instructed, from a respectable home to an industrial school, where it will consort with the children of vagabonds and thieves. The insertion of the words "above the age of five years" in sect. 11 clearly shows that that section was intended to refer to sect. 8, because there was no necessity to insert those words at all if it was not so intended, as "child" is expressly defined by sect. 48 to be a child between five and fourteen. *Saunders v. Crawford* was rightly decided. He also referred to

*Mellor v. Denham*, 40 L. T. Rep. N. S. 395; 42 L. T. Rep. N. S. 496; 4 Q. B. Div. 241; 5 Q. B. Div. 467.

*R. S. Wright* (*J. V. Austin* with him) for the respondent in *Hance v. Fortnum*.—*Saunders v. Crawford* ought to be followed unless it is clearly shown to be wrong. Being a previous decision of this court, the court will be slow to depart from unless it is clearly proved that it was wrongly decided: *Hadfield's case* (28 L. T. Rep. N. S. 901; L. Rep. 8 C. P. 313). It cannot be shown to have been wrongly decided, for there are difficulties in either view of the matter. Sect. 5 is very wide in its terms, whereas sect. 11, sub-sect. 1, is a narrow provision using words applicable to the subject of factory employment. The words "prohibited from being taken into full-time employment" are taken from the Factory Acts, and would seem to refer to questions of the Factory Acts. In construing this Act it is more natural to refer a narrow enactment, such as sect. 11 is, to a similar narrow enactment such as sect. 8 is, rather than to a wide enactment such as sect. 5 is.

No reply was heard.

Lord COLERIDGE, C.J.—It has been thought proper in the present case to hear this particular argument, raising, no doubt, a point of considerable importance, by a court consisting of five judges. This has been done in pursuance of an express statutory provision (see Appellate Jurisdiction Act 1876, 39 & 40 Vict. c. 59, s. 17), and the reason why we thought that that provision should be acted upon on the present occasion is obvious, because



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a desire is entertained on the part of the appellants to question a decision of my brothers Grove and Huddleston on a very important subject; I mean the decision in *Saunders v. Crawford*. I may say that both those learned judges are desirous that their decision should be reconsidered; but even were that not so, no objection to our reconsidering that decision could be maintained. There is no constitutional objection to it, and I entirely assent to the principles laid down in *Hadfield's case*, which were properly brought before us. The substance of that case I take to be this—that every deference is due to the judgment of a court, and that perhaps more deference is due when that judgment is the judgment of the same court itself, but that in any case an authority of a co-ordinate court upon any point should not be differed from or disregarded except upon the clearest view that it is wrong. In former days, before the power of appealing was enlarged as in latter days it has been, there were many extremely important questions which by law could not be considered in a court of appeal, upon which the judgments of the then Courts of Queen's Bench, Common Pleas, and Exchequer were final and conclusive as between the parties; but nevertheless those courts, amongst themselves, felt themselves at liberty under exceptional circumstances either to distinguish, or if need be to differ, though strictly speaking the term "overruled" could not properly be applied to them because they were co-ordinate courts. Now, if I for one moment considered that the decision in *Saunders v. Crawford* was one which according to a fair construction of the Act of Parliament could be maintained, I should at once defer to the authority of that case, and should desire to dismiss this appeal; but, with every deference, I cannot bring my mind to see that this is anything but a perfectly clear case, and that the decision of the magistrate is therefore erroneous and must be reversed. In saying that his decision is erroneous, I desire in justice to him to observe that he only came to his decision, as he was of course bound to do, upon the authority of the judgment of this court. Now the facts in this case are few and simple. The respondent is the father of two children, who are both between five and fourteen years of age, as to whom nothing has happened to enable either of them to be taken into full-time employment, and for whom the respondent has habitually, and without reasonable excuse, neglected to provide efficient elementary instruction. Was he then breaking a duty in so neglecting? It seems to me he was breaking a clear duty imposed upon him in plain terms by the 4th section of the Act of 1876, which enacts that "It shall be the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading, writing, and arithmetic." It then goes on to state what is to happen if the parent refuses to perform such duty, viz., that he shall be liable to such orders and penalties as are provided by this Act. An order was applied for, called in the Act an attendance order, ordering the child to attend in a particular place at a particular time under certain specified circumstances defined in the Act, and to be embodied in the order. The duty of the respondent being clear, and the breach of that duty being also clear, the question is why should not that order be made?

It is contended that the words of sect. 11, sub-sect. 1, refer only to a person over the age of five years being prohibited from being taken into full-time employment, and it is suggested that that section means to say that it is only where by virtue of this Act there is a provision in terms from being taken into full-time employment that the remedies are to be applied. If the Act had so limited its expressions, of course we should have had nothing to do but to defer to them, but it has not done so. The Act was passed expressly to extend, as the definition in the 48th section shows, the age of elementary instruction from thirteen to fourteen. It is admitted that, if the narrower construction contended for on behalf of the respondent is placed upon the words of the Act, the effect is and must be, that the very children for the purpose of instructing whom this Act was passed, and in respect of whom in terms the definition of a "child" is extended by the interpretation clause, may be habitually and without reasonable excuse neglected as to elementary instruction, and that nevertheless the parent of such a child is not subject to the orders and penalties relating to a person who neglects to perform the duty of making his child receive a sufficient elementary education. I see no ground for so limiting the effect of the Act. Whether the draftsman may or may not have had in his mind the 8th section, and may or may not have intended in his mind by the words that he used, when he used them, so to limit the enactment, I really neither know nor care. I should think it extremely unlikely; but if that was his intention, he has failed to express it, and it is *quod dicit lex*, and not *quod voluit parliamentum*, that the court has to look at. For the reasons I have given, I am of opinion that the judgment of the learned magistrate must be reversed. I purposely abstain from going into any other questions than those I have already dealt with, as they do not appear to me to be essential for the determination of this case. As to the question whether sect. 8 of the Act of 1876 has been kept alive by the Factory and Workshop Act 1878, I confess I am by no means satisfied; but I do not think the point material one way or the other.

FIELD, J.—I have arrived at the same conclusion, and substantially upon the same grounds; and should not desire to add anything, but for the fact that we are called upon here to come to a conclusion conflicting with the decision in *Saunders v. Crawford*. It seems to me that I ought therefore, out of respect to the learned judges who decided that case, to state my reasons. If I entertained any serious doubt at all about the true construction of the sections of the Elementary Education Act 1876 under consideration, I should think it right to follow *Saunders v. Crawford*; but, after carefully following the arguments in this case, I am bound to say I think this case is a very clear one. One of the children is under ten, and unquestionably is prohibited from being employed, because sect. 5 is clear, sub-sect. 1 being that no person shall take a child under the age of ten into his employment. If that be so, how is it possible to say that a child who is prohibited and cannot be taken into employment at all is not prohibited from being taken into full-time employment? He is prohibited from being taken into any employment half-time, full-time, or any other. As to the second child, who is above ten, and over thirteen years of age, that child may go into employ-

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ment; but what are the elements of the permission? They are that he either shall have acquired a certain degree of education, of which a certificate is the proof; or that he shall be engaged in factory employment, where he will receive a certain amount of education also. It did not come within either of those two provisions, and consequently that child was equally prohibited from being taken into full time employment. The object of the Act is to provide for education of children between the ages of five and fourteen, and to impose upon the parent, first of all, the duty of giving that education, and then to provide that, if that parent fails, an attendance order shall be made so as to secure the education of the child. It may be that the consequence pointed out on behalf of the respondent might follow, viz., that a child of respectable people and of honest habits may ultimately find itself in an industrial school, where it will be obliged to associate with a certain class of the population, the reverse of respectable; but, although that may be the consequence, which we should endeavour to mitigate as far as possible, it is no ground whatever for holding that the plain meaning of the Act ought not to be carried out.

HAWKINS, J.—I am of the same opinion.

STEPHEN, J.—I am also of the same opinion. The arguments urged on behalf of the respondent have not succeeded in raising any doubt in my mind as to the construction and meaning of the Act. At the same time I feel strongly the necessity for the utmost caution being used with regard to the exercise of the power of sending a child to an industrial school.

WILLIAMS, J.—I entirely concur, for the reasons given by the Lord Chief Justice.

*Appeals allowed without costs.*

Solicitors for appellants in *Winyard v. Toogood, Gedge, Kirby, Millett, and Morse.*

Solicitor for respondents in *Winyard v. Toogood, Solicitor to the Treasury.*

Solicitors for appellants in *Hance v. Fortnum, Gregory, Bowcliffes, and Co., for Stone and Co., Liverpool.*

Solicitors for respondents in *Hance v. Fortnum, F. Venn and Co., for J. Bayner, Town Clerk, Liverpool.*

*Friday, March 9.*

(Before POLLOCK and HUDDLESTON BB., and NORTH, J.)

TIPPETT (app.) v. HART (resp.). (a)

*Brewing—Duty, payment of—Exemption—Occupation of brewer—Inland Revenue Act 1880 (43 & 44 Vict. c. 20), ss. 33, 34.*

*By the Inland Revenue Act 1880, s. 33, sub-sect. 3, beer brewed by a brewer, other than a brewer for sale, is not chargeable with duty if the annual value of the house occupied by such person does not exceed 10l.*

*Held, that this refers to the annual value of the house occupied and inhabited by the brewer, and not of the house in which the beer is brewed.*

*The respondent occupied two houses of the annual value of 20l. and 10l. respectively. He resided in the former, and brewed beer in the latter.*

*Held, that the beer was chargeable with duty.*

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

THIS was a case stated by way of appeal from a decision of magistrates dismissing an information instituted by the appellants, the Inland Revenue authorities, against the respondent, under the provisions of the Inland Revenue Act 1880 (43 & 44 Vict. c. 20). By sect. 32 of that Act it is provided that a paper in the prescribed form shall be delivered by an officer to every brewer, other than a brewer for sale, if chargeable to the duty on beer under this Act, and that the brewer shall enter in such paper the quantity of malt, corn, and sugar which he intends to use in the brewing.

By sect. 33:

(1.) The commissioners may, when they think fit, require a brewer, other than a brewer for sale, to verify the entries in the paper delivered to him, by a declaration to be made by him before a justice of the peace or an authorised officer.

(2.) The charge of duty shall be made, and the duty shall be paid, at such times as the commissioners shall appoint.

(3.) Provided that if the annual value of the house occupied by the brewer does not exceed 10l., the beer brewed by him shall not be charged with duty.

By sect. 34:

(1.) A brewer, other than a brewer for sale, shall only brew beer for his own domestic use, or for consumption by farm labourers employed by him in the actual course of their labour or employment.

(2.) The brewer shall only brew on premises occupied by him, or in case the brewer occupies a house of an annual value not exceeding 10l., on premises gratuitously lent to him by a brewer other than a brewer for sale.

(3.) If the brewer contravenes either of the foregoing provisions of this section, or sells, or offers for sale, any beer brewed by him, he shall incur the penalty of 10l.

The respondent was a farmer in Suffolk, and occupied two distinct houses in the same parish, one of the annual value of 20l., in which he himself resided, and the other of the annual value of 10l., which was inhabited by the respondent's bailiff. In respect of both of these houses the respondent had taken out a licence to brew beer, but declined to pay duty imposed upon him in respect of the smaller house, relying on the words of sect. 33, sub-sect. 3. The magistrates dismissed the information.

*A. L. Smith* for the appellants.—The exemption provided by sect. 33, sub-sect. 3, was intended to apply to the poorer classes, and to persons who actually occupied houses the annual value of which does not exceed 10l. Occupation in this section must mean personal occupation. The respondent did not occupy the smaller house. The 10l. limit was never intended to refer to the house where the beer is brewed, but to the value of the house actually occupied by the person who brews the beer. If this is not so, any occupier of a house of a value far exceeding 10l. might brew in a lodge or cottage on his estate, and entirely evade the duty.

*Grafton* for the respondent.—The combined effect of sect. 33 and sect. 34 is to exempt the occupier of any house of 10l., or less than that amount, in which beer is brewed, from the obligation to pay duty. This is a penal enactment, and ought to be construed strictly as against the appellant. Upon the strict construction of the two sections the value of the house in which the beer is brewed is the test whether the beer is to be chargeable with duty.

POLLOCK, B.—The question reserved for our determination is, whether the magistrates were right in dismissing the summons. It was argued

on behalf of the respondent that he was not liable to be charged with duty in respect of beer brewed by him in a house occupied by his bailiff, the annual value of which did not exceed 10*l.*, and he relied upon the sects. 33 and 34 of the Act. It was said on behalf of the appellant that that is not sufficient; that the value of the house where the beer is actually brewed is not material, and that the whole question depends upon the value of the house which the brewer actually occupies. It seems to me that what the Legislature intended to get at was the status of the person who brews. If a man occupies a house, the annual value of which does not exceed 10*l.*, he comes within the exemption and is not to be troubled; but where he occupies a house the annual value of which exceeds that amount, it is immaterial where he brews the beer. This being so, I am of opinion that the respondent was liable to the payment of the duty, and that the decision of the magistrates was wrong.

HUDDESTON, B.—I have arrived at the same conclusion, though not without considerable doubt. I was inclined to think that, looking at the grammatical construction of the Act, there was great force in the view adopted by the magistrates. Those doubts, however, are not strong enough to entitle me to dissent from the opinion of my learned brothers, and I agree therefore that this appeal should be allowed.

NORTH, J. concurred. *Appeal allowed.*

Solicitor for the appellant, *The Solicitor to the Inland Revenue.*

Solicitor for the respondent, *J. Mills, Ipswich.*

### CROWN CASES RESERVED.

*Saturday, March 3.*

(Before Lord COLERIDGE, C.J., POLLOCK and HUDDESTON, BB., MANIETY and STEPHEN, JJ.)

REG. v. SAMUEL BROWN. (a)

*Attempt to murder—Taking out a pistol from pocket—Pistol seized by bystander—24 & 25 Vict. c. 100, ss. 14, 15.*

*B. was indicted for attempting to discharge a loaded pistol at S., with intent to murder. B., having a grudge against S., went to S.'s house. B. was observed to draw a pistol from his pocket, a third person snatched the pistol away, and B. was arrested.*

*Held, that this was not an offence within sect. 15 of 24 & 25 Vict. c. 100.*

*Quære, whether the case was within sect. 14.*

*The cases of Reg. v. St. George and Reg. v. Lewis (9 Car. & P. 483 and 523) commented upon.*

*Case reserved for the opinion of this Court by Stephen, J.*

At the December Session of the Central Criminal Court, Samuel Brown was convicted before me upon the first count of an indictment then preferred against him.

The count (omitting formal parts) was in these words:

Samuel Brown, on the 23rd Nov. 1882, "feloniously did attempt to discharge certain loaded arms (to wit, a certain pistol loaded in the barrels with gunpowder and divers leaden bullets) at and

against one William Sutton, with intent, in so doing, feloniously, wilfully, and of malice aforethought of him, the said Samuel Brown, to kill and murder the said William Sutton."

The facts were as follows: Brown had a quarrel with Sutton. On the day in question he went to Sutton's house, and desired to speak with him in private. Sutton told Brown to go into the back shop for that purpose, but, having some suspicion, made Brown go first. Brown, as he went into the shop, was observed to draw from his pocket a loaded revolver. Sutton's nephew, Collins, immediately snatched it from his hand, and he was arrested by Sutton and Collins. On his way to the police-station he said that he had not forgotten the way in which Sutton had previously treated him.

In order to explain my direction to the jury it is necessary to observe that though it concludes "against the form of the statute," the count on which Brown was convicted does not follow the words of either of two sections of the "Offences against the Person Act," each of which bears upon the subject. The material parts of these sections are as follows:

24 & 25 Vict. c. 100, s. 14, punishes several different ways of attempting to commit murder, one of which is, "Whosoever shall by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person with intent to commit murder."

Sect. 15 punishes every one who "by any means other than those specified in any of the preceding sections of this Act attempts to commit murder."

In *R. v. St. George* (4 C. & P. 483) it was held that the words "by drawing a trigger or in any other manner," meant in any other manner like drawing a trigger, as, e.g., by striking a percussion cap with a hammer, and that an attempt to discharge a pistol by attempting to pull a trigger was not an offence within the Act then in force, which was in the same words as sect. 14.

I held, accordingly, that there was no evidence to go to the jury of any offence under sect. 14.

I thought there was evidence to go to the jury of an offence against sect. 15, but I doubted whether the prisoner could be convicted of such an offence upon the count as drawn.

In these circumstances I directed the jury to find as follows: I told them that an attempt to commit a crime might, at least for the purposes of the case, be defined as an act done with intent to commit a crime so closely connected with the actual commission of the crime as to form one of a series of acts which, if not interrupted, would constitute collectively the actual commission of the crime; and, in reference to the particular case, I told them that if they thought Brown intended to murder Sutton, and drew the pistol from his pocket for that purpose, and was prevented from murdering Sutton, or from firing the revolver at him for that purpose, only by its being taken from his hand, they ought to convict him on the count above mentioned, which I held, for the purposes of the trial, to be a count charging an attempt to murder by means other than those specified in sects. 11, 12, 13, and 14 of 24 & 25 Vict. c. 100.

The jury convicted the prisoner, and I reserved judgment and committed him to prison until this case should have been decided by the Court for Crown Cases Reserved.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The questions for the Court are :

1. Whether, assuming the sufficiency of the indictment, my direction to the jury was right ?

2. Whether the indictment sufficiently charged an offence under sect. 15 ?

If either of these questions is answered in the negative, the conviction must be quashed; if both are answered in the affirmative, it must be confirmed. J. F. STEPHEN.

No counsel was instructed to argue for the prisoner.

*Poland* for the prosecution.—It is submitted that the first count of the indictment is good, and the direction of the learned judge to the jury correct. On the direction and verdict these facts must be taken to have been found, that the prisoner intended to murder Sutton and drew the pistol from his pocket for that purpose, and was prevented only from murdering Sutton by the pistol being taken from his hand. This was, therefore, an attempt to murder. The count is framed upon the 14th section (a section under the heading "Attempts to murder") of the 24 & 25 Vict. c. 100, which enacts: "Whosoever shall attempt to administer to, or shall attempt to cause to be administered to, or to be taken by any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony." At the trial the learned judge ruled that the evidence was not sufficient to bring the case within sect. 14, upon the authority of *Reg. v. St. George* (9 Car. & P. 483), which was a charge of attempt to murder upon the 1 Vict. c. 85, s. 3: "Whoever shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent to commit the crime of murder, shall, although no bodily injury be effected, be guilty of felony." The prisoner in that case put his hand into his coat pocket and took out a pistol, put his finger on the trigger, and pointed the end of the pistol to his chest to cock it, and was prevented from cocking it. Parke, B. said: "It appears to me that the charge of felony cannot be supported, as it is not proved that the prisoner drew the trigger. The words 'in any other manner' in the statute mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off. Suppose, for instance, you had a matchlock and put a match to it, and the gun did not go off, that would be a case within the Act of Parliament; but here is no proof that the prisoner drew the trigger, though he put his finger to it, and he cannot therefore be convicted on those counts which charge him with so doing, or which charge him with a felonious attempt to discharge the pistol, for it must be an attempt *ejusdem generis*. The consequence is, he cannot be convicted of a felony, but he may be convicted of an assault." [Lord COLERIDGE, C.J. referred to the case of *Reg. v. Lewis* (9 Car. & P. 523), a similar charge upon the same enactment. On the refusal of the prosecutor to give him up some title deeds, the prisoner rose up and said, "Then you are a dead man," and unfolded a great coat and took out a blunder-

buss. Before the blunderbuss was pointed at the prosecutor the prisoner was seized and prevented doing anything. It was found that there was no flint in the blunderbuss, the flint being found between the lining of the coat. On the objection being made that the charge was not proved, Serjt. Arabin, after consulting with Patteson, J., told the jury that to sustain the indictment there must be something more than the mere presenting of the blunderbuss, and that some act must be shown to have been done by the prisoner to satisfy them that the prisoner did in fact attempt to discharge the blunderbuss.] The statute in this part aims at acts done approximating to the crime of murder with intent to murder. [HUDDLESTON, B.—I am inclined to think that this was a case within sect. 14. STEPHEN, J.—Sect. 14 includes attempts to shoot, which this would be, if anything; and the general clause (sect. 15) covers all attempts to murder not covered by the preceding sections.]

Lord COLERIDGE, C.J.—I am of opinion that the conviction cannot be sustained. The indictment is clearly framed on the words of, and with reference to sect. 14 of the 24 & 25 Vict. c. 100, and it having been held by the learned judge at the trial, in obedience to the decision of *Reg. v. St. George* (4 Car. & P. 483), that the evidence did not bring the case within that section, and the only question reserved for us being whether the indictment sufficiently charges an offence within sect. 15, I think that it is not a case within sect. 15. If the draftsman who framed that statute meant to do what Mr. Poland contends was the object of sect. 15, he has failed to effect it. The true construction of the sections under the heading "Attempts to murder" is that they show a variety of means and things which might be done with an intent to commit murder; as, e.g., sect. 11, administering poison; sect. 12, destroying buildings by gunpowder or other explosive substances; and sect. 13, setting fire to a ship with intent to commit murder. Sect. 14 provides, among other things, for the attempting to discharge firearms at any person with intent to commit murder. Then comes sect. 15, which enacts that, "Whosoever shall, by any means, other than those specified in the preceding sections of this Act, attempt to commit murder, shall be guilty of felony," clearly intending such means as are not pointed out in the earlier sections of the Act. It was deemed impossible to specify every mode of committing murder, and therefore a general clause was inserted that if a person attempted to commit murder by any other means than those previously specified, he should be guilty of felony. But it seems to me that these other means must not be means *ejusdem generis* as those mentioned in sect. 14. The present case, I think, is one *ejusdem generis* with one mentioned in sect. 14. It has, however, been held in the two cases cited, not to be within sect. 14. I, however, think that sect. 15 was not intended to extend the operation of sect. 14, for sect. 14 says: "Or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms" that is, "in any other manner" not *ejusdem generis* with those specified. Therefore, I am clearly of opinion that this is a case within sect. 14, but it has been held not to be within the section, and the question is not submitted to us whether it was rightly so held. This

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case cannot be within sect. 15, which deals with other matters than those within the previous sections. I desire to add that on a fit occasion when the cases of *Reg. v. St. George and Res v. Lewis (ubi sup.)* come up for further consideration I reserve to myself the right to reconsider those decisions, though sitting alone, I might, as my brother Stephen has done, deem myself bound by them.

POLLOCK, B.—I have arrived at the same conclusion. If it had been open to us now to consider whether the present case is within sect. 14, I should like to reconsider the two cases cited, but the only question open to us is to consider whether the case is within sect. 15. I think that it would be a wrong construction of the words of sect. 15 to say that this comes within it when it seems to me to come within sect. 14.

HUDDLESTON, B.—I think it would be desirable to reconsider the two cases cited, and I also think that this conviction should be quashed. Sect. 14 treats of attempts to murder by shooting, and three attempts are specified. Then sect. 15 says: "Whoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to murder shall be guilty of felony." This was an attempt to shoot a person within sect. 14, but the evidence did not go sufficiently far to bring the case within sect. 14. If so, it is not a case within sect. 15.

MANISTY, J.—I am of the same opinion. This is a case of attempting to discharge loaded arms within sect. 14. Then sect. 15 provides for other cases than such as are within sect. 14. I should also wish to reconsider the cases cited.

STEPHEN, J.—I reserved the case because I thought there was some obscurity in the language of sect. 15, but when you read that section, together with the others, the matter becomes clear. It is made a felony by sect. 14 to shoot at any person, or by drawing a trigger, or in any other manner, to attempt to discharge loaded arms at any person with intent to commit murder. It is also made a felony by sect. 15 to attempt to commit murder by any other means than those specified in the preceding sections, that is than by shooting at a person or attempting to discharge loaded firearms at a person. If the prisoner in the present case attempted to commit murder at all it was by attempting to discharge a loaded pistol. The offence therefore does not come within sect. 15, but within sect. 14. The case does not come within sect. 14, because he did not draw the trigger or attempt to shoot in a mode specified in that section, according to the authority of the two cases cited. I pronounce no opinion as to the authority of the two cases cited.

*Conviction quashed.*

Saturday, March 3.

(Before Lord COLERIDGE, C.J., POLLOCK and HUDDLESTON, BB., MANISTY and STEPHEN, JJ.)

REG. v. FREDERICK HORN. (a)

*False pretences—Previous conviction—Term of penal servitude—Amendment of sentence.*

*The prisoner was convicted on an indictment for obtaining goods by false pretences, and also pleaded guilty to a previous conviction for false pretences charged in the indictment. He was sentenced to seven years' penal servitude.*

*Held, that the sentence was wrong, and it was amended by reducing it to five years' penal servitude.*

CASE reserved by the Recorder of the City of London.

At a session holden for the jurisdiction of the Central Criminal Court, on Monday, the 8th Jan. last, Frederick Horn was convicted before me upon an indictment, framed under 24 & 25 Vict. c. 96, s. 88, charging him with obtaining goods by false pretences, and he pleaded guilty to a previous conviction for obtaining goods by false pretences charged in the same indictment.

By this section the misdemeanour of obtaining goods by false pretences is punishable with penal servitude for the term of three years, or imprisonment for any term not exceeding two years with or without hard labour, and with or without solitary confinement.

By sect. 4 of the same statute simple larceny is punishable with penal servitude for the term of three years, or imprisonment for any term not exceeding two years with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping.

By sect. 7 of the same statute the punishment for the offence of simple larceny after a previous conviction for felony is, at the discretion of the court, penal servitude for any term not exceeding ten years, and not less than three years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under sixteen, with or without whipping.

By sect. 8 of the same statute it is provided that whosoever shall commit the offence of simple larceny, or any offence thereby made punishable like simple larceny, after having been previously convicted of any indictable misdemeanour punishable under that Act, shall be liable to be kept in penal servitude for any term not exceeding seven years.

By sects. 31, 32, 93 and 36 of the same statute, it is provided that whosoever shall commit the felonies mentioned in those sections shall be liable to be punished "as in the case of simple larceny."

By sect. 116 of the same statute provisions are contained for the form in which a previous conviction for felony or misdemeanour shall be charged in indictments for offences punishable under that Act.

By 27 & 28 Vict. c. 47, s. 2, it is provided that no sentence of penal servitude shall be for less than five years.

The prisoner was above the age of sixteen years.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Under these circumstances I held that the prisoner had committed an offence made punishable by the Larceny Act like simple larceny after having been previously convicted of an indictable misdemeanour punishable under that Act, and I accordingly sentenced him to seven years' penal servitude.

It was contended on the part of the prisoner that I had no power to pass the said sentence for the offence of which the prisoner was convicted on the ground that the words "any offence thereby made punishable like simple larceny," in sect. 8 of the Larceny Act, were only intended to apply to the offences referred to in sects. 31, 32, 33, and 36 of that Act, and this contention was supported by the fact that if the previous conviction had been for felony, there would clearly be no power to pass a sentence of seven years' penal servitude.

The question for the opinion of the Court is, whether the sentence of seven years' penal servitude was right.

If this question is answered in the affirmative, the sentence is to stand; if in the negative, the sentence is to be amended to five years' penal servitude. Prisoner is undergoing his sentence.

THOMAS CHAMBERS,  
Recorder of London.

*Blackwell* for the prisoner.

*Poland* for the prosecution.

By the COURT.—This case is too clear for argument. The sentence was wrong, and must be reduced to five years' penal servitude, and it will be amended under the 11 & 12 Vict. c. 78, s. 2 accordingly.

*Sentence to be amended accordingly.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

Friday, Feb. 9.

(Before JESSEL, M.R., LINDLEY and BOWEN, L.JJ.)

ATTORNEY-GENERAL v. VESTRY OF BERMONDSEY. (a)

*Practice—Costs—Action against corporation—Individual corporators joining as defendants.*

*A vestry incorporated under the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), having resolved to incur certain unauthorised expenditure, an action for an injunction was commenced by the Attorney-General, at the relation of a ratepayer, against the vestry and the movers and seconders of the resolutions passed by the vestry and some of their supporters. On motion, on which the individual defendants were unrepresented, the vestry consented to a perpetual injunction without costs, and the plaintiffs then moved for judgment against the individual defendants in default of pleadings, and asked that they might be ordered to pay the costs of the action. The statement of claim did not ask for costs against the vestry.*

*Held (affirming the decision of Fry, J., 46 L. T. Rep. N. S. 852), that it was irregular to make the individual members of the vestry defendants for the sole purpose of making them pay costs, and*

*that the action must be dismissed as against them.*

Attorney-General v. Compton (1 Y. & C. Ch. 417) distinguished.

This action was brought by the Attorney-General, at the relation of F. Mortimore, a Bermondsey ratepayer, and by F. Mortimore against the Bermondsey Vestry, William Shepherd, Oliver Norval Swann, Henry William Revill, John Porter, Robert Bonny, and Henry George Philcox, for an injunction to restrain the defendants from paying or applying any portion of the rates or parish funds in or towards defraying the expenses of the celebration of the opening of a new vestry hall, or of a certain dinner and ball; and for an order on the defendants other than the vestry to pay the costs of the action, and further relief.

By the statement of claim it appeared that the Bermondsey Vestry, being a body incorporated under the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), erected a new vestry hall. At a vestry meeting, on the 25th Jan. 1882, it was resolved that the churchwarden for the time being should be presented with a key, and that he should open the hall, accompanied by the board. It was also moved and seconded by the defendants Shepherd and Swann, and resolved, that an expenditure of 100*l.* for the celebration of the opening should be authorised.

It was also moved and seconded by the defendants, Swann and Revill, and resolved, that a ball should be held on the next evening, and 25*l.* and a band be provided. At another vestry meeting on the 6th March 1882 it was moved and seconded by the defendants Porter and Revill, and resolved, that an additional sum of 50*l.* should be voted towards the expenses. The defendants Bonny and Philcox voted in favour of the resolutions. The vestry clerk advised the vestry that they had no power to spend the parish funds in the way proposed, but the resolutions were passed. The vestry hall was opened on the 15th March 1882, and on that occasion the defendant Bonny, who was the churchwarden for the time being, was presented with a small gold key studded with diamonds, a dinner was given by the vestry on that day to about a hundred persons, and a ball was given by them on the following day, and refreshments provided, about six hundred and fifty persons being present. The statement of claim further alleged that the expenses of such festivities would far exceed the 175*l.* which had been voted, and that the vestry intended to pay the expenses so incurred out of the rates or parish funds in their hands, unless restrained by injunction.

On the 1st April 1882 the writ in the action was issued, asking that "the defendants" might pay the costs; and on the same day an interim injunction was granted by Fry, J. in the terms afterwards embodied in the statement of claim, and notice of motion for an injunction till the hearing was served on the vestry alone.

On the 27th April 1882 the motion was heard, and, by consent of the vestry, a perpetual injunction was granted, no order being made against the vestry in respect of costs. The other defendants were not represented on this occasion, not having been served with notice.

The statement of claim, which was delivered on the 24th April 1882, prayed, as above stated, for costs against the defendants other than the vestry.

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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No statement of defence was put in by any of the defendants, and on the 12th May 1882 notice of motion for judgment was served on the individual defendants.

The motion for judgment was heard on the 24th June 1882, by Fry, J., who then dismissed the action as against the defendants other than the vestry, without costs: (46 L. T. Rep. N. S. 852.) The plaintiff appealed.

*S. Dickinson* for the appellant.—No defence having been put in, the facts alleged in the statement of claim must be taken to be admitted. I do not say that these defendants are the majority of those who voted for the illegal resolutions, but it is not necessary to bring all the persons constituting the majority before the court. It was proper, however, to make some of them parties, as otherwise, if the relief had been granted with costs, the vestry would have paid the costs out of the rates, to which the plaintiff, as a ratepayer, is a contributor. [JESSEL, M.R.—Why should not the vestry pay the costs? Vestrymen ought not to be made to pay the costs because they have made a mistake as to the law; they are not like railway directors.] They intended to misapply the funds, and it was no fault of theirs that the funds were not actually misapplied. [JESSEL, M.R.—They are not liable because they voted wrongly.] The property of the vestry is held by the vestrymen upon trust for public purposes, and the court will prevent them from misapplying it:

*Attorney-General v. Compton*, 1 Y. & C. Ch. Cas. 417.

[JESSEL, M.R.—There the money had been actually paid over. Here they have not paid the money, and they could not shield themselves under their character as corporators against the consequences of a wrongful act.] These defendants were part of a majority which had the disposal of the funds. Was the plaintiff to wait until the money was spent before coming to the court? The defendants might be paupers and unable to repay the amount spent. They are trustees not only of the funds but of the powers of the vestry conferred on them by Act of Parliament, and if an abuse of those powers is threatened, the persons who will be injured may come to the court and ask that it shall be prevented. The legal liability has been incurred. Voting for illegal purposes is as unlawful an act as improperly spending money. The court can only dismiss the appeal on the ground that the defendants have done no unlawful act. If they have done such an act they are liable for the consequences. Any other decision will throw on a person injured part of the costs of the proper remedy. [JESSEL, M.R.—It does not follow that a rate can be made to pay the expenses incurred.]

*Russell Roberts*, for the defendant Swann, and *Ingle Joyce*, for the other defendants, were not called upon.

JESSEL, M.R.—This is an appeal from Fry, J., which raises an important question, which he did not decide or consider because he decided the case on a technical ground. I am not saying that it was wrong for him to do so, but it prevented him from deciding this question on the larger ground. There is in the statement of claim a sort of allegation that some of the defendants voted in favour of resolutions involving, if carried into effect, the misapplication of part of the funds under the control of the vestry. Of course vestries

have no right to give balls, and dinners, and gold keys out of the rates, and in this case they were properly restrained by injunction from so doing. But the Attorney-General, or whoever was responsible, joined as co-defendants six vestrymen, all of whom, to put it in the most favourable way for the appellant, I will assume to have voted in favour of the resolutions in favour of this illegal application of the parish funds. I will also assume that they formed part of the majority which carried the resolutions; I am not going to base my decision on the bare technicality that it is only alleged that they moved or seconded resolutions, and did not actually vote for them. But assuming that the defendants formed part of the majority, are they proper parties to the action? Can the Attorney-General sue them at all, the money not having been actually misapplied? In my opinion he could not properly make them parties. If the money had been actually misapplied, then of course they would have been liable, and would have been bound, whether in their corporate capacity or not, to repay the money misapplied. If they had merely directed the money to be paid, and the money had been paid, whether by drawing a cheque or otherwise, they would have been liable for the misapplication of the funds. But when that has not been done, and the Attorney-General sues them merely to prevent its being done, it appears to me that he must allege two things—first, that these persons actually threatened to do an illegal act; and, secondly, that the act was threatened to be done by persons who had it in their power to do it. It is only alleged here that these people were about to do it acting as the vestry, and the vestry are also made parties. It might have been different if the defendants had had the control of the funds independently of their being vestrymen. Why, then, were they made parties? Only that they might be made to pay the costs of the action. The parties properly liable to pay the costs would be the vestry, who threatened to misapply the money. The reason that it was not asked that the vestry should pay the costs was, that the plaintiff as a ratepayer would be one of those who would have to pay. In a recent case before the Court of Appeal *Mathias v. Yells* (46 L. T. Rep. N. S. 497) the old rule called the rule of three A.'s was discussed, under which an attorney, an agent, or an arbitrator, might have been joined as a party in order to make him liable for costs only. Ever since Lord Cottenham's time it has been held that rule ought not to be extended, and I am sure it ought not to be extended to corporators or vestrymen. But there is another ground in this case. You cannot do complete justice as to costs. If the appellant is right these defendants would be liable to indemnify the vestry from the consequences of their resolutions; and if these defendants can be made to pay the costs of the action, they will also be liable to pay the costs of indemnifying the vestry. But that liability could not be investigated in this action because the other vestrymen are not parties, and therefore complete justice could not be done. If these defendants are made liable in an action at all it should be in an action of indemnity which will cover every point, and if they ought to pay these costs, they ought also to pay the costs of the vestry. These vestrymen ought not to have been made parties at all, and the action ought to have



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been dismissed with costs against them. The plaintiff got off better than he ought to have done in the court below, and was fortunate in not having the action dismissed with costs.

LINDLEY, L.J.—I am of the same opinion. This appears to me to be an interesting experiment, and if I had been one of the vestrymen joined as defendants I should have demurred with a prospect of success. The action to restrain the vestry was right to that extent, but it went too far in including these vestrymen, simply because they voted. It was not said that they got control of the money *de facto*. There is no authority that they are liable in an action merely for voting. In *Attorney-General v. Compton* the ground was that there had been active participation in the breach of a public duty. But the unlawful act was not committed in this case. The experiment has failed. It does not follow that there is no remedy, or that a rate made for improper purposes cannot be quashed.

BOWEN, L.J.—I am of the same opinion. These vestrymen should not have been joined as defendants. They were not themselves, apart from the vestry, doing anything, or threatening to do anything illegal. The only reason for joining them as parties was that they might be ordered to pay the costs. Jessel, M.R. has said all that need be said on that point. I am not so well acquainted as he is with the rule of equity which allowed persons to be made parties simply to obtain costs from them, but I am satisfied that these vestrymen ought not to have been made parties.

*Appeal dismissed with costs.*

Solicitors: Wilkinson and Drew; R. Chapman; J. Harrison, A. G. Ditton.

Wednesday, Feb. 14.

(Before JESSEL, M.R., LINDLEY and BOWEN, L.JJ.)

REG. v. NASH. (a)

*Infant—Bastard—Custody of.*

*A girl of fifteen was seduced and delivered of an illegitimate child, and left it (hoping to be able to pay for its maintenance) in the custody of the defendants, who were strangers. The mother became unable to maintain the child, and, after the defendants had maintained it for six years, the mother (being then the mistress of a gentleman, who was not the father of the child) applied for delivery of the child to her sister and brother-in-law, who were respectable people.*

*Held (affirming the decision of the Queen's Bench Division), that the mother was entitled to the order asked.*

ROSE CAREY, spinster, applied to North, J. at chambers for a writ of *habeas corpus* for delivery to her of her illegitimate female child, aged seven years, by Mr. and Mrs. Nash, in whose care the child was.

It appeared from the mother's evidence, in support of her application, that the child was born in May 1876; that the putative father denied that she was his child; that shortly after the birth of the child she was put out to nurse with Mr. and Mrs. Nash, with whom, except for one

short interval, she had since remained; that Mr. and Mrs. Nash were poor people, subsisting partly on charity, and partly on what Mr. Nash got from odd jobs as a day labourer.

On the other side affidavits were produced alleging that Rose Carey gained her living by prostitution; that Mr. and Mrs. Nash were not living upon charity; that the child was being well brought up; and that Mr. and Mrs. Nash's reasons for keeping her were their affection for her, and their wish to preserve her from an immoral life.

North, J. refused to order the writ to be issued on the ground that Rose Carey was not a proper person to have the custody of the child.

Rose Carey then applied to a divisional court of the Queen's Bench Division for a writ of *habeas corpus* requiring the child to be brought up and delivered over to the custody of Mr. and Mrs. Wright, a brother-in-law and sister of the applicant.

In a further affidavit, filed by Rose Carey, in support of this application, she stated that she was seduced, when living with her parents and under the age of fifteen years, by an officer in the army; that her father, who was a gardener, insisted on her taking proceedings against the father of the child, and on her refusing to do so turned her out of doors; that her mother died two months before the applicant's confinement; that, her sister being out at service, Mr. and Mrs. Nash, whom she had known since she was six years old, and who lived near her father's house, were the only persons she could think of or turn to to mind the child; that she afterwards got a situation as waitress in an eating-house, which she retained until it was proved the work was too much for her, and she was laid up for three months in an infirmary; that when she came out she was offered the protection of a gentleman, and under such protection had "since lived in a respectable way."

Mr. Wright also made an affidavit stating that for the past eleven years he had been a clerk in the employ of the Press Association; that he was married to the applicant's sister, and had one child, who was then living; that he was acquainted with the manner of living of Rose Carey, and that she was not a prostitute; that he was quite willing to take the guardianship of the child and bring her up with his own child.

On this evidence the Divisional Court directed the writ of *habeas corpus* to issue for delivery of the child to Mr. and Mrs. Wright.

Mr. and Mrs. Nash appealed.

H. Lacy Fraser, for the appellants.—The child, being illegitimate, is in the view of the law *nullius filia*, and in strictness neither the father nor the mother is entitled, legally, to its custody. [JESSEL, M.R.—Equity, which now prevails in all divisions of the court, has regard to natural relationship.] In one case Wightman, J. refused to order an illegitimate child, eight years of age, to be restored to its mother, when the parties against whom the application was made had had the custody of it for seven years with the mother's consent, and the child was well cared for, and wished to remain with its present protectors:

*Re White*, 10 L. T. Rep. O. S. 349.

Wightman, J. said: "In point of law, the child being illegitimate, neither the father nor the

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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mother has any particular right to its custody." In another case the court refused to allow the mother of an illegitimate child between eleven and twelve years of age to take her from the custody of her putative father, the child being unwilling to go with her mother:

*Re Lloyd*, 3 M. & G. 547.

The court will only have regard to the interests of the child, who, if she remains where she is, will be educated at the expense of a district visitor, who has undertaken to pay for her schooling. It would not be for the child's benefit to deliver her to the custody of her mother, who is admittedly living an immoral life, and the court will not make such an order. [JESSEL, M.R.—That must be taken subject to this, that there must be injury to the child. There would be no injury to the child if she were sent to school. Besides, the application is that the child shall be delivered to her aunt.] That would be, practically, giving her into her mother's charge. He also referred to *Simpson on Infants*, 126, 127.

*Herbert Reed*, for the mother, was not called upon.

JESSEL, M.R.—If ever a judgment was right, it is the one now appealed from. This unfortunate young woman was seduced when she was fourteen years old, and the consequence was that she had a child. Her father having turned her out of his house, the unlucky woman found herself compelled to put her child out to nurse with poor people in the neighbourhood whom she intended to pay for their trouble, and it appears that she did give them some money which she obtained from her seducer. Then she came up to London and got a situation as a waitress. After a time her strength failed her, she was obliged to throw up her situation, and was unable to pay for the maintenance of the child. In the meantime the child was maintained by the poor people in whose custody she remained, and who were assisted by the contributions of charitable persons in the neighbourhood. The mother had to go into a public infirmary, and when she came out she went into the keeping of a gentleman, with whom she is still living—in that sense she is living an immoral life. She now wants to get her child back, and these poor people want to keep it from her—but they have no claim whatever to the child. They are mere strangers, and have not a particle of right to its custody; yet they contend by their counsel in this court—now a court of law and equity—that a natural mother is no relation to her child, and has no more right to its custody than a mere stranger. The absurdity of their claim cannot be exaggerated. It is true that *Manle, J.*, in *Re Lloyd*, is reported to have asked, "How does the mother of an illegitimate child differ from a stranger?" I should have thought the answer was, "Because she is its mother." The question was asked during the argument, and not when the learned judge was delivering his judgment in the case, and, knowing something of him, I think he must have intended the question as a joke. At any rate, if he did not mean to make a joke, he could only have been speaking of the strict legal right to the guardianship of an illegitimate child. But even at common law there were many cases in which the right of the mother to the custody of her illegitimate child was recognised, and Lord Mansfield held

that she was so entitled unless good cause was shown to the contrary. Her rights are also recognised by the poor law, which imposes on her the liability to maintain her illegitimate child. But now the courts are courts of equity, as well as of law, and the question is not to be decided with reference only to the legal rights which were formerly considered in granting writs of *habeas corpus*, for equity does consider the natural relationship, not only of the mother of an illegitimate child, but of the putative father and the relations on the mother's side. What is to be regarded is the benefit of the child, and that kind of blood relationship, though it was not always recognised at law, gives a preference when there are conflicting claims to the custody of an illegitimate child. In this case the mother says: "I do not want you to give the child to me, but to give her to my sister, who is a respectable married woman, the wife of a respectable man." The sister's husband is a clerk, and in a position far superior to that of the appellants, and he is willing to take charge of the child. I cannot understand why this contest has been raised. To me this appears to be the plainest possible case for ordering the child to be delivered to blood relations, who will give it every possible care and a better education than that which the appellants could give it. In my opinion no order was ever more rightly made, and this appeal ought to be dismissed.

LINDLEY, L.J.—I am of the same opinion. In some respects this is a very painful case. There is no apparent reason for depriving Nash and his wife of the custody of the child, except the superior right of his mother. There is no suggestion that they have been unkind to or neglectful of it. But they have no more right to the custody of the child than any other stranger has, and the affection even of a natural mother gives a better right than the regard of a mere stranger. The child is now at school, and no doubt the fact of her having been taken up by some district visitor is at the bottom of the whole affair.

BOWEN, L.J.—I am of the same opinion. I have no doubt that this appeal has been brought with the best of motives in the supposed interest of the child; but philanthropy sometimes makes mistakes, and this is one of them. It is said that the mother is not entitled to the legal guardianship of the child. But that is not the question. The question is, whether, as between the mother and a stranger, the court, in deciding who is to have the custody of an illegitimate child, ought not to give preference to the mother. It is said that the mother is not respectable; but she asks that her sister may have the custody of the child, and it seems to me the scale is turned in favour of her demand, when it appears that the child is to be given into the care of respectable people. I have no hesitation in saying that the decision of the court below is right in principle and upon the merits. I am satisfied that it is the best for the child itself, and that it ought to be affirmed.

*Appeal dismissed with costs.*

Solicitor for the appellant, *A. B. O. Strutfield*.

Solicitors for the respondent, *Wilkinson and Howlett*.

CHAN. DIV.] **BARLOW v. VESTRY OF ST. MARY ABBOTTS, KENSINGTON, AND ELSDON.** [CHAN. DIV.]

## HIGH COURT OF JUSTICE.

## CHANCERY DIVISION.

Wednesday, Feb. 28.

(Before BACON, V.O.)

**BARLOW v. THE VESTRY OF ST. MARY ABBOTTS, KENSINGTON, AND ELSDON.**(a)

*Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), ss. 74, 75—General line of buildings—Old buildings—Frontage and Abutment—Jurisdiction—Magistrate's order—Architect's certificate—Injunction.*

The plaintiff in 1875 became the owner in fee of certain land, covered with buildings, situated between Kensington-road on the north and Canning-place on the south.

On the 11th Oct. 1875 he obtained the approval of the Metropolitan Board of Works to a new street which would lead across the said land and buildings from north to south, as he intended pulling down his old buildings so that he might erect larger houses on the same site. The street was called "De Vere Gardens."

On the 18th Oct. 1881 the line of buildings in the new street was certified by the superintending architect of the Board of Works. The premises, which were the subject of this action, were then being built on a site at the north-east corner of De Vere Gardens, fronting Kensington-road, and they projected on their western side up to the pavement in De Vere Gardens, and seven feet beyond the certified building line of De Vere Gardens.

The Kensington vestry applied to a police magistrate on the 24th Jan. 1882, and obtained an order for the demolition of so much of the premises as projected beyond the certified building line. The plaintiff (who had become the mortgagee of the premises) moved for an injunction to restrain the defendants from demolishing any part of the said premises.

Held, that the premises were not necessarily to conform to the general line of buildings in De Vere Gardens, having regard to sects. 74 and 75 of the *Metropolis Management Act 1862*, and that their frontage was in Kensington-road; that they could not be considered to be in De Vere Gardens, and that the injunction must be granted.

**Lord Auckland v. Westminster District Board of Works** (26 L. T. Rep. N. S. 961; L. Rep. 7 Ch. App. 597) followed.

This action was brought by the plaintiff, who was the second mortgagee of a certain freehold piece of land with a dwelling-house thereon, situated in the parish of Kensington on the south side of Kensington-road and bounded on the western side by De Vere Gardens, against the Vestry of St. Mary Abbots, Kensington, and W. Elsdon the mortgagor of the said premises, the claim being for an injunction to restrain the vestry from demolishing, pulling down, or interfering with any part of the said dwelling house, or otherwise injuring his security therein. The facts were as follows: the plaintiff and William Bennett Daw purchased the freehold in the said land in the year 1875. The property was then covered with old buildings, and the only frontage was towards

Kensington-road on the north and Canning-place on the south. The plaintiff and W. B. Daw purchased the property with the intention of pulling down the old buildings and erecting in their stead new and valuable dwelling-houses. The plaintiff shortly afterwards acquired all the interest of W. B. Daw. To develop the said land for building purposes the plaintiff considered it desirable to make a new street across the property from Kensington High Road to Canning-place. Accordingly he applied to, and gained the approval of the Metropolitan Board of Works to his forming such a new street, fifty-eight feet wide, and he named it De Vere Gardens. After he had pulled down the old buildings he set up a placard to announce that the site on which they had formerly stood (excepting the strip taken for the street) was to be let or sold as building land. In consequence of that the defendant William Elsdon on the 2nd Aug. 1881 agreed to purchase the said piece of land for the sum of 17,500*l.*, and it was also agreed between the plaintiff and the defendant Elsdon that of that sum 5000*l.* should be left on a second mortgage of such piece of land. Such mortgage was dated the 22nd Nov. 1881, and expressed to be subject to a prior mortgage dated the 21st Nov. 1881, and the plaintiff conveyed the said piece of land to the defendant Elsdon, shortly before the execution of the mortgage of the 22nd Nov. 1881. The defendant Elsdon erected several houses on the said piece of land fronting Kensington-road and the most westerly of them (the subject of this action) abutted on De Vere Gardens, and the western side of it ran up De Vere Gardens along the line of pavement, and was seven feet in front of the building line of De Vere Gardens. The houses in that street did not commence till some distance to the rear of the house in question, and their building line was defined by the certificate of the chief architect of the Board of Works which was dated the 18th Oct. 1881, and which after reciting the 75th section of the *Metropolis Management Amendment Act 1862*, proceeded as follows:

And whereas Mr. William Weaver, surveyor to the Vestry of Kensington, and Mr. William Elsdon, of Victoria-road, Kensington, have severally appeared before me, and have been heard regarding the erection of a house in Kensington-road, at the corner of De Vere Gardens, and beyond the face or front of the buildings forming a row of houses on the eastern side of De Vere Gardens aforesaid, and I have been required to decide the general line of buildings in such gardens as provided in the said statute. Now, therefore, having considered the several matters, I, the undersigned, being the superintending architect to the Metropolitan Board of Works, do hereby, pursuant to the said Act, decide that the main front of the buildings forming the row of houses aforesaid, and tinted pink on the plan hereto annexed and signed by me is the general line of buildings on the eastern side of De Vere Gardens aforesaid.

GEORGE VULLIAMY.

Superintending Architect to the Metropolitan Board of Works.

The said dwelling-house was nearly finished when the defendant vestry took proceedings under the said 75th section against the defendant William Elsdon to obtain an order for the demolition of so much of the said dwelling-house as was beyond the building line of De Vere Gardens. And by an order made by Mr. James Sheil, one of the magistrates of the police courts of the metropolis, sitting at Hammersmith, on the 24th Jan. 1882, it was ordered and adjudged that the defendant William Elsdon should within eight weeks

(a) Reported by A. COYSGARNE SM, Esq., Barrister-at-Law,

from that date demolish the said dwelling-house to the extent of seven feet from the inner line of the pathway in De Vere Gardens aforesaid, and parallel therewith, so that the same should no longer be beyond the general line of buildings in De Vere Gardens.

The plaintiff was no party to these proceedings, and had had no opportunity of resisting or showing the impropriety of the order which threatened so seriously to injure the house, which was his principal security for the £000l. which he had lent to the defendant William Elsdon. The sections of the Metropolitan Management Amendment Act (25 & 26 Vict. c. 102) referred to in the case are as follows:

Sect. 74. In case any building situated within any of the parishes, districts, or places comprised in the schedules of the firstly recited Act, which shall in any part thereof project beyond the general line of the street in which the same may be situate, or beyond the front of the building, wall, or railing on either side thereof, shall at any time be taken down to an extent exceeding one half of such building, such half to be measured in cubic feet, or shall be destroyed by fire or other casualty, or demolished, pulled down, or removed from any other cause to the extent aforesaid, it shall be lawful for the Metropolitan Board of Works to require the same to be set back to such a line and in such a manner for the improvement of any street as the said board shall direct, provided that the said board shall make compensation to the owner of such building for any damage and expenses which he may sustain and incur thereby.

Sect. 75. The 143rd section of the first recited Act (18 & 19 Vict. c. 120) and the 140th section of the 7 Geo. 4, c. 142, are hereby repealed, and in lieu thereof be it enacted that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses, in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway, when the distance of the line of buildings therefrom amounts to, or exceeds, fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being, and in case any building, structure, or erection be erected, or be begun to be erected or raised without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the Board of Works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment to appear at a time and place to be stated in the summons, to answer such complaint, and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing.

*Marten, Q.C. and B. Bickley Rogers* for the plaintiff.—The action of the defendant vestry before the magistrate was based upon a misunderstanding of the 74th and 75th section of the Act. The 75th section only applies to vacant ground, and not to ground where there have been old buildings before. The vestry ought to have proceeded under the 74th section, and therefore the magistrate had no jurisdiction to make the order which he did make under the 75th section, and in doing so he was clearly acting *ultra vires*:

*Lord Auckland v. Westminster District Board of Works*, 26 L. T. Rep. N. S. 961; L. Rep. 7 Ch. App. 597.

The decisions of James and Mellish, L.JJ. in that case are very clear on the point of sect. 75 not being applicable where there have been old buildings previously on the site where new ones are being erected, and that case has never been doubted on that point. We never for a moment abandoned our right to build on our own property, except on the strip we made into a street. In fact, although adverse comments have been made on that case in more recent decisions, they were not upon points which concern the present case, and do not bind us, but the court is bound by that case:

*Kerr v. Corporation of Preston*, 6 Ch. Div. 463:

*Hedley v. Bates*, 42 L. T. Rep. N. S. 41; 13 Ch. Div. 498;

*Great Western Railway Company v. Waterford and Limerick Railway Company*, 44 L. T. Rep. N. S. 723; 17 Ch. Div. 493;

*Stannard v. Vestry of St. Giles, Camberwell*, 46 L. T. Rep. N. S. 243; 20 Ch. Div. 190.

These cases all have to do with penalties, and regard the jurisdiction of magistrates to make injunctions to restrain criminal proceedings for breach of the provision of an Act of Parliament, and some of them are under a different Act from the one in question in this case. [BACON, V.C.—We have nothing to do with penalties here; suing for damages, or to pull down buildings, has nothing to do with penalties.] Our next point is that this house is not in any sense situate in or subject to the building line of De Vere Gardens. It faces into or has its frontage in Kensington-road, and, as is the usual practice in such buildings, it is flush with the pavement of the road into which it abuts. We have a clear right to build over the whole of our freehold land in any way we like, so long as we do not interfere with any previously existing rights of our neighbours, and our land comes close up to the pavement of the new street which we gave up to the public. Before the magistrate gave his decision he ought to have had a certificate from the Board of Works, which would have stated in which street the house stood, and till he got that he had no right to make the order, and he never had such a certificate. Again, this order was not properly drawn up in writing, or duly served within the proper time, or on the proper parties, as provided by the 75th section. The plaintiff was not a party to the proceedings before the magistrate, and the defendant Elsdon never saw the order till he saw it in court, and the right of the vestry to pull down the building in question can only come into operation when the order has been drawn up in writing, and duly served in accordance with the Act.

*Millar, Q.C. and M. Ingle Joyce* for the defendants.—The encroachment, which the vestry has obtained an order from the magistrate to have demolished, is a serious one; it interferes with the view of valuable houses, and depreciates their value seriously. The plaintiff had practically abandoned his right to obstruct the view which the new houses in De Vere Gardens had of the park. The large space of land owned by him was cleared for building purposes in 1875, and remained so cleared till 1881, and till that time the whole of the new street conformed to the building line as certified by the architect of the

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Metropolitan Board of Works. He did not abandon his right by any express contract, but we have the evidence of the plans which he originally made for the new buildings in which the line of proposed building is some feet behind the present actual line. It was not till 1881 that Elsdon commenced to build the house in question, which spoils the general aspect of the street, and interferes with the view of the new houses therein. Every step in obtaining the magistrates order was taken by the vestry with great regularity, in compliance with the Act. And, following the decision of Bovill, C.J. in *Simpson v. Smith* (24 L. T. Rep. N. S. 109; L. Rep. 6 C. P. 87), the magistrate (after receiving the architect's certificate) adjourned the case for the purpose of viewing the premises and deciding what was the true general building line of the new street, and if the house in question interfered with it, and to what extent; and, after he had made his order, that seven feet of the house must be demolished, that order was final, and being made by a competent officer appointed for the purpose of deciding such questions, this court has now no jurisdiction to review that order. Coleridge, C.J. has held in a very recent case that there is no appeal to quarter sessions against the order of a justice made under sect. 75 for the demolition of a building brought out beyond the general line of building:

*Reg. v. The Justices of Middlesex; Re Elsdon*, 9 Q. B. Div. 41.

And the Master of the Rolls in a similar case said, "I must assume that the Legislature has given the magistrates the power to decide the question according to law, and no one is entitled to say that a judge intrusted by the Legislature with judicial power is incompetent to exercise it."

*Kerr v. Corporation of Preston* (ubi sup.).

This court has no jurisdiction to act as a Court of Appeal in this matter if the magistrate was not acting *ultra vires*, and he was not, because he was acting in direct accordance with sect. 75. The case of *Lord Auckland v. The Westminster District Board of Works* has no application to this case. The facts were different. There was a corner house involved, and there was an existing old street, with an existing building line, before the old houses were pulled down. Here there was no old thoroughfare, and there was no old line of buildings in De Vere Gardens. The proper officer certified which was to be the building line in the new street, and after that certificate was made all buildings in that street were bound to conform to it, and the house in question did not do so. [BACON, V.C.—But a man may build on his own property as he likes, and cover as much of it with buildings as he pleases.] *Lord Auckland's* case was brought within the 74th section of the Act which concerns, "existing buildings in existing streets," but we contend that sect. 75 is clearly applicable to this case, and that sect. 74 has nothing to do with it. The photographs and plans show for themselves that the house in question stands as much in De Vere Gardens as in Kensington-road; even the name of De Vere Gardens was on its wall, and as originally designed the front hall and door led out into the new street. It was not necessary for the plaintiff (who was the second mortgagee of the premises) to be before the magistrate. Sect. 75 of the Act clearly specifies the persons who are to be present. It says, "or"

the builder (that is Elsdon) "or" the occupier (but there was not one then). Elsdon cannot be heard to say that he was not properly served with the order, and did not see it before this action was commenced, as he was present when the case was before the magistrate, and he saw the pleadings, and the Act does not lay down that he was to be served personally. It is true the order was not drawn up within the prescribed time, but all orders date and take effect from the time they are delivered, and not from the date when they are drawn up:

*Ex parte Johnson*, 3 B. & S. 947; 32 L. J. 193, M. C.; *Brutton v. Vestry of St. George's, Hanover-square*, 25 L. T. Rep. N. S. 552; L. Rep. 13 Eq. 346.

*Marten*, Q.C. in reply.—A house cannot be in two places. This house is situate in Kensington-road, and abuts on De Vere Gardens, and the only building line which affects it is that of Kensington-road. There is no evidence of any actual abandonment of our right to build as and where we liked over our own land, and it cannot be said that we are to lose seven feet of frontage as well as the fifty-eight feet which we have voluntarily surrendered for the new street.

BACON, V.C.—There have been a great many interesting things mentioned in the course of the discussion; but the main substance of the case, as nobody can deny, is of very great importance. To the plaintiff, unquestionably, it is of great importance. He has built up a large house upon his own land, and the vestry of Kensington threaten that they will pull it down, if he does not. Whether he pulls it down himself, or whether he waits until the vestry exercise their authority and pull it down, the value of his property must be greatly diminished if it is pulled down. Now, the main facts of the case are not in dispute. [His Lordship went through them.] The plaintiff has done nothing but exercise his right as owner of his land, to build upon his own land, and he has kept his word with the Board of Works, because he has not attempted to go beyond that line of pavement which they claimed and secured for the enjoyment of the public when they assented to De Vere Gardens being made into a road. In my opinion the magistrate was misled by the case put before him. He was made to believe that he had authority; and he had none. Neither in the words of the statute, nor according to the facts proved in the case, can it be truly said that the plaintiff's existing house, to which the order is said to apply, ever did stand in De Vere Gardens, or anywhere but in Kensington-road. One fact mainly relied upon was that a door had been made in the western side of the house, and leading into De Vere Gardens. In my opinion Elsdon had a right to make as many doors as he liked in his own wall; and he has got a right, now that the pavement is dedicated to the public, to step out of his own house on to the pavement, and there is no power to restrict him or prevent him. Upon what ground could anybody say that he could not make as many doorways as he liked, and as many windows as he liked? I know of no reason why he should be compelled to make his door in Kensington-road because the front of his house looks out upon Kensington-road. However, the reasoning of the case has much less to do with it than the strict legal right; and, bearing in mind

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all the cases which have been referred to, especially the case of Lord Auckland (which cannot be in any degree distinguished from this case, except only that De Vere Gardens did not exist, and the five cottages in Lord Auckland's case did exist), I come to the conclusion that the house in question has been lawfully and rightfully built. Now it is also said that, although the house was built upon the plaintiff's own land within the line of the pavement which he surrendered to the public, and for which he asked the protection and sanction of the Board of Works—because this house comes to the edge of the pavement, he has, therefore, intercepted the view which the inhabitants of De Vere Gardens might by accident have of Kensington Gardens. It must have been an oblique view at all times; but I have not to consider its importance; but I should say a more frivolous, trifling, and unreasonable suggestion could hardly be made than that the gentlemen and ladies living in De Vere Gardens should complain of the house having been built upon the plaintiff's own land, and within the limit which the pavement indicates, because that house shuts out a portion of a view to which they never had any legal right. Upon the facts of the case, and upon the authority of the cases which have been referred to, I have no doubt of the plaintiff's right to be protected against the execution of that order which the learned magistrate has made, and with which I have nothing to do. I have not to canvass it. I have only to consider whether he had a right to make any such order. According to the form of that order, compared with the terms of the statute, I am of opinion that he had no jurisdiction. Then it is said I have no jurisdiction. That was said, I suppose, because something must be said. I hope that I have jurisdiction to protect the owner of property against what seems to me to be a most wrongful act, although it is enforced by the order of a police magistrate under the statute. Of course the magistrate's order is entitled to all respect, and nobody would imagine I fail in respect to his order, or have anything to say against it, except that which the case forces me to say. I say that he has misread this Act of Parliament. If he had read it properly he would have known that it only authorised him to prevent any obstruction by anyone in the line of houses in which his edifice, structure, or building, or whatever it was, was situate. The magistrate has misunderstood his power, and made an order which is against this plaintiff, and ought to be inoperative. I think, therefore, that the plaintiff is entitled to the protection which he asks. As to the other points, about the date of the order, the presence of Mr. Eldon, and the presence of the plaintiff, I do not think that they are material facts in the case, and I do not think that I need dwell upon them. But upon the plain and substantial facts of the case I find that the house in Kensington-road has been lawfully built in the way in which it has been built, although one side of it touches the pavement, which the plaintiff surrendered to the public. Whether the vestry were instigated or not by memorials, or anything else, I do not know. I have not to inquire into it; nor have I anything to blame them for, only I have to decide that they have no right to avail themselves of that order, it being *ultra vires* of the magistrate to make it, and not applicable to the facts of the case

proved before me, within the purview of the Act of 1875. Therefore the plaintiff is entitled to the injunction asked for, and the vestry, or rather the ratepayers unfortunately, must pay the costs.

Solicitors for the plaintiff, *Last and Sons*.

Solicitors for the defendants, *J. and M. Pontifex*.

### QUEEN'S BENCH DIVISION.

Friday, Nov. 24, 1882.

(Before FIELD and STEPHEN, JJ.)

VINTER (app.) v. HIND (resp.). (a)

*Meat unfit for the food of man—Exposure for sale—Seizure after sale—Liability of seller—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 116 and 117.*

*Sect. 116 of the Public Health Act 1875 provides for an examination by an inspector of meat exposed for sale, and if it appear to him unfit for the food of man he can seize it in order to have the same dealt with by a justice.*

*Sect. 117 provides for condemnation by the justice of the meat so seized, "and the person to whom the same belongs, or did belong at the time of exposure for sale," shall be liable to a penalty or imprisonment.*

*Held, upon a case stated, that these provisions did not apply to the seizure of meat unfit for the food of man, if seized in the possession of a person who had purchased and carried away the meat from the premises where it was exposed for sale; and that the person to whom the meat did belong at the time of exposure for sale could not be convicted under such circumstances.*

THIS was a case stated under 20 & 21 Vict. c. 43, by certain justices of the peace for the Bourn Petty Sessional Division of the parts of Kesteven, in the county of Lincoln.

An information was preferred by Fredk. Vinter, the inspector of nuisances for the district, the present appellant, against Robert Hind, the younger, of Rippingale, in the said district, butcher, the present respondent, under sects. 116 and 117 of the Public Health Act 1875 (38 & 39 Vict. c. 55), charging

That he the said Robert Hind, in the month of March 1882, did expose for sale certain meat his property, to wit, about four stones weight of beef, which was afterwards on the 18th March last seized by one Fredk. Vinter, then being the inspector of nuisances for the Bourn Rural Sanitary Authority, at the parish of Rippingale, within the district of the said sanitary authority, the said meat then being in the possession of one John Claypole, and intended for the food of man, and then appearing to the said Fredk. Vinter to be unfit for the food of man; and the said meat was afterwards on the 18th March then instant duly adjudged by Wm. Parker, the younger, Esquire, one of Her Majesty's justices of the peace for the said parts, to be unfit for the food of man, and condemned by him accordingly, and by him ordered to be destroyed to prevent it being used for the food of man, contrary to the statute.

On Monday, the 13th March 1882, the respondent Hind purchased the carcass of a cow, weighing about forty stone, that had been slaughtered on account of its having had the milk fever. Hind brought the carcass to his shop in Rippingale, and there exposed the meat for sale, and sold several portions for the food of man.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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On Wednesday, the 15th March, the said John Claypole saw four or five stones weight of the meat exposed for sale in the shop, and purchased it at 5d. per lb., and took it away with him for the consumption of his own family and household.

On Saturday, the 18th March, from information received, Vinter, the appellant, went to Hind's shop and searched for this meat, but did not find any. Vinter then went to Claypole's house and was shown the meat. Its smell was offensive, and it was then in Vinter's opinion unfit for the food of man. At the request of Vinter, Claypole permitted him to take it away, and the meat, after having been pronounced unfit for the food of man by the medical officer of health, was condemned by a justice and ordered to be destroyed.

On the hearing of the information it was contended, on behalf of the respondent, that as the sale of the meat to Claypole was made and completed, and the meat removed by him before any action was taken by the appellant, and that as none of the meat was found upon the respondent's premises, but only on Claypole's, who voluntarily gave it up to the appellant, no seizure had been made within the meaning of sects. 116 and 117 of the Public Health Act 1875.

It was contended on behalf of the appellant that the person to be convicted was the person to whom the meat belonged at the time of exposure for sale, and that the respondent was such person; that there had been a seizure within the meaning of the Act, and that the fact of the meat having been removed and sold before seizure and condemnation was immaterial.

By sect. 16 of the said Act :

Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal, carcass, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk exposed for sale or deposited in any place for the purpose of sale or of preparation for sale and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose or was not intended for the food of man resting with the party charged; and if any such animal, carcass, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same himself, or by an assistant, in order to have the same dealt with by a justice.

By sect. 117 :

If it appears to the justice that any animal, carcass, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk so seized is diseased or unsound, or unwholesome or unfit for the food of man, he shall condemn the same and order it to be destroyed or so disposed of as to prevent it from being exposed for sale, or used for the food of man, and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding 20s. for every animal, carcass, or fish, or piece of meat, flesh or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread, or flour, or for the milk so condemned, or at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months. The justice who under this section is empowered to convict the offender may be either the justice who may have ordered the article to be disposed of or destroyed, or any other justice having jurisdiction in the place.

At the hearing of the information the justices were of opinion, first, that under these two sections the power of the inspector of nuisances

arises in regard to the articles of food therein mentioned only when exposed for sale or deposited in any place for the purpose of sale or of preparation for sale; secondly, that the meat in question, having been already sold by the respondent and removed by the purchaser to his own premises for his private use and consumption, was not exposed for sale or deposited in any place for the purpose of sale or of preparation for sale; thirdly, that this meat was not in fact seized by the inspector at all, and certainly not so within the terms and meaning of and as required by the said sections, having been voluntarily handed over by Claypole, the purchaser in the manner aforesaid, and Claypole having no intention to sell any of it; and fourthly, that the words "did belong" in the concluding part of sect. 117, and relied on for the appellant, are used in reference only to the fact that meat or other articles duly and lawfully seized when exposed for sale or deposited for the purpose of sale or of preparation for sale might and frequently would have been destroyed before the hearing of an information for the penalty, in which case the words "did belong" would be grammatically correct, and that such is the true reading as well as the intention and meaning of this part of the section referred to; and the justices, therefore, gave their determination against the appellant.

The question for the opinion of the court was whether the justices' construction of the words and operation of sects. 116 and 117 of the Public Health Act 1875 was correct or the reverse.

*Sills* for the appellant.—In *White v. Redfern* (41 L. T. Rep. N. S. 524; 5 Q. B. Div. 15) a question was raised as to whether a condemnation of meat under these sections was valid, without giving the owner an opportunity of being heard, and in his judgment Manisty, J. observed: "It is no doubt by design that sect. 117 omits all reference to exposure or deposit for sale—words which occur in the preceding section, and limit the inquiry before the justices merely to the question whether the meat which has been already seized is unfit for the food of man." It follows therefore that the latter part of sect. 117 is a separate enactment from the earlier part, and the person to whom the meat did belong at the time of exposure for sale is liable for the penalty, notwithstanding the fact that he had disposed of the meat before it was seized. [Stopped by the Court.]

*Poultier* for the respondent.—In *White v. Redfern* the meat was properly seized on the premises of the person who was convicted. Here there has been no seizure within the meaning of the Act, even if (which is doubtful) an actual seizure took place on the premises of the respondent's customer. "The same" in sect. 117 can only refer to meat which had been legally seized under the provision of sect. 116.

*Sills* called upon to reply.—Though the seizure might have been irregular, there was nothing to render the condemnation invalid. The words "the same" and "so" in sect. 117 are satisfied by reference to the condemnation.

FIELD, J.—I think the decision of the justices must be affirmed. No doubt this section 117 has been, as we found when *White v. Redfern* was argued, inartificially drawn, and if our decision is contrary to the general intention of the Legislature, this result is from the collocation of words and the



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language used in the Act. Before we construe it, so as to convict a man in a penalty, we must see if the Legislature has said that in such events as those which have happened in this case he is to be liable. These events are peculiar and uncommon. They are shortly as follows: The respondent had, on the 13th March, bought a cow, which had died from a disease likely to render it unfit for the food of man, and he exposed the meat for sale in his shop, and sold several portions for the food of man. If the inspector had come in at the time and seized the meat while in the possession of the respondent and exposed for sale, the subsequent proceedings would have been exactly in accordance with the Act. [The learned Judge read sect. 116.] We do not know that on the 13th March the meat was unfit for the food of man at all. It may have been, and probably was so. But a considerable time, nearly five days, elapsed between the exposure for sale and the examination of the meat by the inspector, for it appears that Claypole, the purchaser, took it away on the 15th for the use and consumption of his own family, and it was not until the 18th March that the inspector, the appellant, after having been to the respondent and heard what had happened, went to Claypole and was shown the meat, which "smelt very offensively, and was then in the opinion of the appellant, unfit for the food of man." But he had no power to seize it, for it was not then "exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale," although it was "intended for the food of man," whereas, to come within the terms of sect. 116, it must be both exposed for sale and intended for the food of man. It may be exposed for sale, and yet be intended only for manure. The gist of the enactment is the exposure for sale of meat unfit for the food of man. This meat was unfit for the food of man, and was on the 18th of March certified so to be. The meat having come into the possession of the inspector by the permission of Claypole, there was no seizure. A justice condemned the meat without hearing any person interested in its preservation. I am not sure that he had jurisdiction to condemn the meat, for there was no proof before him as to whether the seizure was proper or not. Then the inspector sought to convict the seller as the person to whom it belonged at the time of the exposure for sale. Mr. Sills argued that the penalty clause is distinct from the preceding enactment, and if the conviction were only by the word "and," I should have thought that the meaning of the Legislature in using the word was "we have enacted the foregoing provision, and now go on to enact more." But the next words opposed to the argument for the appellant are "the same." They must refer to something antecedent. Looking back, we find the justice shall condemn "the same," and that "the same" is, amongst other things, any meat "so seized." It might have been argued even then that the construction was in favour of the appellant, but the penalty clause prescribes a penalty for every piece of meat "so condemned." Can we say that, under the circumstances, when there has been no seizure at all, the mere fact of the meat having been condemned on any ground by a justice creates an offence? If that were so, then, inasmuch as *White v. Redfern* decides that the meat may

be condemned by a justice without any summons or notice to the person to whom it belonged, if this meat had never been exposed for sale by any one, but had been taken to a justice, and he had condemned it, a penalty might have been incurred. It seems to me a necessary condition of the offence that the condemned meat must have been exposed for sale. I wish I could come to another determination, but I must conclude that, unless there has been a seizure and condemnation consequent on such seizure, the penalty cannot be imposed.

STEPHEN, J.—I am of the same opinion, and also regret that I must come to it. But I cannot do otherwise. It would be unreasonable to suppose that every section in this long Act of 343 sections and many schedules could, at the time when it passed, be criticised with all the care which conveyancers might use in a complicated deed. I do not join in the censure on the mode in which Acts of Parliament are drawn; considering their number and length, the defects in them seem to me few. But there are occasions on which anyone may doubt whether the attention of the Legislature was directed to the words of a particular clause, and to the question whether they were likely to carry out the intention of the Legislature. It is mere supposition, but I should suppose these sections were intended to impose penalties up to the sum of 20*l.* on any person who exposed unsound meat for sale. But when the two sections are scrutinised closely, it is clear that whatever may have been meant, that which is suggested by the counsel for the appellant as the meaning has not been expressed. The two sections form a whole. There are words connecting them together, and reading only the words material to the question before us, they are "any officer of health may inspect any meat exposed for sale, and if any such meat appear to be diseased, he may carry away the same, to have the same dealt with by a justice;" and by sect. 117, "if it appears to the justice that any meat so seized is unfit for the food of man he shall condemn the same, and the person to whom the same belongs, or did belong at the time of the exposure for sale, shall be liable to a penalty." Such is the provision shortly read. These words taken together describe one process. First, there is to be a seizure of meat exposed for sale, then condemnation by a justice of the meat so seized, and then the person in whose possession it was seized, or whose property it is, will be liable to a penalty of 20*l.* for every piece of meat so seized. It is evident that these three matters form one consecutive process, and if the conditions are not fulfilled, the third consequence does not follow. One good test for the interpretation of an enactment of this kind is to think of what words would have been used to convey the meaning which, for the purpose of argument, is sought to be extracted from those actually used. If it had been intended to make mere exposure of meat for sale an offence subjecting the offender to a penalty, the means by which this would have been done would surely have been to throw sect. 116, and the first part of sect. 117, together, and to make a new section of the latter part, so as to run, "any person who exposes for sale any meat unfit for human food shall be liable to a penalty of 20*l.*" That is what we are asked to find as the meaning of the latter part of the section, and I should have been glad

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to do so. But to arrive at such a result it would have been necessary to take extraordinary liberties with the Act, and to leave out all the words of reference and much alter the legislation. I, therefore, think the true interpretation of the Act to be that which I have stated. This meat was undoubtedly exposed for sale, and diseased and unsound. It was, however, sold to a purchaser, who, I suppose, considered it worth 5d. per pound, and took it home to eat. Fortunately for him and his family the inspector came in and asked for the meat. Whether the purchaser was sick of his bargain or not it is unnecessary to inquire, but he gave up the meat, and a justice, rightly or wrongly, ordered it to be destroyed. It is obvious that that did not amount to such seizure and condemnation as are contemplated by sect. 116 and the early part of sect 117. A further observation is that, suppose there had been a regular seizure under sect. 116, and a regular condemnation by a justice under sect. 117, and that then the person to whom the meat belonged had been summoned before the justices, could he have been heard to say on that summons that the meat was not in fact unsound. It appears to us that he could not, for the decision of the justice on that is to be taken to be conclusive, and if the person summoned could only dispute the seizure or exposure for sale, and could not dispute the unsoundness, that is a strong ground to support our construction of the Act.

*Judgment for respondent.*

Solicitors for appellant, *Keen and Rogers*, for *J. L. Bell*, Bourne.

Solicitors for respondent, *Lee, Ockerly*, and *Everington*, for *J. B. Schofield*, Bourne.

Feb. 26 and 27.

(Before HUDDLESTON, B. and NORTH, J.)

THE MAYOR, &c. OF LONDON (apps.) v. THE ASSESSMENT COMMITTEE OF THE GREENWICH UNION (resps.). (a)

*Rating — Market tolls — Contagious Diseases (Animals) Acts 1869 and 1878 — User of the soil — Tolls for foreign animals landing at a market wharf — Rateability of — 32 & 33 Vict. c. 70; 41 & 42 Vict. c. 74.*

By the *Contagious Diseases (Animals) Act 1869*, ss. 2, 3, 24, and 25, it was provided that the local authority might provide wharves, lairs, sheds, market houses, and places for the landing, reception, sale, and slaughter of foreign animals, such place to be deemed a market, and might charge for the use of such wharf, &c., such sums as by bye-laws they might appoint.

By the *Contagious Diseases (Animals) Act 1878*, s. 4, the Act of 1869 was repealed, saving all existing acquired rights; but by sect. 39 the provisions of sects. 23, 24, and 25 of that Act were practically re-enacted, adding that the said charges should be deemed "tolls."

In 1871 the Corporation of London, as the local authority, built a market at D. for the reception, &c., of foreign animals. By certain bye-laws, a fixed charge per head for wharfage, lairage, market dues, and charges was levied on all animals landed, such charge becoming due on the animals being landed. These charges included

lairage until the animals were slaughtered. No consignee of any animals has any right to put his animals in any particular part of the market. The appellants were rated in respect of these charges as tolls in respect of the use and occupation of the soil. They appealed against such assessment, and contended that the tolls were only taken in respect of the franchise of the market.

*Held, on appeal, that such charges were tolls made in respect of the user and occupation of the soil, and so were rateable.*

SPECIAL case, stated under the Valuation (Metropolitan) Act 1869 (32 & 33 Vict. c. 67) s. 40.

The following are the material parts of it:—

1. The appellants are the owners and occupiers of the land, wharves, landing stages, dolphins, and buildings, called the Deptford Foreign Cattle Market, and are entitled to receive the tolls hereinafter mentioned.

2. The said market is situate in the parish of St. Nicholas, that parish is in the union of which the respondents are the assessment committee.

3. The rateable value of the market as determined by the respondents, and set out in the valuation list of that parish, was 20,000*l.*, and the gross value 25,000*l.*

4. By sect. 10 of the *Contagious Diseases (Animals) Act 1869*, the appellants were appointed the local authority for the City of London for the purposes of the Act; and by sect. 28, sub-sect. 1, they were appointed exclusively the local authority for the metropolis for the purposes of the third part of the Act, which comprises sects. 15 to 30 inclusive, and deals with the subject of foreign animals.

5. Sect. 23 empowers a local authority to provide, erect, and fit up wharves, lairs, sheds, market houses, and places for the landing, reception, sale, and slaughter of foreign animals.

6. The appellants, in pursuance of this section, acquired, provided, and fitted up the property now known as the Deptford Market.

7. By sect. 24 the Markets and Fairs Clauses Act 1847 was incorporated with the third part of the Act now in recital, and it was enacted that any place provided by a local authority under the third part of the Act for the landing, reception, sale, or slaughter of foreign animals, should be deemed a market, and the said third part of the Act should be deemed the special Act, and by the same section the local authority was empowered to make bye-laws.

8. By sect. 25 the local authority was empowered to charge for the use of any wharf, lair, shed, market house, or place provided by them as aforesaid such sums as they by bye-law should appoint.

9. The appellants, in pursuance of this section, made certain bye-laws, and bye-law 12 provided that the charges set forth in the schedule to the bye-laws should become due and payable immediately on the animals, in respect of which such charges were to be taken, being landed at the market wharf. The schedule is as follows:

SCHEDULE OF CHARGES.

Wharfage, Lairage, Market Dues, and Charges.	
	s. d.
Beasts, per head .....	5 0
Calves ..	2 0
Pigs ..	1 0
Sheep ..	0 9

(a) reported by W. P. EVERSLY, Esq., Barrister-at-Law.

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10. The Act of 1869 was afterwards repealed by the Contagious Diseases (Animals) Act 1878, s. 4, such appeal not affecting anything done under the former Act.

11. By sect. 9, sub-sect. 1, of the Act of 1878 the appellants are to continue the sole local authority for the metropolis as before. By sect. 39, sub-sect. 1, a local authority may provide, erect, and fit up wharves, stations, lairs, sheds, and other places for the landing, reception, keeping, sale, slaughter, or disposal of foreign animals, &c. By sub-sect. 2 the Markets and Fairs Clauses Act 1847 is incorporated, and sub-sect. 3 provides that a wharf or other place provided by a local authority under this section shall be a market within that Act, and that this Act shall be the special Act.

12. Sub-sect. 4 provides that a local authority may charge for the use of a wharf or other place provided by them under this section, such sums as bye-laws appoint, such charges to be deemed tolls.

13. By sub-sect. 5 the local authority are to carry to a separate account all sums so received by them, and to apply them as therein stated; and by sub-sect. 8 the provisions of this 39th section are made to apply to a wharf or other place provided by a local authority under the prior Act of 1869, which has been repealed.

14. Sect. 35 of the Market and Fairs Clauses Act 1847 provides that the tolls in respect of cattle brought to the market for sale shall become due as soon as the cattle, in respect whereof they are demandable, are brought into the market place, and before they are put into any pen or tied up in such market place.

15. In 1871 the appellants purchased and adapted for the purposes of the Act a large quantity of land abutting on the Thames, formerly used as Deptford Dockyard, and built a market thereon. Part of the buildings are let to tenants, and the rents received from them in 1879 amounted to 3817*l*. Part of the market containing two slaughterhouses is used by the appellants themselves for the purposes of the Acts; and part of the market is used for lairage. The rated area abuts on the Thames, and includes wharves, landing stages, and dolphins in the river bed, which have been constructed and used for the purposes of the Act.

16. All animals within the meaning of the Acts imported into the port of London from any foreign country, except Sweden and Denmark, must, under Orders in Council made under sect. 35 sub-sect. 1, and sect. 36 of the Act of 1878, be landed on the rated area, and nowhere else, and there remain until slaughtered.

17. The animals brought into the rated area are landed from vessels on to landing stages, and driven into pens in the sheds. The clerk of the market directs each consignee into what part to drive his animals, and no consignee is allowed to retain, as of right, any particular part of the market or any particular pen for himself.

18. The charges mentioned in paragraph 9 include lairage for that number of days, at the end of which the animals must be slaughtered (at the time in question the number of days was ten); the animals are then slaughtered at one of the slaughterhouses rented of the appellants, or at one retained by the appellants in their own hands, for which a separate charge is made.

19. In assessing the gross value at 25,000*l*. and the rateable value at 20,000*l*., the respondents took into consideration, not only the property admitted to be rateable, but also the charges set out in paragraph 9. The appellants gave notice of appeal against the valuation to the General Assessment Sessions 1881, whereupon this case was stated.

20. The appellants contended that all the charges in paragraph 9, made under bye-law 12, were market tolls not taken in respect of the occupation of the soil, but in respect of the franchise of the market, and that the amounts so received should not be taken into account.

21. The respondents contended:—(1.) That none of such charges were market tolls taken in respect of the franchise of the market, but that such charges were made for the use of the wharves, landing places, lairs, sheds, market houses, and places provided by the appellants for the reception, sale, and slaughter of foreign animals, and were therefore taken in respect of the occupation of the soil, and that the amounts so received should be taken into account. (2.) That at any rate so much of such charges as represented the use of the wharves, lairs, sheds, and landing places, and generally the use of the privileged place set apart by the Act for the lawful reception of, and dealing with the animals imported, whether for the purpose of sale, slaughter, or otherwise should be taken into account. (There were other contentions which it is not necessary to state).

22. The questions for the court were:—(1.) Whether the charges made under bye-law 12, or any, and what proportion of them, were market tolls not taken in respect of the occupation by the appellants of the soil, but in respect of the franchise of the markets. (2.) Whether the amount received upon such charges, or any, and what part of them should be taken into consideration in assessing the value of the premises in question.

*Webster, Q.C. (Poland and Mead with him)* for the appellants.—The rateable value is too high, because the charges set out in bye-law 12 ought not to be taken into consideration. They are not charges made in respect of the use and occupation of the soil, but are market tolls taken in respect of the franchise of the market. The charges are payable in respect of cattle that enter the market, whether they ever use the pens, or stay in the market at all, except for the purpose of walking through; the charges are payable on admission. In the case of *Rea v. Bell* (5 M. & S. 221) the toll was not rateable. In *Robert v. Aylesbury* (20 L. T. Rep. O. S. 219; 1 E. & B. 423; 22 L. J. M. O. 34) the tolls that were held rateable were stallage tolls. The two last cases on the point are *Reg. v. Caswell* (26 L. T. Rep. N. S. 574; L. Rep. 7 Q. B. 328), and *The Mayor of London v. St. Sepulchre* (L. Rep. 7 Q. B. 333). In both these cases, the charges taken in respect of cattle in the one case, and in respect of meat, poultry, &c., in the other, brought into the market for sale, were held not to be rateable. It is not open to the respondents to say that if there is a use of the soil, then the charges are rateable. In both these cases there was a use of the soil, as the market in each was inclosed, into which the animals or meat were brought. Those cases govern the present case, and these charges are not rateable.

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*Meadows White*, Q.C. (*Besley and Tickell* with him) for the respondents.—These charges are not tolls in gross, but tolls in respect of the occupation of land. The word "tolls" is not used solely in the sense of franchise tolls, but includes other charges, such as stallage, pickage, &c.:

*Duke of Bedford v. Emmett*, 3 B. & A. 366;  
*Duke of Bedford v. St. Paul's, Covent Garden*, 45 L. T. Rep. N. S. 616; 51 L. J. 41, M. C.

Wightman, J. says in *The Earl of Durham v. Bishopwearmouth* (2 E. & E. 230, at p. 247; 28 L. J. 232, M. C. at p. 239): "If the use of the soil is any part of the consideration for the payment of the tolls, we think that is enough to connect them with the occupation and use of the soil, and to render them rateable." The cases of *Reg. v. Casswell* (*ubi sup.*), and *The Mayor of London v. St. Sepulchre* (*ubi sup.*), are distinguishable, because there the occupation of the soil, other than the mere walking over it, was no part of the consideration for the payment of the tolls. These tolls are rateable, and the whole and not a part only must be rated. He referred also to

*The Mayor of Northampton v. Ward*, 2 Strange, 1238; 1 Wils. 107;  
 32 & 33 Vict. c. 70, sched. 5.

Webster, Q.C. in reply.—By sect. 35 of the Markets and Fairs Clauses Act 1847, these charges become due as soon as the cattle are brought into the market-place, and before they are put into a pen or tied up in the market. This shows that these charges are for admission solely. [HUDDLESTON, B.—Is there not a distinction between this case and *Casswell's* and *St. Sepulchre's* cases, that here there is a wharf kept up by the Corporation of London, on which the cattle land?] In *St. Sepulchre's* case there were roads made leading to the market, which were vested in the Corporation of London. The wharf is in truth a private road leading to the market.

HUDDLESTON, B.—We think it desirable to deliver judgment at once in this case. We are asked whether the charges made under bye-law 12 or any and what proportion of them are market tolls not taken in respect of the occupation by the appellants of the soil, but in respect of the franchise of the market. We are of opinion that they are taken in respect of the occupation by the appellants of the soil, and that therefore they are rateable. We have considered carefully the different cases on the subject, beginning with *Rea v. Bell* (*ubi sup.*). There it was held that the tolls were not rateable, because they were, in fact, a right to take a certain amount of the corn that came into the market, and the court said that the appellant could not be considered to be the occupier of the land. Lord Ellenborough said: "I cannot say upon this statement that the appellant is an occupier of the land. Would he not be equally entitled to the toll, although the sacks were not set down in the market, but were upheld on the shoulders of those who exposed the corn for sale." Then the gist of the judgment is in this passage: "There is nothing to give this toll a corporeal quality." Now, in the case of *Roberts v. Aylesbury* (*ubi sup.*), Lord Campbell said [the learned Judge quoted from 22 L. J. 38, M. C.]: "This case is now reduced to the single point as to the rateability of the payments made for stallage . . . . The person making the payment has the use and occupation of that portion

of the soil upon which the stall stands. It is a very different thing from the market toll, which is paid only on goods sold, and then without any consideration of whether or not the goods had been deposited upon the soil, the general principle being that what is given for the use and occupation of land is properly the subject of rateability. I do not see any doubt as to the stallage, which is a payment for the use and occupation of land, being rateable." These two authorities support the proposition that the real question in all these cases is, whether there is a "corporeal quality" in the toll—whether it is really paid for the use and occupation of the land. The only difficulty proceeds from the judgments in the cases of *The Mayor, &c. of London v. St. Sepulchre* (*ubi sup.*), and *Reg. v. Casswell* (*ubi sup.*). But when we come to look at those cases they support the authority of *Rea v. Bell* (*ubi sup.*), and go on to show that the payments, which were not rateable there, were not in any way connected with the soil. It is quite true it was a sum paid not for the right of admission—in the one case, it was paid for the animals when they were in the market; in the other case, it was paid for the goods when they were in the market. Both the Lord Chief Justice and Blackburn, J. draw the distinction very clearly in *St. Sepulchre's* case. Blackburn, J. says: "The only question is whether under this Act the tolls which the corporation have power to take are franchise tolls, or stallage tolls payable for the occupation of the soil. I can see nothing to distinguish them from market tolls attached to a franchise." The case of *Reg. v. Casswell* (*ubi sup.*) is to the same effect. There the court draws the distinction between the classes of cases. They say that where the animals are brought into the market for the purpose of sale, there the tolls are not rateable where they are merely upon that; but where the tolls are for the animals being placed under cover, or in sheds, in the market place, then they are rateable, as being a payment for the use of the soil. The word "toll" itself does not necessarily mean a payment in respect of a franchise. The word "tolls" is used as well for stallage tolls, or pickage tolls, or lairage tolls, &c. This is clearly pointed out in the judgment of Bowen, L.J., in *The Duke of Bedford v. Covent Garden* (*ubi sup.*). I also find it mentioned in some of the earlier cases, and in 2 Coke's Institutes, 220, that a "toll is a reasonable sum due to the lord of the market or fair for things sold which are tollable, and which was usually allowed for witnessing the sale, and so, whether the toll may be due for goods brought into the market or for goods not sold," &c. Mr. Webster drew a very nice distinction upon those two last cases. He said that those payments which were held not to be rateable were to a certain extent for the use of the soil, because the goods in the one case and the animals in the other must be put or remain somewhere in the market, and to that extent there is a use of the soil; and he says that the passage in Mr. Justice Wightman's judgment in *The Earl of Durham v. The Overseers of Bishop Wearmouth* (*ubi sup.*) cannot be applicable, where he says: "If the use of the soil is any part of the consideration for the payment of the tolls, we think that is enough to connect them with the occupation and use of the soil, and to render them rateable." This passage, however, seems to me to dispose of his contention. In *The Duke of*

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*Bedford v. Emmatt* (ubi sup.) Bayley, J. says that a market toll includes a stallage and pickage toll. These two last cases, *The Mayor of London v. St. Sepulchre* and *Reg. v. Casswell*, seem to have carried the law beyond the earlier cases. In these two cases the appellants were clearly in occupation of the soil of their respective markets, and it is at first difficult to see why the tolls taken upon animals entering the market did not constitute part of the profits of the occupation, though no specific part was appropriated to their use. The real distinction, however, is that tolls paid upon cattle entering a market are prices paid for admission, and constitute a tax upon a particular class. It appears from the decision of *The Mayor of Northampton v. Ward* (2 Strange, 1238; 1 Wils. 107) that the toll is an independent tax, depending on grant or immemorial usage, and that by the common law the public have a right to enter a market, and the toll is unconnected with the soil, and may be severed from it. In *St. Sepulchre's* and *Casswell's* cases the payment of the tolls was not a condition precedent to the right of entering the market—i.e., not the price of admission; but the right of entry was acknowledged, and it was when that had taken place that the tolls became payable. The question is, are the tolls paid as a condition precedent to the use of the land; if so, the tolls are rateable, because the payees are in occupation of the land either by themselves or their licensees. If we apply this test the cases are easily solved. Now apply that test to this case, and see whether these tolls are not payments made to the payees (the appellants) by the licensees for the use of the soil. [The learned Judge read sects. 16, 23, and 25 of the Act of 1869, and sect. 39 of the Act of 1878.] The local authority may charge certain sums in the nature of tolls for the use of a wharf, station, lair, shed, &c. The Corporation of London, as the local authority, provide a market place for the landing, standing, and sale of foreign animals, and provide the sums or tolls to be paid for the use of this. The effect of this in substance is that the payees of the toll provide all the things that are necessary for the reception of the animals. There are wharves, lairs, slaughtering-houses—there is everything that is necessary; and they license certain persons, on payment of a certain sum of money, to come upon the wharf, take possession of the place, and use the slaughter-houses. These fees include a certain sum for lairage, and every animal may for that fee stay for a period of ten days. They are, in fact, payments made by the licensees to the payees for the use and occupation of these places so provided for them by the payees, and hence, according to the principle derived from the cases, are rateable.

NORTH, J.—I wish to add a few remarks. The question is, is this a toll payable for the right of entering the market, when it would not be rateable, or is it a toll payable for the right of using and enjoying the soil of the market, other than the mere power of walking over it, when it would be rateable? There are two Acts of Parliament which affect this question, namely, the Contagious Diseases (Animals) Acts of 1869 and 1878. The Corporation of London are doing that which, if done by a private firm, would constitute the tolls rateable. Therefore, one would expect to find some distinction, if any were intended, made in the Act itself. Do the Acts give any immunity?

I can find no immunity and no such distinction. It is said that payment is to be made on the animals entering the market independently of what is to be done when the animals are in the market. But is this so? There is power to charge under the Acts of Parliament for the use of the wharf, markets, &c. The corporation can provide stallage, and charge for it. Bye-law 12 provides charges for wharfage, lairage, market dues, and charges. There is no power to levy tolls for market dues other than those given by the 39th section of the Acts of 1878. Therefore the charges made here are in respect of wharfage and lairage. I need not go through the cases that have been quoted. As to the case of *Reg. v. Casswell* (ubi sup.), the Lord Chief Justice there lays down the rule that I intend to follow. [The learned Judge read the judgment]. Is the toll in the case before us paid simply for admission to the market? I think not. Following that case and the case of the *Mayor of London v. St. Sepulchre* (ubi sup.), I think that these charges were for wharfage and lairage, that is, for the use of the soil. There are two other points I should like to mention: First, does the Act draw any distinction between what is paid for the use of land for wharfage and lairage, and what is paid for the right of passing over the land? I think not. The Act gives the right to use the wharves and stalls; secondly, is the whole toll rateable or only a part of it? I think that the whole is, and that the observation of Wightman, J., in the *Earl of Durham v. Bishopwearmouth* (ubi sup.) is an authority in point.

*Judgment for the respondents.*

Solicitor for the appellants, Sir T. J. Nelson.  
Solicitors for the respondents, Saw and Son.

Dec. 11 and 21, 1882.

(Before FIELD and STEPHEN, JJ.)

REG. v. THE JUSTICES OF MIDDLESEX. (a)

*Prisons—Superannuation of officers—Liability of county for—Prisons Act 1877 (40 & 41 Vict. c. 21), s. 36—Superannuation Act 1859 (22 Vict. c. 26), s. 7.*

At the time of the coming into operation of the Prisons Act 1877, O., a governor of a prison, had been in the prison service for more than twenty years. In order to facilitate improvements in the organisation of the Prisons Department, the Lords of the Treasury, pursuant to sect. 36 of the Prisons Act 1877, granted to O. an annuity by way of compensation allowance, in consideration of his retirement from office, and made an order pursuant to paragraph 4 of that section, apportioning the amount between the rates and funds provided by Parliament. The amount so granted did not exceed two-thirds of O.'s salary. Upon objection taken by the justices that the Lords of the Treasury had no power to order that a portion of such allowance should be paid out of the rates, on the ground that the annuity was not by way of superannuation allowance within the meaning of paragraph 1 of the above section, but was a special compensation allowance made for the purpose of facilitating improvements in the department to which O. belonged, which according to paragraph 2, could only be dealt

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

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*with in manner provided by the Superannuation Act 1859 :*

*Held, that the provisions of paragraph 4 of sect. 36 apply to all payments referred to in the preceding paragraphs, and that the apportionment was therefore rightly made.*

THIS was a special case, and raised the question whether the superannuation allowance to officers retiring from service under the provisions of the Prisons Act 1877 should be borne entirely by the Treasury, or whether the counties in which such officers had served should contribute.

The case turned upon the construction of sect. 36 of the Prisons Act 1877, and the facts and arguments sufficiently appear by the judgment of the court.

Sect. 36 provides :

If at any time after the commencement of this Act it appears to the Treasury that any existing officer of a prison has been in the prison service for not less than twenty years, and is not less than sixty years of age, or that any existing officer of a prison has become incapable, from confirmed sickness, age, or infirmity, or injury received in actual execution of his duty, of executing his office in person, and such sickness, age, infirmity, or injury is certified by a medical certificate and there shall be a report of the Prison Commissioners testifying to his good conduct during his period of service under them and recommending a grant to be made to him, the Treasury may grant to such officer, having regard to his length of prison service, an annuity by way of superannuation allowance not exceeding two-thirds of his salary and emoluments, or a gratuity not exceeding the amount of his salary and emoluments for one year.

If any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison who, by reason of such abolition, retirement, or removal, is deprived of any salary or emoluments, shall be dealt with in manner provided for by the Superannuation Act 1859, with respect to a person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs.

"Prison service," for the purposes of this section, means, as respects the period before the commencement of this Act, service in a particular prison or in the prisons of the same authority, transferred to the Secretary of State, and as respects the period after the commencement of this Act, service in any such prison, or in any other prison transferred to the Secretary of State under this Act.

Any annuity by way of superannuation allowance, or gratuity granted under this section, shall be apportioned between the period of service before the commencement of this Act and the period of service after the commencement of this Act; and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid, but without taking into account any number of years added to the officer's service on account of the abolition of office or for facilitating the organisation of the department, shall be paid by the prison authority of the prison in which the officer to whom such annuity or allowance is granted was serving at the date of the commencement of this Act out of rates which, at or immediately before the commencement of this Act, were applicable to the payment of the salary of such officer, and the residue shall be paid out of the moneys provided by Parliament.

Sir H. James, A.G. (A. L. Smith with him) for the Treasury.

B. S. Wright for the justices.

The judgment of the court (Field and Stephen, JJ.) was delivered by

STEPHEN, J.—This was a special case, the material parts of which were as follows: Up to the coming into operation of the Prisons Act 1877 the Justices of Middlesex were the prison

authorities for Coldbath-fields prison. On the 7th Dec. 1854 Col. Colville was appointed governor of that prison, and he continued to act as such till the 24th Aug. 1878. After the Prisons Act came into force, the prison was taken over by the Secretary of State, and Col. Colville continued to act as governor till Aug. 1878. He was then told by one of the Prison Commissioners that he might, if he pleased, resign his appointment at once, and receive the full rate of pension, and he told the Prison Commissioners that he was willing to retire on a pension of two-thirds of his salary and emoluments. He wrote a letter to that effect to the commissioners, and his successor was appointed. The Lords of the Treasury awarded to Col. Colville an annuity of 582*l.* 13*s.* 4*d.*, and apportioned it as follows: 429*l.* 6*s.* 8*d.* to be paid by the justices of Middlesex, and 153*l.* 6*s.* 8*d.* out of funds provided by Parliament. The question for the court substantially was, whether this apportionment was one which, under the various statutes hereinafter referred to, the Lords of the Treasury had a right to make. By the Prisons Act 1877, sect. 36, if any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison, who by reason of such abolition, retirement, or removal is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act 1859, with respect to a person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs. By the Superannuation Act 1859 (22 Vict. c. 26), s. 7, it is enacted, that the Lords of the Treasury may grant to any person retiring or removed from the public service for the purpose of facilitating improvements in the organisation of the department to which he belongs, such special annual allowance by way of compensation for his loss of office as may seem to the Lords of the Treasury to be a reasonable and just compensation for the loss of his office. If the compensation so granted exceed the amount to which the person would have been entitled under the scale of superannuation provided by the Act if ten years were added to the number of years which he may have actually served, the allowance is to be granted by special minute stating the special grounds for granting the allowance. The minute is to be laid before Parliament, and the amount is in no case to exceed two-thirds of the salary and emoluments. This provision no doubt applied to Col. Colville's case, as he retired from his office in order to facilitate improvements in the organisation of the department to which he belonged; and the result appears to us to be that the Lords of the Treasury were entitled to make to him such special allowance as they pleased, subject only to the following conditions: it was not to exceed two-thirds of his pay and emoluments; if it exceeded the amount to which he would have been entitled by bare length of service, and if the excess over that amount was more than would have been earned by ten additional years' service, the allowance must be made by special minute stating the special grounds, and laid before Parliament. Sect. 2 of the same Act sets out the scale of superannuation provided. After eleven years' service,

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one-sixtieth of the annual salary and emoluments is to be added to the allowance. By sect. 4 the Lords of the Treasury are empowered, with regard to classes of officers whose offices require peculiar qualifications, and as to which it is for the public interest that persons should be appointed to them at an age exceeding that at which public service ordinarily begins, to direct that a certain number of years shall be added to their service. Col. Colville had served twenty-three years. He would, if he had been in the public service proper, have been entitled to five years' extra service under regulations issued under sect. 4, and would thus have been entitled, if "dealt with in manner provided by the Superannuation Act," to a pension as for twenty-eight years' service. The sum actually allowed to him by the Lords of the Treasury consisted of (a) the amount earned by twenty-three years' service; (b) the amount due in respect of five years allowed under sect. 4; (c) an amount equal to what would have been earned by ten years' extra service. The whole was 582l. 13s. 4d., which is a little less than two-thirds of 920l., which was the amount of his salary and emoluments. There was thus no occasion for a special minute to be laid before Parliament. So far, little or no question arose between the parties. The question between them was as to the right of the Lords of the Treasury to apportion the annuity between the rates and the fund provided by Parliament. The decision of the question depended on the construction of the last paragraph of sect. 36 of the Prisons Act 1877. The material words of the paragraph in question are as follows: "Any annuity by way of superannuation allowance or gratuity granted under this section shall be apportioned between the period of service before the commencement of this Act and the period of service after the commencement of this Act, and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid, but without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department, shall be paid by the prison authority of the prison out of the rates." The whole of Col. Colville's service, except a few months, was before the commencement of the Prison Act of 1877, and the apportionment made between the funds provided by Parliament and the rates did not charge to the rates the amount allowed by the Lords of the Treasury in excess of the twenty-eight years to which Col. Colville would have been entitled under the Superannuation Act. For these reasons it was contended that the apportionment was valid, and in our judgment that contention is in accordance with the words of the two Acts and must prevail. The argument to the contrary was, that the last paragraph of the 36th section applied only to the superannuation allowance or gratuities referred to in the first paragraph of the section, and not to allowances by way of compensation referred to in the second paragraph; and Mr. Wright, in his able argument on the subject, referred to several other Acts more or less analogous, in order to show that there is a distinction between compensation and superannuation allowance. The question must, however, we think, be decided by the words of the very provision under consideration, and we are unable to understand how it is possible to read the fourth para-

graph of sect. 36 otherwise than as applying to all the payments mentioned in the preceding paragraphs. It is impossible, without resorting to constructions which, however ingenious, appear to us unnatural and far-fetched, to suppose that the words "but without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department" were not intended to apply to the payments sanctioned by paragraph 2. I may repeat the very words of sect. 7 of the Act of 1859 and must refer to it, but that section is referred to in paragraph 2 of sect. 36 of the Act of 1877, and is not referred to in paragraph 1. This consideration appears to us conclusive. Some other objections were taken to the grant of the pension, but they were so slightly relied upon that we do not think it necessary to discuss it in detail. The special case concludes by asking the opinion of the court on the question, whether the defendants ought to discharge out of the county rates the portion of the annuity so charged on them as aforesaid. We are of opinion that they ought to pay the whole of it.

*Judgment for the Crown.*

Solicitors for the plaintiffs, *The Solicitor to the Treasury.*

Solicitors for the defendants, *Nicholson and Herbert.*

*Thursday, March 16.*

(Before POLLOCK, B. and NORTH, J.)

DOWNING (app.) v. SCHNEIDER AND OTHERS (resps.). (a)

*Licensing—Appeal to Quarter Sessions—Off-licence—Licensing Act 1828 (9 Geo. 4. c. 61), ss. 1, 27—Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27), s. 8—The Beer Dealers' Retail Licences Act 1880 (43 Vict. c. 6), s. 1—The Beer Dealers' Retail Licences (Amendment) Act 1882 (45 & 46 Vict. c. 34), s. 1.*

*By the Beer Dealers' Retail Licences Act 1880 (43 Vict. c. 6), s. 1: "Sect. 8 of the Wine and Beerhouse Act 1869 is hereby repealed, as far as the qualification therein contained relates to grants of certificates for such additional licences as aforesaid, and the licensing justices shall be at liberty either to refuse such certificates as aforesaid on any grounds appearing to them in the exercise of their discretion sufficient, or to grant the same to such persons as they in the execution of their statutory powers and in the exercise of their discretion deem fit and proper."*

*By the Beer Dealers' Patent Licences (Amendment) Act 1882 (45 & 46 Vict. c. 34), s. 1: "Notwithstanding anything in sect. 8 of the Wine and Beerhouse Act 1869, or in any other Act now in force, the licensing justices shall be at liberty, in their free and unqualified discretion either to refuse a certificate for any licence for sale of beer by retail to be consumed off the premises on any grounds appearing to them sufficient, or to grant the same to such persons as they in the execution of their statutory powers, and in the exercise of their discretion, deem fit and proper."*

*Held, that these statutes have not taken away the right of appeal to the Court of Quarter Sessions, from a refusal by the licensing justices to rem-*

(a) Reported by H. D. BOWSER, Esq., Barrister-at-Law.



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*a licence for the sale of beer not to be consumed on the premises.*

THE respondents obtained a rule *nisi*, calling on the appellant to show cause why an order of the Court of Quarter Sessions for the county of Lancashire allowing an appeal from a refusal by the licensing justices (the respondents) to renew the appellant's licence for the sale of beer to be consumed off the premises should not be set aside.

The material part of the case stated by the chairman of the Court of Quarter Sessions was as follows :

1. The appellant is a grocer and beerseller at Barrow-in-Furness, in the county of Lancaster, and the respondents are the licensing justices for the licensing division of Barrow-in-Furness, in the said county.

2. The appellant has for several years been the holder of a justices' certificate and an excise licence to sell beer not to be consumed on the premises.

3. Prior to the general annual licensing meeting for the said division held on the 4th Sept. 1882 the appellant paid to the magistrates' clerk in the usual manner the fee for the renewal of his certificate.

4. The appellant was not required to attend, and did not attend, the said court in person, and no notice was served on him prior to the said meeting that his application would be opposed or refused.

5. At the said meeting the chairman publicly announced that applications for certificates to sell beer not to be consumed on the premises would be taken at the adjourned annual licensing meeting, to be held on the 29th Sept. 1882, but the appellant never had any intimation of such announcement.

6. The respondents held an adjourned meeting on the 29th Sept. 1882, but did not require the appellant to attend the said adjourned meeting, nor did they give him notice that his application would be opposed or refused; but certain persons, desiring to oppose the application, did serve on the appellant, eight days before the said adjourned meeting, a notice requiring him to attend the said meeting, and stating that the application would be opposed on the grounds that no requirement for such a licence existed in the neighbourhood.

7. The appellant attended the said adjourned meeting with his solicitor.

8. The respondents refused to hear the said persons who desired to oppose the appellant's application. The appellant tendered himself as a witness, and he and his solicitor addressed the respondents in support of his application.

9. The respondents (who are personally well acquainted with the district), without hearing any evidence, and refusing to hear the evidence either of the appellant himself or any of his witnesses, refused the certificate in the exercise of their discretion, on its being admitted that the defendant was a grocer.

10. The appellant appealed to the quarter sessions on the following among other grounds, as stated in his notice of appeal: That notice in writing of an intention to oppose or object to the renewal or grant of the said licence or certificate was not duly served upon the appellant seven days before the commencement of the general annual licensing meeting. That the justices did not

require the appellant's attendance. That the respondents refused to renew or grant the said licence or certificate without receiving evidence on oath. That if the respondents had the power to refuse to renew or grant the said licence or certificate, such power could only be exercised by them in respect of certain grounds personal to the appellant as such applicant; and no such grounds were stated or alleged. That the renewing or granting of the said licence would have been a convenience to the public and an accommodation to the neighbourhood, and that there was no sufficient cause or reason arising out of the applicant's character or conduct, or any other just and sufficient reason why such licence or certificate should not have been renewed or granted, and that such licence or certificate ought to have been renewed or granted, and ought not to have been refused, and that the refusal of the respondents to renew or grant the said licence or certificate as aforesaid was illegal, erroneous, and unjust.

11. At the quarter sessions the respondents contended (1) that there was no appeal from their decision; (2) that they had power to refuse the certificate notwithstanding the formalities of 35 & 36 Vict. c. 94, s. 42, and 37 & 38 Vict. c. 49, s. 26 had not been observed; (3) that the notices given by the persons mentioned in the 6th paragraph of this case, and the attendance afterwards of the appellant in person in court were a sufficient compliance with the formalities directed by the said sections, but upon this point it was contended by the appellant that by reason of not receiving notice from the respondents requiring his attendance, he did not go prepared with the evidence of witnesses, and such other evidence as he would otherwise have done; (4) that if the said formalities had not been sufficiently observed, the appellant waived the non-observance of them by addressing the court in support of his application; (5) that the quarter sessions ought not to allow the appeal without hearing the case on the merits.

12. The Court of Quarter Sessions decided the first four points in the appellant's favour after hearing the evidence tendered by the appellant; and, having heard two witnesses for the respondents as to the requirements of the neighbourhood and refused to hear further evidence of the respondents to the like effect, allowed the appeal.

13. If the court is of opinion that there is no appeal to the Court of Quarter Sessions, then the decision of that court is to be reversed. If there is an appeal, and the respondents are wrong on any one of the second, third, fourth, or fifth contentions stated in the 11th paragraph, then the decision of the Court of Quarter Sessions is to stand.

By the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27):

Sect. 4. From and after the fifteenth of July, one thousand eight hundred and sixty-nine no licence or renewal of a licence for the sale by retail of beer, cider, or wine, or any of such articles under the provisions of any of the said recited Acts, shall (save as is in this Act otherwise provided) be granted except upon the production, and in pursuance of the authority of a certificate granted under this Act. Any licence granted or renewed in contravention of this enactment shall be void.

Sect. 8. All the provisions of the said Act of the ninth year of the reign of King George the Fourth, as to the terms upon which, and the manner in which, and the

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persons by whom grants of licences are to be made by the justices at the said general annual licensing meeting, and as to appeal from any act of any justice shall, so far as may be, have effect with regard to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act, in respect of a licence to sell by retail, beer, cider, or wine, not to be consumed on the premises, shall be refused except upon one or more of the following grounds:

(1) That the applicant has failed to produce satisfactory evidence of good character.

(2) That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character.

(3) That the applicant, having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has, through misconduct, been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles.

(4) That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required. Where an application for any such last-mentioned certificate is refused on the ground that the house in respect of which he applies is not duly qualified as by law is required, the judges shall specify in writing to the applicant the grounds of their decision.

By 9 Geo. 4, c. 61, it is enacted:

SECT. 27: That any person who shall think himself aggrieved by any act of any justice done in or concerning the execution of this Act may appeal against such act to the next general or quarter sessions of the peace holden for the county or place wherein the cause of such complaint shall have arisen, unless such session shall be holden within twelve days next after such act shall have been done, and in that case to the next subsequent session holden as aforesaid, and not afterwards; provided that such person shall give to such justice notice in writing of his intention to appeal, and of the cause and matter thereof, within five days next after such act shall have been done, and seven days at the least before such session, and shall within such five days enter into a recognisance with two sufficient sureties, before a justice acting in and for such county or place as aforesaid, conditioned to appear at the said session, and to try such appeal and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and, upon such notice being given and such recognisance being entered into, the justice before whom the same shall be entered into shall liberate such person if in custody for any offence in reference to which the act intended to be appealed against shall have been done; and the court at such session shall hear and determine the matter of such appeal, and shall make such order therein with or without costs as to the said court shall seem meet; and in case the act appealed against shall be the refusal to grant or to transfer any licence, and the judgment under which such act was done be reversed, it shall be lawful for the said court to grant or to transfer such licence in the same manner as if such licence had been granted at the general annual licensing meeting, or have been transferred at a special session; and the judgment of the said court shall be final and conclusive to all intents and purposes; and in case of the dismissal of such appeal or the affirmance of the judgment on which such act was done, and which was appealed against, the said court shall adjudge and order the said judgment to be carried into execution, and costs awarded to be paid, and shall, if necessary, issue process for enforcing such order, provided that no justice shall act in the hearing or determination of any appeal to the general or quarter sessions as aforesaid from any act done by him in or concerning the execution of this Act; provided also that when any cause of complaint shall have arisen within any liberty, county of a city, county of a town, city or town corporate, it shall be lawful for the person who shall think himself so as aforesaid aggrieved, to appeal against any such act as aforesaid, if he shall think fit, to the quarter sessions of the county within or adjoining to which such liberty or place shall be situate, subject to all the provisions hereinafter contained.

A. L. Smith (Hannen with him) showed cause.—

It is a mistake to suppose that the Act of 1882 takes away the right of appeal from the licensing justices to the Court of Quarter Sessions, which has existed ever since the year 1828, when by 9 Geo. 4, c. 61, s. 27, an appeal is given to any person who thinks himself aggrieved by any act of the licensing justices. The effect of sect. 1 of the Act of 1882 is to extend the discretionary power of the justices in refusing licences for the sale of beer to be consumed off the premises beyond the grounds stated in 32 & 33 Vict. c. 27, s. 8, sub-ss 1, 2, 3, and 4. Of course the justices must exercise a judicial discretion. I submit that this rule should be discharged. He cited

*Jarmian v. Chatterton*, 20 Ch. Div. 493;  
*Reg. v. Kay*, 10 Q. B. Div. 213.

*Poland and Shee* in support of the rule.—The first section of the Act of 1882 gives an absolute discretion, and takes away all right of appeal. The words of the section are as wide as possible, and they must have some meaning. The intention of the Legislature was to place an absolute power in the licensing justices to refuse the licence. The tendency of all recent legislation on this matter has been in that direction.

POLLOCK, B.—This case has raised some questions of very general importance, but we shall abstain from expressing our opinion except upon the two points necessary for the determination of the case, and those two points are—first, whether the Court of Quarter Sessions had jurisdiction to entertain the appeal from the licensing justices; and secondly, if they have jurisdiction, whether they have properly heard the appeal on its merits. The first question depends upon the construction of several statutes, the first of which is 9 Geo. 4, c. 61, passed in the year 1828. By the 27th section of that statute an appeal to the Court of Quarter Sessions is given to any person who thinks himself aggrieved by any act of any justice done in or concerning the execution of the Act, and so the law remains to the present day, so far as regards those cases to which that Act applies. In the year 1869 the Wine and Beerhouse Act was passed (32 & 33 Vict. c. 27), and by the 4th section it is provided that no licence or renewal of a licence for the sale by retail of beer, cider, or wine, or any of such articles, under the provisions of any of the recited Acts, shall (save as is in the Act otherwise provided) be granted, except upon the production and in pursuance of the authority of a certificate granted under the Act. The 8th section of that Act provides that the provisions of 9 Geo. 4, c. 61, as to appeal, are to apply to licences granted under the Act of 1869; and the same section goes on to say that no application for a certificate in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises shall be refused, except upon one or more of the grounds stated in the four sub-sections to that section. By the Beer Dealers' Retail Licences Act 1880 (43 Vict. c. 6), some of these restrictions on the discretion of the licensing justices were removed, and by the Beer Dealers' Retail Licences (Amendment) Act 1882 (45 & 46 Vict. c. 34) a free and unqualified discretion was given to the justices either to refuse a certificate for any licence for the sale of beer by retail to be consumed off the premises, on any grounds appearing to them sufficient, or to grant a certificate to such persons as they, in the execution of their statutory

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powers, and in the exercise of their discretion, deem fit and proper. It is contended that by sect. 1 of that Act the right of appeal is also taken away, and the words of the section would seem to justify the observation; but I think they were used because, when the Bill was drafted, it was known that the intention was to do away with the restrictions that existed before the Act, on the discretion of the justices to refuse an off licence. I do not think the right of appeal that always existed was intended to be taken away or dealt with in any way. If that had been the intention I think that clear and explicit words would have been used. I think, therefore, there was a right of appeal, and I also think the Court of Quarter Sessions heard the appeal on its merits. That is the only decision we need give.

NORTH, J.—I am of the same opinion. The only question in the present case is whether the Act of 1882 (45 & 46 Vict. c. 34) takes away the right of appeal to the Court of Quarter Sessions, which there clearly has been since the Act of 9 Geo. 4, c. 61, and I do not think there are any words which do so. No doubt the Act of 1882 gives the licensing justices a larger discretion than they possessed before, but I see nothing which says that discretion is free from appeal. I think it is also clear that the court must adjudicate on the matter, and hear the case on the merits, and in this case I think the court did. Therefore the rule must be discharged.

*Rule discharged with costs.*

Solicitors for the appellant, *Tyas and Huntington*, agents for *Thompson*, Barrow.

Solicitors for the respondent, *Parkers*, agents for *Major*, Barrow.

Nov. 29 and Dec. 20, 1882.

(Before FIELD and WILLIAMS, JJ.)

HENRY AND OTHERS (pets.) v. ARMITAGE (resp.). (a)

*Municipal election—Nomination paper—Situation of property in respect of which nominating burgess is enrolled on burgess-roll—Municipal Elections Act 1875 (38 & 39 Vict. c. 40), s. 1, sub-sect. 2, and sched. 1, form 2.*

*The Municipal Elections Act 1875 (38 & 39 Vict. c. 40), s. 1, sub-sect. 2, enacts that at all municipal elections of councillors "the nomination paper . . . shall be in the form No. 2 set forth in the first schedule to this Act, or to the like effect."*

*Held, that these words are imperative, and not directory only.*

*A foot-note to form No. 2 of the first schedule to the Act directs "the situation of the property in respect of which the burgess subscribing is enrolled on the burgess-roll" to be placed after his signature to the nomination paper.*

*Where a burgess subscribing a nomination paper placed after his signature "6, Belle Vue Crescent," that being the place where he was living, while his qualification on the burgess-roll was "houses in succession, 6, Belle Vue Crescent and Linden Terrace."*

*Held, that the nomination paper was not in the form set forth in the schedule to the Act, or to the like effect, and was therefore invalid.*

*This was a special case stated for the opinion of*

(a) Reported by J. SMITH, Esq., Barrister-at-Law

the court pursuant to an order of Williams, J. of Dec. 20, 1881, made in a petition presented by John Henry, Thomas Ray, James Paxton, and John Thomas Brignall, under the Municipal Elections Acts 1872 and 1875, praying that the election of the respondent John Armitage, for the Pallion Ward, in the borough of Sunderland, holden on Nov. 1, 1881, might be declared void.

The special case was as follows:

1. The borough of Sunderland, in the county of Durham, is divided into nine wards, one of which is called Pallion Ward, and the election of a councillor for the said ward was appointed to be holden on the 1st Nov. in the year of our Lord, 1881. William Moore Skinner, of 16, Belle Vue Crescent, Sunderland, a solicitor, and John Armitage, of Pallion Farm, Sunderland, were respectively candidates for the office of councillor for the said ward, and the said John Armitage has been declared to be duly elected in the manner hereinafter appearing.

2. The said William Moore Skinner, and the said John Armitage were the only persons nominated, as hereinafter appears, as candidates at the said election for the said ward.

3. On the 22nd Oct. 1881, both the nomination papers hereinafter set out and marked respectively "A." and "B." in the schedule hereto, were delivered to the town clerk of the said borough at thirteen minutes before five o'clock in the afternoon, being at least seven days before the day of election, and the said town clerk immediately after the receipt of the said nomination papers, gave notice to the said William Moore Skinner that he had been nominated as a candidate for such election as aforesaid.

4. The following is a copy of the first of the said nomination papers delivered as aforesaid, which is annexed to this case, and marked "A." in the schedule hereto:

NOMINATION PAPER—BOROUGH OF SUNDERLAND.

Election of councillor for Pallion Ward, in the said borough, to be held on the 1st day of November, 1881.

We, the undersigned, being respectively enrolled burgesses for Pallion ward, in the said borough, hereby nominate the following person as a candidate at the said election:

Surname	Other Names	Abode	Description
Skinner	Wm. Moore	No. 16, Belle Vue Crescent, Tunstall-lane	Solicitor

638. 1. John Young, of \* 6, Belle Vue Crescent.

(Signed) Reg. No. 638.

2. William Cuggy, of \* No. 25, Potts Street. 241.

We, the undersigned, being respectively enrolled burgesses for the said ward, do hereby assent to the nomination of the above person as a candidate at the said election.

second

Dated this twenty-sixth day of October 1881.

(Signed)

1. George Robson Wayman, of \* 8, Belle Vue Road. Reg. No. 649.

2. Thomas J. Baker, of \* 15 Belle Vue Road. Reg. No. 646.

3. David Hastings, of \* Holmlands. Reg. No. 652.

4. Joseph Simpson, of \* 25, Hume Street. No. 317.

5. Thomas Harbottle, of \* 17, Hume Street. No. 311.

6. John Thomas Brignall, of \* Willow Pond Terrace. No. 291.

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7. G. McHenry, of \* 21, Washington Street. No. 190.

8. James Stephenson, of \* 25, Bell Street. No. 153.

\* The number on the Burgess Roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the Burgess Roll.

N.B.—Only one person must be nominated by this paper.

5. The nomination paper set out in the last preceding paragraph of this case, and marked "A." in the schedule hereto was, immediately after the receipt thereof, indorsed as follows:

Delivered by Mr. Skinner, the candidate, at 4.47 this Saturday the 22nd Oct. 1881. Notice of nomination given him at same time.—F. M. B. Objections by Mr. John Armitage, annexed, allowed. Wm. WILSON, Mayor, 24th Oct. 1881.

The said initials "F. M. B." are the initials of Francis Marshall Bowey, the deputy town clerk, who was acting as town clerk on the said 22nd day of Oct. 1881.

6. The following is a copy of the second of the said nomination papers, delivered as aforesaid, which is annexed to this case, and marked "B." in the schedule hereto:

#### NOMINATION PAPER—BOROUGH OF SUNDERLAND.

Election of councillor for Pallion Ward, in the said borough, to be held on the first day of November 1881.

We, the undersigned, being respectively enrolled burgesses for Pallion Ward, in the said borough, hereby nominate the following person as a candidate at the said election:

Surname	Other Names	Abode	Description
Skinner	William Moore	Belle Vue Crescent	Solicitor

(Signed) { 1. Thomas Ray, of \* 25 St. Luke's Road.  
2. John Lynn, of \* 21 St. Luke's Road.

We, the undersigned, being respectively enrolled burgesses for the said ward, do hereby assent to the nomination of the above person as a candidate at the said election.

Dated this day of 188

(Signed),  
210 1. Wm. E. Robson, of \* 52, 53 Washington Street.  
178 2. John Lauderdale, of \* 2 Washington Street.  
50 3. George Wate, of \* No. 1 East Moor Road.  
189 4. John Mitchell, of \* 20 Washington Street.  
277 5. John Henry, of \* No. 1 North Rutland Street.  
24 12 24 6. James Bambridge, of \* No. 14 St. Luke's Road.  
319 7. Henry Biddell, of \* No. 27 Hume Street.  
314 315 8. James Paxton, of \* 21 1/2 Hume Street.

\* The number on the Burgess Roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the Burgess Roll.

N.B.—Only one person must be nominated by this paper.

7. The nomination paper set out in the last preceding paragraph of this case, and marked "B." in the schedule hereto, was, immediately after the receipt thereof, indorsed as follows:

Delivered by Mr. William Moore Skinner, the candidate, at 4.47 this Saturday, the 22nd October 1881. Notice of nomination given him at same time.—F. M. B. Objections by Mr. John Armitage, annexed, allowed.

Wm. WILSON, Mayor.

24th October 1881.

The said initials, "F. M. B." aforesaid, are the initials of Francis Marshall Bowey, the deputy town clerk, who was acting as town clerk on the said 22nd day of October 1881.

8. On the 24th Oct. 1881, William Wilson, Esquire, the mayor of the said borough, attended at the Town Hall in the said borough, between the hours of two and four in the afternoon, for the purpose of deciding on the validity of objections to nomination papers, and the said John Armitage,

on the said 24th day of October, objected in writing to the first of the said nomination papers. The following is a copy of the objection to the first of the said nomination papers, marked "A." in the schedule hereto, which first objection paper is annexed to this case, and marked "C." in the schedule hereto:

#### BOROUGH OF SUNDERLAND.

Election of councillor for Pallion Ward, in the said borough, appointed to be held on the first day of November 1881.

I, the undersigned, being duly entitled to attend the proceedings for nomination of candidates at this election, do object, for the reasons hereunder mentioned, to the nomination paper of William Moore Skinner (proposer, John Young; seconder, William Cuggy).

Dated this twenty-fourth day of November (a) 1881.

Name—JOHN ARMITAGE.

Address—Pallion Farm.

To the Mayor,

My reasons for objecting to such nomination paper are—that section 1, sub-section 2, and Schedule 1, Form 2, of 38 & 39 Victoria, chapter 40, have not been complied with, inasmuch as (1) the nomination paper does not state the surname and other names of the person nominated, as required by the said section 1, sub-section 2 of the said Act; and also, inasmuch as (2) the situation of the property in respect of which John Young, the proposer in the said nomination paper, is enrolled on the burgess roll has not been set out in the said nomination paper, as required by the note to Schedule 1, Form 2 of the above Act.

(Mather v. Brown, 45 L. J. 547.)

I allow the above objections.

Wm. WILSON, Mayor.

24th October 1881.

9. At the same time and place the said John Armitage objected in writing to the said second of the said nomination papers marked "B" in the schedule hereto. The following is a copy of the objection to the second of the said nomination papers marked "B" in the schedule hereto, which second objection paper is annexed to this case, and marked "D." in the schedule hereto:

#### BOROUGH OF SUNDERLAND.

Election of councillor for Pallion Ward, in the said borough, appointed to be held on the first day of November, 1881.

I, the undersigned, being duly entitled to attend the proceedings for nomination of candidates at this election, do object for the reasons hereunder mentioned to the nomination paper of William Moore Skinner (proposer, Thomas Ray; seconder, John Lynn).

Dated this twenty-fourth day of October 1881.

Name—JOHN ARMITAGE.

Address—Pallion Farm.

To the Mayor,

My reasons for objecting to such nomination paper are, that section 1, sub-section 2, and Schedule 1, Form 2 of 38 & 39 Victoria, chapter 40, have not been complied with, inasmuch as (1) the nomination paper is not dated as required by Schedule 1, Form 2 of the said Act, and (2) the situation of the property in respect of which John Lynn, the seconder of the said nomination paper, is enrolled on the burgess-roll, has not been set out in the nomination paper as required by the note to Schedule 1, Form 2, of the said Act.

(Mather v. Brown, 45 L. J. 547.)

I allow the above objections.

Wm. WILSON, Mayor.

24th Oct. 1881.

10. The said William Moore Skinner is a solicitor, in practice in Sunderland.

The following is a copy of the entry of the name and qualification of John Young aforesaid, in the burgess-roll:

638—Young, John, 6, Belle Vue Crescent, houses in succession, 6, Belle Vue Crescent, and Linden Terrace.

(a) Sic.

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The said John Young had occupied the said premises in succession, and the said John Young was, at the time when the said nomination paper was signed, and had been ever since December 1880, in actual occupation of and rated for the premises, 6, Belle Vue-crescent, aforesaid.

11. The following is a copy of the entry of the name and qualification of John Lynn aforesaid in the burgess-roll :

21—Lynn, John, Monkwearmouth, workshops in succession, Saint Luke's Road and Ropery Road.

The said John Lynn had occupied the said premises in succession, and at the time when the said nomination paper was signed, the said John Lynn was and had been ever since Dec. 1880, in actual occupation of and rated for the premises in St. Luke's-road aforesaid.

12. The said William Wilson, Esq., the mayor of the said borough, allowed the said objections of the said John Armitage to both of the said nomination papers, and the said John Armitage was declared duly elected as councillor for the said Pallion Ward, as being, according to the decision of the said William Wilson, the only candidate duly nominated for the said ward.

13. The petitioners thereupon in due course duly petitioned against the said return, praying that it might be determined that the said John Armitage was not duly elected, and that the said election of the said John Armitage was void.

A copy of the said petition is annexed to this case and marked "E."

14. A copy of the burgess-roll of the said Pallion Ward of the said borough of Sunderland, for the year 1881-1882, as finally settled in the month of Oct. 1881, is to be taken as part of this case, and is marked "F."

The question for the consideration of the court is—

Whether the mayor was right in the circumstances above-mentioned in deciding that the said William Moore Skinner was not duly nominated.

If the decision of the said mayor was wrong, the election of the said John Armitage is to be declared void.

If the decision of the said mayor was right, this petition is to be dismissed, and the court may make such further order as to them shall seem meet.

The 2nd sub-section of the Municipal Elections Act 1875 (38 & 39 Vict. c. 40), s. 1, is as follows :

(2) At any such election every candidate shall be nominated in writing; the writing shall be subscribed by two enrolled burgesses of such borough or ward as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination. Each candidate shall be nominated by a separate nomination paper, but the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more. Every person nominated shall be enrolled on the burgess roll of the borough, or a person whose name is inserted in the separate list at the end of the burgess-roll, as provided by section three of the Act thirty-two and thirty-three Victoria, chapter fifty-five, and shall be otherwise qualified to be elected. The nomination paper shall state the surname and other names of the person nominated, with his place of abode and description, and shall be in the form No. 2 set forth in the first schedule to this Act, or to the like effect. And the town clerk shall provide nomination papers, and shall supply any enrolled burgess with as many nomination papers as may be required, and shall, at the request of any such person, fill up a nomination paper in the manner prescribed by this Act.

And Form No. 2 of the First Schedule is :

NOMINATION PAPER.

Borough of . Election of Councillors, Auditors, or Assessors for . Ward, in the said Borough, to be held on the . day of . 18 .

We, the undersigned, being respectively enrolled burgesses, hereby nominate the following person as a candidate at the said election :

Surname.	Other names.	Abode.	Description.

(Signed) A. B., of \*

C. D., of \*

We, the undersigned, being respectively enrolled burgesses, do hereby assent to the nomination of the above person as a candidate at the said election.

Dated this . day of . 18 .

(Signed) E. F., of \*

G. H., of \*

I. J., of \*

K. L., of \*

M. N., of \*

O. P., of \*

Q. R., of \*

S. T., of \*

\* The number on the burgess-roll of the burgess subscribing with the situation of the property in respect of which he is enrolled on the burgess-roll.

*MacOlymont* for the petitioners.—The objections to these nomination papers ought not to have been allowed. This sub-section (38 & 39 Vict. c. 40, s. 1, sub-sect. 2) is directory only, and not strictly imperative. To decide whether a statute is directory or otherwise it is necessary to look at the intention of the Legislature: (*Reg. v. The Mayor of Rochester* 7 E. & B. 910.) The intention of the Legislature here was to secure the identification of the subscribing burgesses. This is sufficiently done in the nomination papers in question. When this object has been secured the section is for the rest merely directory. This is the *ratio decidendi* of *Reg. v. Bradley* (3 E. & E. 634) and *Mather v. Brown* (34 L. T. Rep. N. S. 869; L. Rep. 1 C. P. 659), in the former of which it was decided that the Christian name of William was sufficiently set out by its contraction Wm., inasmuch as it was a contraction ordinarily written for William; while in the latter it was held that a representation of a Christian name by its initial was a fatal misnomer. In *Soper v. The Mayor of Basingstoke* (36 L. T. Rep. N. S. 468; L. Rep. 2 C. P. Div. 440) Denman, J. says: "All that is required by the Act is that the person should be identified, which is to be done by his name, his number upon the burgess roll, and the situation of the property in respect of which he is enrolled, being set out," and the property being described as situate in H. Street, which was the former name of W. Street, in which the property was situate, the misdescription was held to be immaterial. In *Gothard v. Clarke* (42 L. T. Rep. N. S. 776; 5 C. P. Div. 253) the number of one of the nominators on the burgess-roll was wrongly given, and that objection was held to be valid, inasmuch as the mistake prevented the identification of the nominator. In this case it was possible to refer to the burgess-roll; the identification of the burgess subscribing was complete, and the omission of his former residence immaterial, and there is, therefore, no substantial ground for holding that the nomination paper is insufficient.

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*Atherley Jones* for the respondent.—In *Soper v. The Mayor of Basingstoke* (*ubi sup.*) the special case stated that H. Street was the name by which the street in question was generally known, its name having been very recently changed, and that no one could be misled by its being called H. Street; and the decision of the court was based on the fact that "the description H. Street was true in every material sense." The case of *Clarke v. Gothard* (*ubi sup.*) shows the strictness with which the requirements of this section must be observed. Lopes, J. in that case actually supposed a case such as the present in support of his judgment. "Again," he asks, "if the insertion of the number on the burgess-roll of the burgess subscribing may be dispensed with, why may not 'the situation of the property in respect of which he is enrolled on the burgess-roll be omitted, and his mere ordinary signature be sufficient?' Here 'the situation of the property, in respect of which the subscribing burgess is enrolled' is not set out. The Act, therefore, is not complied with, and the omission is fatal.

*MacOlymont* in reply.

FIELD, J.—This is a question which arises under the 2nd sub-section of the 1st section of the Municipal Elections Act 1875 (38 & 39 Vict. c. 40). That Act followed the Ballot Act of 1872 (35 & 36 Vict. c. 33) in making a nomination necessary, and this special case is stated by order of my learned brother Williams on a petition praying this court to set aside a decision of the Mayor of Sunderland, allowing objections to the validity of two nomination papers, and pronouncing them insufficient to meet the requirements of the statute. The principal section in this case is the 1st section of the Act of 1875. This provides a scheme for the nomination and election of members of town councils. The scheme is that in the first place nine days before the election the town clerk must issue notices in the form No. 1 set forth in the first schedule to the Act. Then nomination papers in writing must be delivered to the town clerk by a particular day, subscribed by two enrolled burgesses as proposer and seconder, and by eight others as assentors, and the nomination paper must contain the surname and other names of the candidate, with his place of abode and description, and is to be in a form given in the schedule to the Act. Now, in the present case the objection raised is, that the nomination paper does not state the situation of the property, in respect of which the burgess subscribing the paper, as proposer, is entered on the burgess-roll and entitled to propose a candidate. It becomes necessary, therefore, to examine the exact words of the section. The important words are these: "The nomination paper shall state the surname and other names of the person nominated, with his place of abode and description, and shall be in the form No. 2 set forth in the first schedule to this Act, or to the like effect." Now, there cannot be stronger words than the words "shall be." Then form No. 2 in the schedule places the initials A. B. and C. D. and the rest to represent the signatures of the proposer and seconder, and eight assentors, and after each A. B. and C. D. is placed the word "of," and opposite each set of initials, and after the word "of" is an asterisk referring to a note

below at the end of the form, which is "the number on the burgess roll of the burgess subscribing, with the situation of the property, in respect of which he is enrolled on the burgess roll." In this case it happened that one of the assentors, George Robson Wayman, filled up that part of the nomination paper beginning "We the undersigned," and he did so by inserting the names of eight persons with their addresses, the word "of" leading him to suppose that he was to put in the address, a mistake very easy to fall into, more especially as in the form prescribed in the Parliamentary Act (35 & 36 Vict. c. 33, sched. 2) the note placed at the foot of this form is not to be found, and the address would be properly inserted. But, however it occurred, in the case of the proposer, John Young, after the asterisk, came "6, Belle Vue-crescent," that being the place where he was living; but, as it happened, he had not lived at 6, Belle Vue-crescent long enough to get a title, and his qualification on the burgess-roll was "houses in succession, 6, Belle Vue-crescent and Linden-terrace." Only a part, therefore, and not the whole, of his title was set out in the nomination paper, and it is said that the paper is insufficient, inasmuch as he did not state the qualification in respect of which he was enrolled. It was contended on the part of the petitioners that the words were only directory, and that an omission to comply with a note, which is merely directory, did not vitiate the nomination paper. Now, where the mayor decides against an objection and holds a thing to be good, his decision is conclusive; but where he allows the objection, and holds a thing to be bad, there is an appeal to this court. In this case the mayor allowed the objection, and held the nomination paper bad, and declared the other candidate elected as being alone duly nominated. I cannot alter the decision of the mayor. I should be glad to do so if I could, because the objection to the validity of the paper is purely technical; but in point of law, when it comes to be a question as to whether I can hold the words to be merely directory, I am bound to support it. It is always a difficult question to decide as to whether a part of an enactment is directory or not. I have searched to see if I could find that any principle had been laid down, but I cannot find any. I know indeed a number of cases in which words have been decided to be directory, as for instance in the *Rochester* case (*Reg. v. The Mayor of Rochester*, 7 E. & B. 910), in which the court held that the provisions of the Municipal Corporation Reform Act (ss. 15 to 22), as to the time at which the burgess-lists were to be revised, were directory only, and that they could issue a *mandamus* to revise them after the 15th Oct. But if the enactments in that case had not been held to be directory only, the voters would have been disenfranchised without redress owing to negligence over which they had no control. That could not have been the intention of the Legislature, and it was therefore obviously expedient to issue a *mandamus*. But I can only hold words to be directory when I can see that it must have been the meaning of the Legislature that they should be so. In this case I cannot see that this was the intention. I do not know for what reason the Legislature for the first time inserted this provision, but they did insert it. I have no doubt that the mistake arose in the way I have pointed out, and I can quite see the truth of the

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suggestion that by turning to the register it is possible to find all the information that can be wanted. But the Legislature says that it must be put into the nomination paper, and that persons requiring information must not be sent to the register, but must be able to find it on the nomination paper. I should have come to this conclusion on a consideration of the principle involved, and on the words of the Act; but my opinion is greatly strengthened by the case of *Gothard and others v. Clarke and others* (42 L. T. Rep. N. S. 776; 5 O. P. Div. 253). In that case the number on the burgess-roll of one of the nominators was wrongly given in the nomination paper; nothing turned on the number, and there was the same difficulty as in the present case of finding any practical reason in support of the objection. Nevertheless the Divisional Court decided that the nomination paper was bad, and Lopes, J., while giving the reasons for his decision in that case, happened to refer to the very point which we are now considering, and he there says: "I think the decision of the mayor was right . . . . We are asked to hold that the provisions of the Act . . . . are directory only, and impose no obligation . . . . If the insertion on the burgess-roll of the burgess subscribing may be dispensed with, why may not the situation of the property in respect of which he is enrolled on the burgess-roll be omitted, and his mere ordinary signature be sufficient? . . . . In this way the whole note to the schedule would be frittered away, and the security provided by the Legislature for the identification of the subscribing burgesses be destroyed." The point so suggested is the point with which we have now to deal, and with considerable regret I am obliged to come to the conclusion that I cannot reverse the decision of the mayor, and that he was right in holding that this nomination was insufficient to comply with the requirements of the statute.

WILLIAMS, J.—I have, not without doubt, arrived at the same conclusion, but I cannot but think that the failure to fill up this nomination paper in the manner prescribed by the Act was careless and perfunctory. Why, with the printed form before them, and the printed note to which the asterisk refers, those who filled up the form should not have inserted the situation of the property in respect of which the assessor was enrolled on the burgess-roll, I do not know. I have no regret, therefore, in supporting the decision at which the mayor arrived in this case.

*Judgment for the respondents.*

Solicitor for the petitioners, *T. Balfour Allan*.  
Solicitors for the respondents, *Johnson and Weatherall*, agents for *Bowey and Brewis*, Sunderland.

Tuesday, April 17, 1883.

(Before FIELD and MATHEW, JJ.)

FRECHEVILLE (app.) v. SOUDEN AND OTHERS (resps.). (a)

*Mine—"Skip" or open box—Miners using skip without cover—Offence—Metalliferous Mines Regulation Act 1872 (35 & 36 Vict. c. 77), s. 23, sub-sect. 11, s. 31.*

*By sect. 23, sub-sect. 11, of the Metalliferous Mines Regulation Act 1872, a sufficient cover overhead shall be used when lowering or raising persons in every working shaft, with certain exceptions.*

*By the last clause of sect. 23 every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this Act.*

*By sect. 31, every person employed in or about a mine, other than an owner or agent, who is guilty of any act or omission which, in the case of an owner or agent, would be an offence against this Act, shall be guilty of an offence against this Act, and is rendered liable to a penalty.*

*S. and others were working miners in the D. mine. The D. mine had two shafts, in one of which was a man engine, with a proper cover, used to lower miners from and raise them to the surface of the mine. In the other was a "skip" or open box, without a cover, used for raising ores and refuse. S. and certain other miners, who were then at the bottom of the mine, while the man engine and "skip" were both at work, got into the "skip," and were raised to the surface of the mine.*

*Held, that they were guilty of an offence against the Act.*

THIS was a case stated by certain justices of the peace for the county of Cornwall, sitting at Camborne, under 20 & 21 Vict. c. 43. The material parts thereof were as follows:

An information was preferred by the appellant against the respondents under sect. 23, sub-sect. 11, of 35 & 36 Vict. c. 77, for that they the respondents being respectively miners at a certain mine situate in the parish of Camborne, in the county of Cornwall, and commonly known as the "Dolcoath Mine," did, on the 9th Oct. 1882, ride in a skip without a sufficient cover overhead, when being raised in a working shaft of the said mine, contrary to sub-sect. 11 aforesaid.

The respondents were working miners employed underground in Dolcoath Mine. They used to be lowered to their work and raised again to the surface on a properly constructed man engine in a shaft used only for that purpose. Ores and refuse were raised to the surface in a skip or open box in another shaft of the mine.

The respondents were aware that the man engine was the only proper means of their being raised to or lowered from the surface.

The skip was under the charge of a workman, called the "lander," whose station was at the mouth of the shaft, and whose duty it was to cause the engine-man to lower the skip, and to cause him to raise it on receiving a signal from below. Men coming up on the man engine were in safety, but men coming up in the skip would be exposed to great danger.

On the 9th Oct. 1882, whilst the man engine was at work and the skip was at the bottom of the shaft, also at work, the "lander" received the signal to

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.



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raise the skip. The respondents got into it and came up in it. The shaft in question was not worked by a windlass, and the respondents were not working about the pump or any work of repair in the shaft, and there was no exemption given by the inspector of the district, and the skip had no cover overhead.

The justices refused to convict, being of opinion that the sub-section did not apply to working miners, but only to the agents of the mine, and dismissed the summons, subject to a case for the opinion of the court.

By sect. 23, sub-sect. 11 of 35 & 36 Vict. c. 77 :

A sufficient cover overhead shall be used when lowering or raising persons in every working shaft, except where it is worked by a windlass, or where the person is employed about the pump or some work of repair in the shaft, or where a written exemption is given by the inspector of the district.

By the last clause of sect. 23 :

Every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this Act, and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whosoever, being proved, the owner and agent of such mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the said rules as regulations for the working of the mine to prevent such contravention or non-compliance.

By sect. 31 :

Every person employed in or about a mine, other than an owner or agent, who is guilty of any act or omission which in the case of an owner or agent would be an offence against this Act, shall be deemed to be guilty of an offence against this Act.

Every person who is guilty of an offence against this Act shall be liable to a penalty not exceeding, if he is an owner or agent, twenty pounds, and if he is any other person, two pounds, for each offence; and if an inspector has given written notice of any such offence, to a further penalty not exceeding one pound for every day after such notice that such offence continues to be committed.

*Mackey* for the appellant.—Sub-sect. 11 of sect. 23 applies to working mines. The Act was passed to prevent accidents in miners, and it is for their protection that the cover is wanted. Hence the respondents have committed an offence against the Act, and are liable to the penalties provided by sect. 31.

The respondents did not appear.

FIELD, J. — This case raises an important question. I am of opinion that the magistrates have taken a wrong view of the law. The case turns upon the proper construction of the Metaliferous Mines Regulation Act 1872. That Act contains very careful regulations for the purpose of avoiding danger to persons engaged in mines, and to others who, though not actually engaged in mines, are engaged about them. The respondents are charged with an act or omission that is made an offence by sect. 31 [the learned Judge read the section]. This section creates the offence. The act or omission of which they are guilty lay in not observing the provisions of sect. 23, sub-sect. 11 [the learned Judge read the sub-section]. Now the charge here is that the respondents, while being raised from the bottom of the shaft, did ride in a skip without using sufficient cover overhead. Is this an offence? The respondents are not owners or agents. The magistrates thought that the offence could only be in the owner or agent, and they were led to this conclu-

sion by the last words of sect. 23. But this section makes two sets of persons liable: first, every person who contravenes or does not comply with any of the general rules in this section (sect. 23); and next, the owner and agent of such mine, unless he proves that he took all reasonable means of publishing and enforcing such rules. Therefore the section is not limited to owners and agents. It would be very dangerous so to limit it. Mines are to be worked in accordance with certain rules enforced by penalties, and the intention of the Act is to enforce those rules upon everybody.

MATHEW, J.—I am of the same opinion. The final clause of sect. 23 has made the case clear. I think the magistrates took a wrong view.

*Case remitted with the above opinion.*

Solicitors for the appellant, *Gregory, Rowcliffe, and Co.*, for *Smith and Paul, Truro*.

April 17 and 19, 1883.

(Before FIELD and MATHEW, JJ.)

DYSON AND OTHERS (apps.) v. THE GREETLAND LOCAL BOARD (resps.). (a)

*Highway—Urban district—Part of parish excluded—Repairs of highways in excluded part—Rates for—Amount—Highway Act 1835 (5 & 6 Will. 4. c. 50), ss. 5, 29—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 144, 216, 217.*

By sect 29 of the Highway Act 1835, no highway rate to be levied or assessed shall exceed at any one time the sum of 10d. in the pound, or 2s. 6d. in the pound in the whole in any one year, without the consent of four-fifths of the inhabitants assembled at a specially called meeting. By sect. 216 of the Public Health Act 1875, where parts of a district are not rated for works of paving, water supply, and sewerage, or for some of them, the cost of repair of highways in those parts shall be defrayed out of a highway rate to be separately assessed and levied in those parts by the urban authority as surveyor of highways; provided that where part of a parish is included within an urban district, and the excluded part was, before the constitution of that district, liable to contribute to the highway rates for such parish, such excluded part shall, for all highway purposes, be treated as forming part of such district. The hamlet of G. was formerly a "parish" maintaining its own highways. Prior to 1875 part of the hamlet was formed into a local government district, called the Inner District, with a local board, and became an urban district under the Public Health Act 1875. Part of the hamlet, called the Outer District, was excluded from it. The local board of the inner district repaired the highways in the outer district, and separately assessed a rate of 3s. 4d. in the pound on the inhabitants of the outer district, without first obtaining the consent of four-fifths of them. The appellants objected to the validity of the rate. Held (affirming the decision of Quarter Sessions), that the consent of four-fifths of the inhabitants of the outer district was rendered unnecessary by sect. 216 of the Public Health Act 1875, and that the rate was valid.

THIS was a special case stated by the Court of

(a) Reported by W. P. EVERSOLEY, Esq., Barrister-at Law.

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Quarter Sessions for the West Riding of the county of York, pursuant to the provisions of the Public Health Act 1875. The material facts appearing therein were as follows:

In March 1865 the Local Government Act 1858 was, by order of a Secretary of State, adopted within part of the hamlet of Greetland, in the parish of Halifax, and called the Inner District. The district so constituted a local government district was, at the time of making the rate hereinafter mentioned, an urban district, and the respondents were the local board of health of the said urban district.

The other part of the hamlet of Greetland, called the Outer District, was excluded by the said order from the operation thereof, and came under the jurisdiction of the rural sanitary authority of the Halifax Union for sanitary purposes.

The appellants were occupiers of lands and tenements within the outer district.

The outer district had not been formed into a separate highway district, nor included in any highway district under the Highway Acts.

The hamlet of Greetland was part of a parish within the meaning of sects. 5 and 29 of the Highway Act 1835.

The respondents, pursuant to their powers, borrowed money for works of water supply and sewerage within the inner district, the expenses of which were defrayed out of the general district rate.

In Dec. 1830 the respondents laid a highway rate of 2s. 6d. in the pound over the outer district, and as the sums thereby produced were not sufficient for the payment of the expense of the highways in the said district, in Nov. 1881 they issued a notice calling a special meeting of the Greetland Local Board for the purposes of laying a rate of 3s. 4d. in the pound upon property assessable thereto in Outer Greetland, but which is included in the district of the said board for highway purposes, and this notice was posted in Inner Greetland.

On the 5th Dec. 1881 the special meeting was held, and a highway rate of 3s. 4d. in the pound was resolved on, and notice thereof was duly given and posted.

Except as aforesaid, no notice of a meeting specially called for the purpose of obtaining the consent of the inhabitants of the outer district, who contribute to the said highway rate, was given by the respondents, nor was any such meeting held, nor was any consent of the inhabitants given to the said rate. There was no vestry or vestry meeting in the said outer or excluded part.

Towards payment of the said rate of 3s. 4d. in the pound, the appellants were rated and assessed in respect of property situate in the outer district, and payment of the amount of their respective assessments was demanded of them. The appellants gave notice of appeal against the said rate, and the appeal was heard at the General Quarter Sessions in and for the West Riding of York in April 1882.

On behalf of the appellants it was contended that the said rate was improperly made and laid, and was invalid. The Court of Quarter Sessions confirmed the rate subject to a case for the opinion of this court.

If the court was of opinion that the said rate was properly made, then the said order should be

confirmed; but, if otherwise, then the said order should be quashed.

By sect. 5 of 5 & 6 Will. 4, c. 50:

The word "parish" shall be construed to include parish, township . . . hamlet . . . or any other place or district maintaining its own highways; and whenever anything in this Act is prescribed to be done by the inhabitants of any parish in vestry assembled, the same shall be construed to extend to any meeting of inhabitants contributing to the highway rates in places where there shall be no vestry meeting, provided the same notice shall have been given of the said meeting as would be required by law for the assembling of a meeting in vestry; . . . and the word "inhabitant" shall be understood to include any person rated to the highway rate.

By sect. 29:

That every rate shall contain the names of the occupiers, the description of the premises or property they occupy, and the full annual value of such premises or property, and shall also specify the sum in the pound at which it is made; and no rate to be levied or assessed as aforesaid shall exceed at any one time the sum of 10d. in the pound, or the sum of 2s. 6d. in the pound in the whole in any one year; provided nevertheless, that with the consent of four-fifths of the inhabitants of any parish contributing to the highway rate assembled at a meeting specially called for that purpose . . . the rate to be levied and assessed as aforesaid may be increased to such sum as the said inhabitants so assembled may think proper.

By sect. 144 of 38 & 39 Vict. c. 55:

Every urban authority shall within their district, exclusively of any other person, execute the office of and be surveyor of highways, &c.

By sect. 216:

In any urban district, where the expenses under this Act of the urban authority are charged and defrayed out of the district fund and general district rates, and no other mode of providing for repair of highways is directed by any local Act, the cost of repair of highways shall be defrayed as follows: (that is to say,)

(1.) Where the whole of the district is rated for works of paving, water supply, and sewerage, or for works for such of these purposes as are provided for in the district, the cost of repair of highways shall be defrayed out of the general district rate:

(2.) Where parts of the district are not rated for works of paving, water supply, and sewerage, or for such of these purposes as are provided for in the district, the cost of repair of highways in those parts shall be defrayed out of a highway rate to be separately assessed and levied in those parts by the urban authority as surveyor of highways, and the cost of such repair in the residue of the district shall be defrayed out of the general district rate.

Provided that where part of a parish is included within an urban district, and the excluded part was, before the constitution of that district, liable to contribute to the highway rates for such parish, such excluded part shall . . . for all purposes connected with the repairs of highways and the payment of highway rates, be considered to be and be treated as forming part of such district.

By sect. 217:

It shall not be necessary for the urban authority, in the case of any highway rate made by them, to do the following acts or any of them; (that is to say,) To lay such rate before any justices, or obtain their allowance; to annex thereto the signature of such urban authority; to lay the same before the parishioners assembled in vestry; to verify before any justices any accounts kept by them of such highway rates; and all such accounts shall be audited in all respects in the same way as the other accounts of the urban authority.

*F. O. Crump* for the respondents.—This rate is a valid rate. The local board repair the highways in Outer Greetland, and assess the district for the expenses of repairing them. By sect. 144 of the Public Health Act 1875 the urban authority execute the office of surveyor of highways. By

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sect. 216 Outer Greetland is to form part of the urban district of Inner Greetland for highway purposes; therefore the local board, as surveyor of highways, can levy a rate on the inhabitants of Outer Greetland, in the same way as they can on the inhabitants of Inner Greetland. Sub-sect. 2 is expressly applicable. The consent of the inhabitants is unnecessary. Sect. 29 of the Highway Act 1835 does not apply, as the Act of 1875 has rendered it obsolete. Sect. 5 of the Act of 1835 defines a "parish" to be a place maintaining its own highways. In this case the local board maintain the highways in Outer Greetland, and so sect. 29 of the Act of 1835 is not applicable. Here there is a perfect machinery under one Act to regulate the assessing and levying of highway rates; it is unnecessary, and would be confusing, to have to look back to the Act of 1835 to find out what the method is.

*Meadows-White, Q.C. and H. T. Atkinson* for the appellants.—This rate is bad. It exceeds 10d. in the pound, and the previous consent of the inhabitants of Outer Greetland has not been obtained under sect. 29 of the Highway Act 1835. Sub-sect. 2 of sect. 216 of the Public Health Act 1875 relates to the rates to be levied; the highway rates of the outer district are to be separately levied. Then, to find out the mode of levying them, the Highway Act 1835, must be looked at, and there it is found that if a higher rate than 10d. in the pound at any one time is required, the consent of four-fifths of the inhabitants in a specially called meeting must first be obtained. The urban authority, therefore, wishing to levy a rate of 3s. 4d. in the pound, ought to have called a meeting of the inhabitants; then the provisions of sect. 217 of the Act of 1875 would apply. The machinery provided by the Highway Act 1835 for passing the surveyor's accounts is set out in sects. 39, 40, 42 and 44: "accounts" include assessments:

*Re v. The Justices of Yorkshire*, 6 B. & C. 152.

Sect. 217 of the Public Health Act 1875 does not repeal the sections of the Act of 1835 directing the surveyor to lay the accounts before the vestry meeting. [MATHEW, J.—The Legislature has said that Inner and Outer Greetland are to form one district for highway purposes; your argument goes to show that they form two districts.] Sect. 216 of the Act of 1875 uses the words, "as such surveyor of highways," and thereby incorporates sect. 29 of the Act of 1835; because the words must mean, "as such surveyor of highways would have done if this Act had not been passed." It would be unjust to make Outer Greetland subject to a local board which its inhabitants do not elect, and Parliament could not have intended it. Hence, as there are no express words taking away the right the inhabitants of Outer Greetland had before 1875, the procedure of the Act of 1835 applies, there being no representation of Outer Greetland on the local board.

FIELD, J.—In this case we are not asked to answer any particular question. The case is not framed with any great particularity, but it sets out certain contentions which are very generally stated. On behalf of the appellants it was contended that the said rate was improperly laid and made, and was invalid. It does not tell us what the invalidity was. Then it says that the Court of Quarter Sessions confirmed the rate subject to the

opinion of this court, without stating on what ground it confirmed it. There is great difficulty in finding out what is the point upon which the Court of Quarter Sessions really wish to obtain our opinion. The Court of Quarter Sessions confirmed the rate, and I am of opinion rightly. Now the question we are asked is, whether the rate was properly made, and the objection taken to it is that it exceeds 10d. in the pound in amount, and that the consent of four-fifths of the inhabitants of the outer district of the parish of Greetland, contributing to the highway rate, was not first obtained. The question for our consideration is, whether or not that makes the rate bad and invalid. Now, the position of things before the Public Health Acts of 1848 and 1875 was this: Greetland was a hamlet maintaining its own roads and ways, and the inhabitants had to maintain the roads within the entire hamlet. Then the Highway Act of 1835 established a mode of doing it by representation in a certain sense, by a vestry meeting of people liable to rates. They were obliged to appoint an officer to do the work, and he was called the surveyor of highways, who not only did the work of repairing the roads, but also had the power of taxing the persons liable to be assessed by the terms of the Act for the amount of money necessary to enable him to repair the highways. He exercised his discretion as to the repairs to be done. He was obliged to keep them in repair so as to save the inhabitants from indictment, and he had to raise the money by a rate; but the Legislature said that he should never make a rate at any one time of more than 10d. in the pound, or in any one year of more than 2s. 6d. in the pound. It is certainly rather startling to find that 3s. 4d. in the pound is sought to be taken by one rate. However, we must give credit to the local board that they have duly estimated what the repairs are, and that 3s. 4d. is necessary. The question is, whether or not the previous assent of the inhabitants or ratepayers, which was necessary before, is necessary now. That depends upon the construction to be put on sect. 216 of the Public Health Act 1875. By sect. 144, any urban sanitary authority within their district have to execute the office of the surveyor of highways. Now the facts here to be taken into account are these: That by an order of the Local Government Board the inner district was formed into a local government district before the passing of the Act of 1875, but that what is now called the outer district was excluded from that district. Therefore, by the operation of sect. 6 of the Public Health Act 1875, Inner Greetland became an urban district, and Outer Greetland was excluded from it. Now what is the state of things with regard to the inhabitants of Outer Greetland? They come clearly within the proviso to sect. 216. [The learned Judge read the proviso.] The words at the beginning of the proviso, "where part of a parish," refer in this case to part of Greetland, the word "parish" being meant to represent hamlet. This means that Outer Greetland is to form part of Inner Greetland for all purposes connected with the repairs of highways, and the payment of highway rates, as Outer Greetland was before the constitution of Inner Greetland liable to contribute to the highway rates for all Greetland. Now, we must look back and see the state of things with regard to the district of which

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Outer Greetland is to form a part. Inner Greetland is under the control of the local board, and is a district where the expenses under this Act are defrayed out of the district fund and general district rates, and no other mode of repairing the highways is directed by a local Act. Then, proceeding with sect. 216, sub-sect. 1 does not apply, as the whole of the district, including Outer Greetland, is not rated for works of paving, water supply, and sewerage. Sub-sect. 2 does apply, because part of the district, viz., Outer Greetland, is not rated for works of paving, water supply, and sewerage. The consequence is that the repair of the highways in that part is to be defrayed out of a highway rate to be separately assessed and levied in that part by the urban authority—that is, the local board—as surveyor of highways. That being so, the suggestion on the part of Outer Greetland is this, that, although they are to be included in the highway district, yet they are to be in a very much better position than every other person in the district, because, whereas all the inhabitants of Inner Greetland are liable to pay the rates in Inner Greetland, without control over the amount, and the money will come out of the district rate where no previous consent is required, yet the inhabitants of Outer Greetland have got a right to say that, though 3s. 4d. is a proper sum, they will not personally bear more than 10d. of it, but that all the rest of it must be borne by the inhabitants of Inner Greetland. I cannot think the Legislature intended this. The only words that the appellants rely on are the words “as surveyor of highways.” What is sought to be included in this statute is certain legislation applied to an altogether different state of things—an old state of things which has disappeared, where the inhabitants appointed their surveyor, who did all the work, spent the money, and made the rate; and where the inhabitants who appointed him could control his expenditure—an altogether different mode of legislation from this, where the local board was established with a different class of powers and for different purposes. I feel a certain amount of inconvenience, and of possible injustice, which might happen, in that the inhabitants of Outer Greetland are liable to be taxed by persons whom they have not sent to represent them; on the other hand, the inconvenience the other way is also very great, and I have come to the conclusion that sub-sect. 2 of sect. 216 vests in the local board the power of making a rate for such amount as they deem proper on the inhabitants of the outer district, in the same way and on the same conditions as they admittedly have the power of doing with regard to the inhabitants of the inner district, where there is no such consent required. I think, therefore, that the rate is free from this objection, which I assume to be the only one raised at Quarter Sessions, and that the judgment must be affirmed with costs.

MATHEW, J.—I am of the same opinion. The argument narrowed itself at the end to a very small point on the construction of sub-sect. 2 of sect. 216 of the Public Health Act 1875. It was conceded that Outer Greetland formed part of Inner Greetland by virtue of the proviso to sect. 216 for all purposes connected with the repairs of highways and the payment of highway rates. Then what does sub-sect. 2 say? [The

learned Judge read the sub-section.] If the sub-section had stopped before the words “as surveyor of highways,” it would be the duty of the urban authority to estimate the sum required for the cost of repairs of the highways over the whole district, and make their rates accordingly, namely, two separate rates, necessarily so, because the rate for the inner district was a general rate, and the rate for the outer district a highway rate only. That being so, it is subject to the observation that the outer district is not represented on the local board; but it is quite conceivable that the Legislature may have intended to trust the local board, constituted as it is, and to give them the authority in question. The language used seems to me as clearly as possible to show that the intention was that, for purposes of highways, the two districts should be placed under the control of the urban sanitary authority, which represented only one district. I anticipated an argument from Mr. White in favour of his contention that the words, “as surveyor of highways,” meant “in the same manner as a surveyor of highways would have made a rate if this Act had never passed.” I cannot think this is their meaning. They clearly mean, “as being surveyor of highways by virtue of sect. 144.” The rate appears to have been properly made by the proper authority, and the judgment of the Quarter Sessions was right.

*Appeal dismissed.*

Solicitors for the appellants, *Emmet and Co.*, for *Wavell and Co.*, Halifax.

Solicitors for the respondents, *Bower, Cotton, and Bower*, for *J. W. Longbottom*, Halifax.

Saturday, April 21, 1883.

(Before FIELD and MATHEW, JJ.)

FIELDING (app.) v. HAWLEY (resp.). (a)

*Copyright—Designs—Article in two parts—Registration mark on one part only—Piracy—Copyright (Designs, &c.) Act 1842 (5 & 6 Vict. c. 100), ss. 3, 4, 7, 8.*

*A butter dish, consisting of a dish and a cover, is one “article of manufacture” within the Copyright (Designs) Act 1842, and it is a sufficient compliance with the Act to stamp the registration mark upon the dish alone, though the cover was separate from and not any way attached to the dish, and though the entire design was upon the cover.*

*Seemle, if during the process of manufacture of the article part of the registration mark thereon becomes illegible, the proprietor of the registered design is not thereby deprived of the protection of the statute.*

THIS was a case stated by the stipendiary magistrate for the borough of Stoke-upon-Trent.

The following were the material facts:—

The complainants, Messrs. Fielding, manufacturers of earthenware, preferred a complaint against the defendants, Messrs. Hawley and Co., also manufacturers of earthenware, for having applied to an article of earthenware, called a teapot, a fraudulent imitation of a registered design, of which the complainants were the proprietors, contrary to the provisions of 5 & 6 Vict. c. 100.

(a) Reported by W. P. EVERSLY, Esq., Barrister-at-Law.

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At the hearing of the summons it was proved that the complainants had invented a new and original design, applicable to earthenware, which was duly registered in June 1881 under the statute, and had a certain mark assigned to it.

After the date of registration the defendants copied the complainants' design, and applied it to various articles of earthenware manufactured and sold by them, including a teapot.

After the registration of the design, the complainants manufactured and offered for sale the following articles to which the registered design had been applied :

1. A bread dish, on which the registration mark was not wholly legible, the mark having become partly illegible while the dish was being fired and glazed. [A person producing at the Registration Office in London a perfect copy of the registration mark could ascertain whether the design was registered, the name of the proprietors, and the date of registration, &c.]

2. A butter dish in two parts, viz., a dish and a cover. The dish was legibly stamped with the registration mark, but there was not and never had been any such mark upon the cover, which was separate and apart from the dish, and not in any way attached thereto.

The entire design was upon the cover, the dish having only a roughened edge. Any of the covers containing the design could be used with any of the dishes interchangeably, or with any other dishes of the same shape and size. Generally the dishes and covers would be sold together, but they might be sold separately.

It was contended on behalf of the complainants that anyone purchasing an article with an imperfect mark might, on inquiry, see other articles perfectly stamped.

It was objected on behalf of the defendants :

1. That as a material part of the registration mark impressed on the bread dish was not legible, the complainants were wholly disentitled to the protection afforded by the Act, not only in respect of the article so imperfectly marked, but in respect of any other article ornamented with the said design, and so could not recover a penalty for any infringement of their registered design.

2. That the butter dish and cover were two separate articles, so that each ought to have been stamped with the registration mark, and that as there was no such mark on the cover, this circumstance disentitled the complainants to the protection given by the statute.

The magistrate gave no opinion on the first objection, but held that the dish and the cover were two articles, and that as the full design was applied to the cover it ought to have been stamped, and dismissed the complaint.

The questions for the opinion of the court were :

1. Whether the fact that on some one or more of the articles, having on them the registered design, manufactured and sold by the complainants after registration, a material portion of the figures and letters in the mark were illegible, is sufficient to deprive the complainants of the protection of the statute.

2. Whether the omission to place the registration mark on the cover of the butter dish deprived the complainants of the protection of the statute and warranted the dismissal of the complaint.

By sect. 3 of 5 & 6 Vict. c. 100 :

And with regard to any new and original design . . . . . the proprietor of every such design not previously published either within the United Kingdom of

Great Britain and Ireland or elsewhere, shall have the sole right to apply the same to any articles of manufacture . . . . . provided the same be done within the United Kingdom of Great Britain and Ireland, for the respective terms hereinafter mentioned, such respective terms to be computed from the time of such design being registered according to this Act; (that is to say,)

In respect of the application of any such design to ornamenting any article of manufacture contained in the first, second, third, fourth, &c., . . . . . of the classes following, for the term of three years: . . . . .

Class 4.—Articles of manufacture composed wholly or chiefly of earthenware.

By sect. 4 :

Provided always that no person shall be entitled to the benefit of this Act, with regard to any design in respect of the application thereof to ornamenting any article of manufacture . . . . . unless such design have, before publication thereof, been registered according to this Act, and unless at the time of such registration such design have been registered in respect of the application thereof to some or one of the articles of manufacture . . . . . comprised in the above-mentioned classes, by specifying the number of the class in respect of which such registration is made, and unless the name of such person shall be registered according to this Act as a proprietor of such design, and unless, after publication of such design, every such article of manufacture . . . . . published by him, hath thereon, if the article of manufacture be a woven fabric for printing, at one end thereof, or, if of any other kind . . . . . at the end or edge thereof, or other convenient place thereon, the letters "Rd," together with such number or letter, or number and letter, and in such form as shall correspond with the date of the registration of such design according to the registry of designs in that behalf, &c.

By sect. 7 :

And for preventing the piracy of registered designs, be it enacted that during the existence of any such right to the entire or partial use of any such design no person shall apply any such design, or any fraudulent imitation thereof for the purpose of sale, to the ornamenting of any article of manufacture, &c.

By sect. 8 :

That if any person commit any such act he shall, for every offence, forfeit a sum not less than 5*l.*, and not exceeding 30*l.*, to the proprietor of the design in respect of whose right such offence has been committed.

*Acland* for the appellants.—As to the second question, that relates to the butter dish : The dish is only an article of manufacture, consisting of two parts. Instances of a similar character are, a soup tureen and a teapot. It can hardly be said that the cover in those cases is a separate article. The magistrate has not found that the butter dish was not stamped on a convenient place.

*J. J. Powell*, Q.C. for the respondents.—The dish and cover, composing the butter dish, may no doubt be used together, but they are two articles of manufacture. A cup and saucer are two articles; they may be bought separately and used separately. Another instance is a watch and key. In the case of *Sarasin v. Hamell* (7 L. T. Rep. N. S. 660; 32 L. J. 380, Ch.) the Master of the Rolls says in effect that each separate piece must bear the registration mark. In *Heywood v. Potter* (20 L. T. Rep. O. S. 207; 22 L. J. 133, Q. B.), the court held that patterns of paper-hangings, cut off from larger pieces bearing the registration mark, must also bear the registration mark. These cases are expressly applicable, and the decision of the magistrate was right.

The first question was not argued.

*FIELD, J.*—Two questions have been asked us in this case. The first question has not been argued

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before us; but it may be useful to say something upon it by way of observation only, and not as a decision on the point. Suppose that out of a certain number of articles, one or more came out of the process of firing with a mark not perfectly legible, I should be very slow to say that the proprietor was thereby deprived of the protection of the statute. It would be well to consider whether the Act intended an accidental thing of that sort to have any such effect. As regards the second question, what is meant by the butter dish? It is referred to just before in the second objection as "the butter dish and cover;" and further back it is called "a butter dish in two parts, viz., a dish and cover." That is the way it is described in the case. We must now look at the Act. Its object is to secure that potters, and lay persons as well, may know whether any particular design belongs to anyone else. The Act says you shall not have the right to these penalties unless the distinguishing registration mark is on each article of manufacture. Sect. 4 says: [The learned Judge read the section.] The mark may be put on by means of a label. Is it contended that there must be a label on each cover as well as dish? What is an "article of manufacture?" What have the complainants here manufactured? If they manufactured dishes and covers separately and to be sold separately, probably then there might be two articles of manufacture. A soup tureen and a vegetable dish, though belonging to one dinner set, are clearly two articles of manufacture. The question is, Is it a single article divisible into parts, or are they separate articles? Clearly this was the former. If the magistrate had found that this was a contrivance to make two articles, which were meant to be sold separately, but at the same time to escape from marking them both, then the case would be different. In this case the dish is marked, but not the cover—which is the principal? The dish seems to be so, and it is marked in the usual place, and so the mark is sufficient.

MATHEW, J.—I am of the same opinion. As to the second question, it is impossible for the magistrate's decision to stand, unless Mr. Powell's contention is correct. The statute is intended to protect registered designs in articles of earthenware. Here is a butter dish, consisting of a dish and cover; it is unreasonable to suppose that this is not one article. As to the first question, I should be very slow to hold that the mark was illegible if any part was indistinct.

FIELD, J.—I forgot to allude to the cases cited by Mr. Powell. I admit that if a manufacturer takes a large piece, and cuts it up into smaller pieces for samples or otherwise, then of course each piece must be marked. But these cases do not touch the present case.

*Appeal allowed, and case remitted.*

Solicitors for the complainants, *Wedlake and Letts*, for *Keary and Marshall*, Stoke-upon-Trent.

Solicitors for the defendants, *H. Tyrrell*, for *W. T. Bagnall*, Stoke-upon-Trent.

## COURT OF APPEAL.

April 24, 26, and 27, 1883.

(Before BRETT, M.R., COTTON and BOWEN, L.JJ.)

REG. on the prosecution of THE GUARDIANS OF THE POOR OF MADELEY UNION v. THE GUARDIANS OF THE POOR OF BRIDGNORTH UNION. (a)

*Poor law — Removal — Wife and children — Derivative settlement of husband and father — Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 35.*

*Since the passing of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 35, (b) in an inquiry as to the removal of a pauper, evidence as to the derivative settlement of the pauper's husband or father is in no case admissible.*

*In a question as to the removal of E. H., a pauper, and her three children, aged five years, three years, and one year, from the B. union to the M. union, it was proved that they were the wife and children of W. H., who was the son of J. H. J. H. was born in the parish of M., in the M. union, but had acquired no settlement in his own right. There was no evidence as to the birthplace of W. H., and he had not acquired any settlement in his own right.*

*Held (affirming the decision of the Queen's Bench Division, 47 L. T. Rep. N. S. 301; 9 Q. B. Div. 765), that the Court of Quarter Sessions was right in quashing an order of justices for the removal of E. H. and her children to the M. union.*

THIS was an appeal from the decision of the Queen's Bench Division upon a special case stated by the Recorder of the Borough of Bridgnorth, who had quashed an order made by two justices of that borough for the removal of one Ellen Hughes, a pauper, and her three children, aged five years, three years, and one year respectively, from the Bridgnorth Poor Law Union to the Madeley Poor Law Union. The Queen's Bench Division affirmed the order of the Recorder (this case is reported 47 L. T. Rep. N. S. 301; 9 Q. B. Div. 765), and the Bridgnorth Union appealed to this court.

The special case, so far as is material, was as follows:—

The grounds of removal alleged that the settlement of the paupers, and of William Hughes, the husband of the said Ellen Hughes, was the birth settlement of John Hughes, the father of the said William Hughes. No other settlement either of the said John Hughes or of the said William Hughes, was set up affirmatively by the Madeley Union, in their grounds of appeal, nor did they

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

(b) 39 & 40 Vict. c. 61, s. 35: No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiry into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

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therein allege that the said John Hughes had derived a settlement from his father, or had acquired any other settlement than such birth settlement as aforesaid, before his son, the said William Hughes, had attained the age of sixteen, but they alleged that the said William Hughes was not born nor ever legally settled in the said parish of Madeley; and in their fourth ground of appeal they maintained that the alleged settlement (if any) of the said William Hughes would be a derivative settlement and as such is abolished by Act of Parliament.

The Court held that, upon the reasonable construction of the grounds of appeal, the Bridgnorth Union were not bound to prove more than the birth of the said John Hughes in the parish of Madeley, and that upon such proof the question of law intended to be raised by the Madeley Union would properly arise.

It was proved or admitted on the trial that John Hughes was born in the said parish in the Madeley Union, in or about the year 1822, and acquired no settlement in his own right, that William Hughes was the lawful son of the said John Hughes, and also had acquired no settlement in his own right, and that the paupers Ellen Hughes and her three children were the lawful wife and children of the said William Hughes, and had become chargeable to the Bridgnorth Union.

The Madeley Union called no evidence at the close of the case for the Bridgnorth Union, but submitted as matter of law that it was not sufficient for the latter to prove the place of birth of John Hughes, but that unless they could show affirmatively a legal settlement of the said John Hughes at Madeley, not derived from the fact of his birth there, his son William Hughes must be held to be settled in the place in which he the said William Hughes was born.

The Court quashed the order on the ground that it was in law insufficient to make out a *primâ facie* birth settlement for John Hughes, and that as the Bridgnorth Union had not established a settlement in the parish of Madeley for John Hughes other than a *primâ facie* birth settlement, William Hughes must be held to be settled in the parish of his birth by virtue of the Divided Parishes Act 1876 (39 & 40 Vict. c. 61).

If the Court shall be of opinion that the facts admitted and proved did not establish a settlement for the said William Hughes in the parish of Madeley, then the order of removal aforesaid shall be quashed and the order of sessions confirmed; but if the court shall be of opinion that the facts admitted and proved established a settlement for the said William Hughes in the parish of Madeley, then the said order of removal shall stand confirmed, and the order of sessions quashing the same shall be quashed.

Jelf, Q.C. and Spearman for the appellants.—The only question asked by the Recorder was as to William Hughes's settlement, and the Queen's Bench Division had no jurisdiction to do anything but quash or confirm the order of removal upon the point reserved by the case:

*Reg. v. The Inhabitants of Harbury*, 8 Q. B. 566.

[COTTON, L.J. referred to *Overseers of Walsall v. London and North-Western Railway Company*, 39 L. T. Rep. N. S. 433; 4 App. Cas. 30.] Both the enacting part of sect. 35 of 39 & 40 Vict. c. 61 and the

exceptions established thereby are retrospective, and therefore William Hughes took his father's settlement:

*Great Yarmouth v. Clerk of the Peace of City of London*, 37 L. T. Rep. N. S. 712; 3 Q. B. Div. 232; *Guardians of Westbury-on-Severn v. Overseers of Barrow-in-Furness*, 38 L. T. Rep. N. S. 315; 3 Ex. Div. 88.

In the former of these cases it was decided that the wife consequently took her father-in-law's settlement through her husband; and in *Hollingbourn Union v. West Ham Union* (44 L. T. Rep. N. S. 520; 6 Q. B. Div. 580) this was admitted, and the Court held that the children under sixteen took the same settlement. That case shows that the latter part of sect. 35, only forbids an independent inquiry as to the derivative settlement of the parent in order to find the settlement of the child; but if the settlement of the parent has been already ascertained, the section does not forbid the use of that settlement in a question as to the removal of the child. Upon this ground the cases of *Guardians of Woodstock Union v. Churchwardens of St. Pancras* (39 L. T. Rep. N. S. 256; 4 Q. B. Div. 1) and *Reg. v. Guardians of Portsea Union* (7 Q. B. Div. 384; 50 L. J. 144, M.C.) are distinguishable.

*Bosanquet, Q.C.* and *Kenyon* for the respondents.—[The COURT intimated that they did not require any argument upon the point as to the jurisdiction of the Divisional Court.] The appellants have to make out that William Hughes was settled in Madeley. [BRETT, M.R.—I think the real question is, was evidence of John Hughes' settlement admissible in order to prove the settlement of William Hughes?] To do this, they must show that William Hughes is within the exception "in the case of a child" in the first part of sect. 35. We say that it is impossible, when you are trying the case of a wife and children, to say that the husband and father is "a child" within the meaning of the section. The last part of the section means that where you have taken away the derivative settlement of a child, and you would have difficulty in settling it, it is to go to the place of its birth. [BOWEN, L.J.—Why should it not apply where there is a difficulty in ascertaining the father's settlement, and the child is between sixteen and twenty-one?] We admit that some of the cases are against us; but in *Great Yarmouth v. City of London* (sup.) the point was rather assumed than argued, and in *Guardians of Hollingbourn v. Guardians of West Ham* (sup.) the view taken by Lindley, J. is in our favour.

April 27.—BRETT, M.R.—In this case an order was made by justices for the removal of Ellen Hughes and her three children, aged respectively three years, five years, and one year, from the Bridgnorth Union to the Madeley Union. That order was brought before the Recorder of the Borough of Bridgnorth, and objected to upon the ground that it was founded upon evidence, which had been taken and admitted by the justices, of the settlement of John Hughes, the grandfather of the children and the father of William Hughes, the husband of the woman. Upon that the Recorder quashed the order of removal, but stated a case. It seems to me that the difficulty which arose in his mind was that which has been argued here and in the Queen's Bench Division, viz.,



whether it was right to have founded the order of removal upon evidence of the settlement of John Hughes, the grandfather. The question asked of the Divisional Court in the special case was whether it was right to have received and acted upon such evidence, and that, I think, is the question, and for the purpose of judicial decision the only question, we have to decide in this case. There is no doubt that that question so stated raises this further question—What is the proper construction with regard to that point of sect. 35 of the Divided Parishes Act 1876? In coming to a conclusion upon that, one would have been glad to understand the whole section, because if one had been able to do so, it would have enabled one to see whether there was any hidden difficulty in the point we are called upon to decide. I think we have all made strenuous efforts to see whether we could understand the section as a whole, but even after the able arguments on both sides I could not gather (I am speaking now only for myself) that the counsel on either side affected to understand this section. I must confess that I cannot understand it, and do not pretend to do so. I am now trying if I can understand it so far as is necessary for the determination of the point in question. I have come to the conclusion that I do understand it to this extent—that in no case of making an order of removal, after the passing of this statute, is it possible to say that it is right to inquire into the settlement of a grandfather of children, or a father of a woman's husband? If it is impossible for that to be a matter of inquiry in any case, it cannot be so here. If that is true, upon the question asked we have only to answer that it was not right to have admitted the evidence in this case, and therefore the Recorder was right in quashing the order of removal, and the Queen's Bench Division were right in upholding his decision. I think it was admitted by Mr. Jelf that he could not maintain his point unless we were prepared to say that the word "child" in sect. 35 comprises every one who has been a child. When the case is put thus, I have no doubt that that is not the meaning to be given to the word. The section begins thus: "No person shall be deemed to have derived a settlement from any other person." This is an abrupt commencement to the section, and there is no introduction to say whether that is with regard to the law of removal, or what it has reference to. It is obvious, therefore, that you must apply it by the introduction of the following words: In any question of the removal of a pauper no person shall be deemed to have derived a settlement, &c. It seems to me that the person who is there meant is the person whose removal is in question—i.e., the pauper. If that stood alone, therefore, and if there were no exception, the section would in effect read thus: Wherever you have to enter upon the question of the removal of a pauper, no such pauper shall be deemed to have derived a settlement from any other person. The section says: "whether by parentage, estate, or otherwise;" but we will leave out these words. Now, we come to the words, "Except in the case of a wife from her husband." The wife, if she had been a person whose removal was in question, would have come within the terms "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or

otherwise"—for "estate" is a large word, and it must include marriage. This exception shows that in a case where the removal of a wife is in question she may derive a settlement from her husband. There it stops. The section goes on, "and in the case of a child under the age of sixteen." If that were the only exception, a child of over sixteen is not excepted. The section proceeds, "which child"—here again you must read the section as meaning in the case of a question as to the removal of a child under sixteen—"shall take the settlement of its father or of its widowed mother, as the case may be, up to that age." Therefore, here again you are shut down to the father or the widowed mother, just as in the case of a wife you are shut down to the husband. If the matter had stopped there, it seems to me that in the case of anyone over sixteen, that creature (I was going to say person, and this shows the difficulty of construing the section), not being within either of the exceptions, would have been a "person" within the beginning of the section. In that case you would have been confined by the beginning of the section to saying, that that person shall not be deemed to have derived a settlement from any other person. But put in, though I agree, clumsily, and perhaps, during the passing of the enactment, you have this creature of over sixteen not within the exceptions already stated, who is dealt with as follows: "and shall retain the settlement so taken until it shall acquire another." There the section deals with the case of the creature after he is sixteen, and from the time he is of that age until he has acquired another settlement. You have probably brought him within the exceptions by those words, "shall retain the settlement so taken." What is the settlement "so taken"? It is a settlement from the husband, the father, or the widowed mother. But it goes no farther, and it does not entitle you any more than the other exceptions did to go to the husband's father, or the grandfather. What is the meaning then of what we have called the third part of the section? I confess I cannot see to what cases it applies; but I can see this, that it does not enable you to go to the grandfather. On the contrary, whatever case that part of the section does apply to, it shuts you off again at the father, or even short of the father; because it deals with the case where "it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent." Therefore it forbids you to inquire into the derivative settlement of such parent. If I may state my present view of that part of the section, I am inclined to think it applies to cases of children of over sixteen where you cannot prove the settlement of the father, and therefore cannot show what settlement they retain; and where the circumstances are such that under the old law you would have been obliged to go to a derivative settlement. This enactment shuts you off from a derivative settlement in those cases, and says the persons as to whom the question of removal arises are to be deemed to be settled in the parish where they were born. Therefore; in no case under this section can you ever go beyond the father or the husband of the person who is to be removed. You cannot go to the father of the husband, or the grandfather of the child. In this case it is sought to inquire as to the father of the woman's

husband and the grandfather of the children, and the question is whether this can be gone into. In my opinion it cannot, and therefore the evidence was not properly admitted by the justices, and the Recorder was right in quashing the order of removal. What effect this judgment may have upon other questions, such as the removal of children under nurture from their mother, it is not for me to say at present. Neither is it necessary for me to solve the many questions that have been raised in the course of the argument. It is not necessary to solve the question of what will become of this woman or of these children, if by shutting out any inquiry as to the settlement of the grandfather you cannot prove the settlement of the father. The question as to what is to be done in such a case is not raised at present, and therefore it is not the subject-matter of decision. Assuming the evidence to be that the husband is alive, but there is an incapacity to prove what his settlement is, questions whether the mother and children are to remain where they are, or whether they are to be removed elsewhere, or whether they can be separated or not, are all questions which it is not necessary to decide in this case. I have given my view of the construction of the Act of Parliament with regard to the point before us. If that view is inconsistent with any decided case, of course I say, as I am bound to do when I differ, that I cannot agree with it.

CORROD, L.J.—I am of the same opinion. The question that we have to answer in determining whether this order of removal ought to be quashed is, whether the facts admitted and proved established a settlement of William Hughes in the parish of Madeley. Now, the only evidence, and the only admission in order to make out a settlement was the fact that John Hughes, the father of William Hughes, had been born there; that is to say, a derivative settlement was proved in the case of William Hughes. But if the true construction of the Act of Parliament be, as I think it is, that evidence of derivative settlement could not be given, and that the derivative settlement could not be entered into, then the order for removal was wrong. Now, the 35th section begins by a general clause. [His Lordship read the section down to "acquires another settlement."] What has been done here is to hold that William Hughes had derived a settlement from his father, and to enter into his derivative settlement, and that is prohibited by the clause in the Act of Parliament, unless it could be shown that there is something in the exception which follows which enables that derivative settlement to be entered into. Now, what is it? "Except in the case of a wife from her husband." It is not that when the question of a wife's settlement is considered, then the previous enactment is to be altogether disregarded, but, as I understand it, that in the case of a wife when her removal is under consideration, she shall derive a settlement from her husband, and it goes no farther. It does not in any way enable her husband's derivative settlement to be entered into. And then it goes on, "and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be." That would seem not in any way to remove the restriction as to going into a derivative settlement, except as regards the child whose case is under consideration; and I will consider presently whether it is to be re-

stricted to the consideration of the case of a child when under sixteen. But the argument, really, of Mr. Jelf is this, that he could go into the consideration of the derivative settlement of William Hughes because he once was a child, and that you may consider what settlement he had when he was a child. In my opinion it would be using forced language to say that you can consider William Hughes, who was the father of a family, as within this exception, which is pointed, I think, to those who not only can be properly called children at the time when the question of derivative settlement arises, but also when the question arises as to their removal. It would be quite wrong and a straining of English language to hold that William Hughes could at this time be said to be a child within the meaning of this Act. It extends undoubtedly to children over sixteen; but would it be right, according to ordinary English language, to say that a man of fifty or sixty, both of whose parents were dead, and who was the head of a family instead of a member of a family under a father or mother, could be considered as a child within the meaning of this Act of Parliament? It has been pointed out, and I do not see the answer to it, that, if that argument is right, you could go into the derivative settlement of any member of a family. It would be in effect to repeal the enactment, which says that no person shall be deemed to have derived a settlement by parentage. It would entirely, so far as I can see, render that enactment inoperative, and would introduce, notwithstanding its provisions, all the difficulties and expense which arose from the question of a derivative settlement being entered into; because I do not see where you are to stop. It is true, I think (although it is not necessary here to decide it), that a child may derive its settlement from its father, even though it is not under sixteen. That, I think, appears from the fact that the first part of the section as well as the third part deals with children who are not under sixteen. Whether the third part extends to children under sixteen as well it is unnecessary here to decide, but undoubtedly it will apply to children who are above sixteen, and it is there contemplated that they shall derive their settlement from the father. But it is also clearly shown that the intention of the Legislature was that the derivative settlement of that father was not to be inquired into. I do not see that this third clause of itself provides for a derivative settlement from the father being entered into; it considers that is already provided for. Therefore, in my opinion, it helps the construction which I have put upon the previous part of the section, that, by saying if it cannot be shown what settlement such child or female derived from the parent, the third clause assumes that can be entered into without inquiring into the derivative settlement of such parent. It does not say that such derivative settlement shall not be entered into, because the power of inquiring into the derivative settlement has been already taken away by the previous clause. This assumes that that is so, and then it says what is to be done as regards fixing the settlement of the child, namely, that it is to be the place of its birth. That, I think, is the true construction of this clause as regards the right of going into the derivative settlement of William Hughes. In my opinion the Act of Parliament

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takes away that power, and therefore this order was rightly quashed. Now I cannot but see that the opinion which I believe we all have formed on this section is inconsistent with certain cases that have been decided. In some of them the point does not seem to have been much discussed. In none of them does it seem to have been fully discussed on the lines on which this case has been argued, and I can only say, notwithstanding the respect I entertain for the learned judges who decided those cases, that I am bound to express a different opinion from that which they held in those cases.

BOWEN, L.J.—I am of the same opinion, and on the construction of the Act I agree with what has been said by the Master of the Rolls, and Cotton, L.J. I would only add one word about the way in which this question comes before us. I think, perhaps, there may be something more in Mr. Jelf's argument than, in the form in which this case comes before us, seems to be thought by the other members of the court. I am not sure that the Recorder in this case had got before him the point of law exactly as we have had it discussed. I am not perfectly certain that he has framed his question in that view of the law, but I am confident that, in whatever way he framed his question, and in whatever way he decided the case, it would be absolutely necessary for him to discuss and to decide, for good or evil, the question and construction of the statute which we have had discussed. I think it would be idle for us to be led aside from giving judgment on the real effect and construction of the statute, by a suggestion that the learned Recorder may not have put in the right way the question which certainly arises upon this case. I should have refused if I was asked by any recorder, or by anybody else, to give an answer to a question of this kind: What would be the law if the law was not what it is? or to be told that I must assume the construction of the statute to be what I conceive it is not, and to answer the question on that basis. Being against Mr. Jelf on the construction of the statute, if we were to be embarrassed by his difficulty about the form of the case we would be really either attempting to answer an impossible question of that sort, or else going through the form of sending back the case to be re-stated by the Recorder, and to come back again upon exactly the same point. Because, as far as the Recorder is concerned, he would state the case, if it was sent back to him, in exactly the same way as we think it ought to be stated. I think one would be playing with the form of pleading to go through that process, and I have no hesitation in saying that the Court ought, as we do, to break through all those technicalities if they exist, and come to the root of the matter, and decide on the construction of the Act and the validity of the order of the Court of Quarter Sessions. As I have said, I agree in the construction put upon the section by the Master of the Rolls and by Cotton, L.J. The first clause of sect. 35 destroys, in my opinion, the possibility of receiving the evidence of the settlement of the grandfather of the children, or of founding any order upon it. I am not sure that the meaning of the third clause may not be that which crossed my mind in the course of the argument, and if the case arises again that may be as good a meaning as any to place upon it, but I am satisfied that meaning will not help

Mr. Jelf's argument. On the contrary, if Mr. Jelf's argument was not already destroyed by the first clause on the plain meaning of the words, it would be destroyed by the third clause. It is not really necessary, however, to decide what the third clause does mean if it does not help Mr. Jelf.

Solicitors for the appellants, *Sole, Turner, and Knight*, for *Cooper and Haslewood*, Bridgnorth.

Solicitors for the respondents, *O. E. and H. Cuff*, for *G. Burd*, Ironbridge.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

March 6 and 8, 1883.

(Before GROVE, LOPES, and MATHEW, JJ.)

CLARK AND OTHERS (pets.) v. WALLOND (resp.). (a)

*Municipal election petition—Practice—Amendment of petition—Jurisdiction of High Court—“Subject to this Act”—Municipal Corporation Act 1882 (45 & 46 Vict. c. 50), s. 100, sub-sect. 4.*

*By the 4th sub-section of the 88th section of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) a municipal election petition shall be presented, except in the case of matters arising after the election, within twenty-one days after the day on which the election was held; and by the 89th section other times are prescribed depending on the date of the presentation of the petition.*

*By the 4th sub-section of the 100th section “the High Court shall, subject to this Act, have the same powers, jurisdiction, and authority with respect to a municipal election petition and the proceedings thereon as if the petition were an ordinary action within its jurisdiction.”*

*Held, that by reason of the words “subject to this Act,” the 4th sub-section of the 100th section gives no jurisdiction to the High Court to allow more than twenty-one days after the election, an amendment in a municipal election petition adding the words “and treating” to the grounds on which the petition questions the election, inasmuch as the petition would thereby be made a new petition, which would thus be presented after the time prescribed by the 4th sub-section of the 88th section.*

THIS was an appeal from an order made by Lopes, J. at chambers in a municipal election petition allowing the petitioners to amend their petition more than twenty-one days after the date of the election by adding the words “and treating” after the word “bribery” in that part of the petition which set forth the ground on which the election was questioned.

*H. Morten* for the respondent.—By the 4th sub-section of the 88th section of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) it is provided that an election petition shall be presented within twenty-one days after the day on which the election is held, and by the 4th sub-section of the 100th section, that the High Court shall, subject to this Act, have the same powers, jurisdiction, and authority with respect to a municipal election petition, and the proceedings thereon, as if the petition were an ordinary action within its jurisdiction. The question turns on these two sub-sections. The power of the court to amend municipal election petitions is limited

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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by the words "subject to this Act," and as the addition of the words "and treating" is equivalent to the presentation of a fresh petition after the expiration of twenty-one days, and therefore contrary to the 4th sub-section of the 88th section, it was beyond the authority of the learned judge to allow such an amendment. In *Pickering v. Startin* (28 L. T. Rep. N. S. 111), which will be relied on by the petitioner, the 5th sub-section of the 21st section of the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60), which is similar to the 4th sub-section of the 100th section of the Municipal Corporations Act 1882, does not appear to have been referred to in the argument, and since the point which arises here does not seem to have been discussed, that case is of no value. In *Maude v. Lowley* (29 L. T. Rep. N. S. 924; L. Rep. 9 C. P. 167) the point was raised and decided in favour of the respondent. [LOPES, J.—The case of *Pickering v. Startin* does not seem to have been cited in that case.] No, but Honyman, J., in that case, suggests the very point which arises here, as being involved in the decision in that case, and Keating, J., one of the judges in *Pickering v. Startin*, was also one of the court in *Maude v. Lowley*, so that the court must have been aware of the case and disregarded it. There is nothing in *Aldridge v. Hirst* (35 L. T. Rep. N. S. 156; 1 C. P. Div. 410) to conflict with *Maude v. Lowley*. The court merely declined to discuss the question as to whether it had power or not to make amendments in petitions, and the reporter in the headnote to the report of that case in the Law Reports, which had considerable weight with the learned judge at chambers, has wrongly stated the effect of the judgment of the court.

*H. F. Dickens* for the petitioners.—This amendment was rightly made, and is within the power of the court. It is incorrect to say that this point was not before the court in *Pickering v. Startin* (*ubi sup.*). It appears clearly upon the face of the report that the learned counsel for the respondent there took three points, the third being that the court had no power to make these amendments, and the court must have overruled this point to arrive at the decision at which it did. In *Maude v. Lowley* (*ubi sup.*) it was stated by counsel that such an amendment had never yet been allowed, so that *Pickering v. Startin* was obviously not before the court. There is no definite provision in the Act taking away the power of amendment it was the object of the 4th sub-section of the 100th section to give. [GROVE, J.—If this amendment is made, what is to be done with respect to the machinery of sects. 88-90, the whole of which rests on specified times calculated from the date of presentation of the petition?] That is not affected. The petitioner must be satisfied within twenty-one days that he has some ground on which to question the election, and must give notice of it, but it is not necessary for him to give notice of everything. [GROVE, J.—But then the real matter disqualifying the candidate might be inserted after the expiration of twenty-one days.] It is a question for the exercise of judicial discretion as to whether an amendment is to be allowed or not. [MATHEW, J.—By the 87th and 88th sections the grounds of the petition are to be specified; the 4th sub-section of the 100th section must be taken subject to this as well as the other provisions of the Act.] These are the strongest words giving the jurisdiction,

and there is nothing in sects. 88-90 equally strong to take it away.

*Morten* in reply.—The case of *Wells v. Wren* (5 C. P. Div. 546) gives the same construction to the words "subject to the provisions of the Act" as that adopted by the court in *Maude v. Lowley*.

GROVE, J.—This is an appeal from an order made by my brother Lopes at chambers allowing an amendment in a municipal election petition after the time had expired within which the Act prescribes that the petition should be presented, namely, twenty-one days, and of course the same principle would apply to the period of twenty-eight days allowed in certain cases. The amendment in the petition related to the grounds by which the petition alleged the elected candidate to be disqualified. The ground originally stated was bribery, and the amendment allowed added the words "and treating," and the question is as to whether my brother Lopes had jurisdiction to make the amendment, as we shall not interfere with his discretion in so doing if the jurisdiction existed. Now the ground on which the learned judge allowed the amendment was founded on the 4th sub-section of the 100th section of the Municipal Corporations Act 1882, the words of which are, "the High Court shall, subject to this Act, have the same powers, jurisdiction, and authority with respect to a municipal election petition and the proceedings thereon, as if the petition were an ordinary action within its jurisdiction." My brother Lopes thought that these words gave him plenary authority, because in an ordinary action before the High Court a judge may amend at any time. Upon consideration of all the cases brought before us in argument, and on reading the section of the Act, it seems to me that this appeal must be allowed. It will be observed that the words are "subject to this Act," and I suppose it will be admitted that these words cannot be struck out, and their meaning must be "subject to those provisions in the Act which the court would deem materially inconsistent with the powers exercised by the High Court in an ordinary action." We must therefore look into the Act to see if there is anything repugnant to the exercise of the ordinary authority of the court. The 87th section says that a municipal election may be questioned by an election petition on four grounds, viz. (1) that the election was to the borough or ward wholly avoided by general bribery, treating, undue influence, or personation; or (2) that the election was avoided by corrupt practices or offences against that part of the Act committed at the election; or (3) that the person whose election is questioned was at the time of the election disqualified; or (4) that he was not duly elected by a majority of lawful votes; and it also says that a municipal election shall not be questioned on any of those grounds except by an election petition. Then the 4th sub-section of the 88th section says, "It (i.e. the petition) shall be presented within twenty-one days after the day on which the election was held, except that if it complains of the election on the ground of corrupt practices, and specifically alleges that a payment of money or other reward has been made or promised since the election by a person elected at the election, or on his account, or with his privity, in pursuance or furtherance

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of such corrupt practices, it may be presented at any time within twenty-eight days after the date of the alleged payment or promise, whether or not any other petition against that person has been previously presented or tried." Now that would appear at once to be an imperative provision of the Act, and there follow in the 89th section other similar provisions. Not only does the Act say the petition shall be presented within twenty-one days, but also (sect. 89, sub-sect. 1), "at the time of presenting an election petition, or within three days afterwards, the petitioner shall give security for all costs, charges, and expenses which may become payable by him to any witness summoned on his behalf, or to any respondent." Here, then, is a provision to be fulfilled within three days of the twenty-one days. Then in the 3rd sub-section we have: "Within five days after the presentation of the petition, the petitioner shall in the prescribed manner serve on the respondent a notice of the presentation of the petition, and of the nature of the proposed security, and a copy of the petition;" and in the 4th sub-section: "Within five days after the service of the notice the respondent may object in writing to any recognisance on the ground that any surety is insufficient or is dead, or cannot be found or ascertained for want of a sufficient description in the recognisance, or that a person named in the recognisance has not duly acknowledged the same;" and in the 5th sub-section: "If the objection is allowed, the petitioner may, within a further prescribed time not exceeding five days, remove it by a deposit in the prescribed manner of such sum of money as will, in the opinion of the court or officer having cognisance of the matter, make the security sufficient." So that those three sub-sections provide for three periods of five days each within which the question of security for costs is to be settled. Then comes the 90th section, which says that "On the expiration of the time limited for making objections," or, after objection made, on the objection being disallowed or removed, whichever last happens, the petition shall be at issue;" and then follow provisions as to what is to be done when the petition is at issue, viz., that the prescribed officer shall make a list of all election petitions at issue, and other provisions. Now, all these provisions I have alluded to fix a time prescribed by a certain number of days, all these times being based on the twenty-one days within which the petition must be presented. These it appears to me are material provisions of the Act, and when the words "subject to this Act" are used we cannot disregard them. Otherwise, if we were to disregard them and allow this amendment, all these provisions would be dislocated, for in order to comply with the Act we should have to give further time to the sitting member to object to the petitioner's security for the further costs which might become payable by him in consequence of the amendment, and the result would be that the same petition would be at issue at two different times, first, as to the original allegations, and afterwards at a different time as to the further allegations allowed by the amendment. There is no provision made in the Act for such a state of affairs, and, practically, such a course would extend all these provisions, for which a limit of time is prescribed, to an unnamed time. To my mind this is a formidable and fatal objection to the allowance of

this amendment. It is said that such amendments are made in statements of claim. That may be so, and as far as any amendment, such as is usually made in a statement of claim, can consistently with the provisions of this Act be made in a municipal election petition, I have no doubt that the court has jurisdiction to allow such an amendment. I give no opinion as to whether an allegation can be withdrawn. That, it must be remembered, would not conflict with any section, but I do not think it is at all material to the present question, because in any case, if notice is given to the other side that it is not intended to proceed with the petition, the judge would certainly take that into consideration on the question of costs. I do not, however, think the point material, and I therefore give no opinion. My judgment is based on the fact that a new charge is added by this amendment, and thereby the petition is made a new petition, the charge being one which goes beyond that preferred by the original petition. It is also based on the ground that the words "subject to this Act" involve the necessity of looking through the Act before making an amendment to see whether there is anything in the Act with which the amendment would be inconsistent. These words "subject to the Act" have received judicial construction in other cases. I may cite the case of *Parsons v. Tinkling* (35 L. T. Rep. N. S. 851; 2 O. P. Div. 119), in which it was held that the words "subject to the provisions of this Act" at the beginning of Order LV. repealed the previous statutes as to costs, except such as were expressly preserved by sect. 67 of the Judicature Act 1873; and again in the case of *Wells v. Wren* (5 O. P. Div. 546) the same words occurring in the 2nd section of the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125) were duly given effect to. Now, on the point before us there are two cases, the first being that of *Pickering v. Startin* (28 L. T. Rep. N. S. 111), where the decision was adverse to that to which I have come; but, as the learned counsel for the plaintiff contended in argument, the question raised in this case was not considered by the court there. In the second case, however, that of *Maude v. Lowley* (29 L. T. Rep. N. S. 924; L. Rep. 9 C. P. 165), the point was considered and decided by Lord Coleridge, C.J. and three other judges, who came to the same decision I am now pronouncing. The importance of that case is, that the point was adverted to and formed a ground of the decision, but objection is taken to it on the ground that it does not appear that the earlier case of *Pickering v. Startin* was ever brought before the court. Still the section in question was discussed, and even if my opinion of the point differed from that of the court which decided *Maude v. Lowley*, I should, in spite of *Pickering v. Startin*, consider myself bound by that case. As to the point itself, the inconvenience of disallowing this amendment was strongly pressed upon us in argument, but, although there can be no doubt that sometimes the argument *ab inconvenienti* may be of use where the words of a statute are capable of two constructions, it is not so where the words are plain. It was said that a petitioner may not be informed immediately of diver acts of corruption committed by the other side; but, on the other hand, an elected member of a constituency must not always be kept in suspense, and it is reasonable that the time for

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preferring charges against him should be limited. The arguments, therefore, derived from the convenience and inconvenience of the respective courses may be set off the one against the other, and that being so, to my mind the meaning of the statute is reasonably clear, and I think that it was the intention of the Legislature to fix a rigid limit of twenty-one days for the presentation of petitions, and that therefore this appeal must be allowed.

LOPES, J.—This is a petition against an order of mine made at chambers allowing a municipal election petition to be amended by adding the words "and treating" to the original ground of the petition. Since making that order, in the course of the argument in this case, the case of *Maude v. Lowley* (29 L. T. Rep. N. S. 924; L. Rep. 9 C. P. 165) has been brought to my attention. The head-note in that case is to the effect that a petition against the election of a town councillor cannot, after the expiration of the twenty-one days limited by sect. 13, sub-sect. 2, for its presentation, be amended by the introduction of a substantially new charge. Now that is the present case; in fact, it is remarkable how near the case altogether comes to the present, and Honyman, J., in his judgment in that case, says: "I am of the same opinion. There is nothing in the Act or in the rules framed in pursuance of it to warrant this amendment. The 7th section requires the petition to be presented within twenty-one days after the election. Here a petition was presented in time, charging the employment as paid canvassers of persons on the register of burgesses for the north ward of the borough. After the expiration of the twenty-one days, the petitioners seek to add a new charge, viz., the employment as paid canvassers of persons who are on the register of burgesses for other wards in the borough. I think that cannot be allowed. Suppose a petition to allege bribery only, could the petitioners be allowed afterwards to add a charge of treating?" These words must have a very strong bearing on the present case, since it appears that the very point now raised before us was raised in that case. But it is said that the case of *Pickering v. Startin* (28 L. T. Rep. N. S. 111) was not cited in that case or the decision would have been different. Whether it was or was not cited, I do not know; it is true that no mention of it appears upon the face of the reports of *Maude v. Lowley*, but it is quite clear upon them that Keating, J., who was one of the judges who decided *Pickering v. Startin*, was also a member of the court in *Maude v. Lowley*, and entirely concurred with the decision there arrived at. This seems to me to dispose entirely of the objection founded upon *Pickering v. Startin*. When I gave my decision at chambers I remember that I relied chiefly on the case of *Aldridge v. Hirst* (L. T. Rep. N. S. 156; L. Rep. 1 C. P. Div. 410), the head-note to which case runs: "This court will not amend an election petition by striking out, after the lapse of the time limited by the Act for presenting it, that part of the prayer of the petition which claims the seat for the petitioner (an unsuccessful candidate), and the allegations applying to a scrutiny which would be dependent thereon, inasmuch as this would affect the rights of the constituency. Practice of election committees in this respect followed. *Semble*, that it is competent to this court to amend an election petition at any

time by striking out allegations therein, where it is satisfied that no injurious result, or a beneficial one, will follow; or by adding matters discovered after the filing of the petition." It was on the authority of that head-note that I allowed this amendment, but it will be seen on reference to the judgments that that proposition is not supported by them. All that Grove, J. says is: "We by no means decide that this court has no power to make amendments in petitions, provided it sees that no injurious or unjust result, or that a beneficial result, will follow. In *Pickering v. Startin* the Court of Common Pleas allowed, in the case of a municipal election petition, an amendment by adding two paragraphs relating to matters discovered after the filing of the petition. On the other hand, in *Maude v. Lowley*, an application for an amendment by addition of allegations as to acts committed in other words besides those named in the original petition was refused by this court." These words it seems to me are quite negative, and do not even amount to a dictum in favour of the petitioner here. I think, therefore, that this appeal should be allowed.

MATHEW, J.—I am of the same opinion.

GROVE, J.—With reference to *Aldridge v. Hirst* (*ubi sup.*) I may say that I think it is clear from the words themselves that I had not at that time in my mind the case of an amendment adding a new ground of petition.

*Appeal allowed.*

Solicitors for the petitioners, *Schultz and Son*, for *A. J. Ellis*, Maidstone.

Solicitors for the respondent, *Routh, Stacey, and Castle*, for *F. S. Stenning*, Maidstone.

Tuesday, April 24, 1883.

(Sittings at Nisi Prius, before the LORD CHIEF JUSTICE OF ENGLAND and a Special Jury.)

REG. v. RAMSAY AND FOOTE.

*Newspaper—Blasphemous libel—What constitutes—Criminal intention in the proprietor.*

*The defendants were indicted for blasphemous libel in the publication of certain cartoons, &c., in a newspaper called the Freethinker.*

*The jury were directed that a blasphemous libel did not consist in an honest denial of the truths of the Christian religion, but in "a wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects;" and further, that an authority to publish libellous matter was not a presumption of law, but a question of fact.*

THIS was an indictment against Foote, the reputed editor, and Ramsay, the reputed publisher, of a newspaper styled the *Freethinker*, for the publication of certain blasphemous libels therein. Mr. Charles Bradlaugh, M.P., had also been indicted together with the above-named defendants upon the same charge, but at his request and that of Ramsay the case had been removed to the Queen's Bench Division for trial, and Mr. Bradlaugh had been tried separately and acquitted on the ground that there was no sufficient evidence to connect him with the publication of the paper.

Both the defendants had been formerly tried and convicted before North, J. for blasphemous libels contained in the last Christmas number of the same paper. The present trial was concerned



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with several issues extending from March to June 1862.

Sir *Hardinge Giffard*, Q.C. (with whom were *Moloney* and *Woodfall*) appeared for the prosecution.

The defendants severally conducted their own defence in person, *Avory* for Ramsay and *Olver* for Foote being present to advise and argue on points of law.

Before the jury were sworn, *Avory* raised certain technical objections to the indictment, and called attention to the fact that, although he was unable to say that his client had been *autrefois acquit*, yet he had been previously convicted, and was now undergoing sentence for a similar offence committed subsequently to that specified by the indictment; but

Lord COLERIDGE, C.J. said, that he had already decided the technical points, and was of opinion that the trial had better proceed.

*Moloney* for the prosecution.—The publications upon which the indictment is based extend from March to June of last year. After these proceedings commenced the defendants were prosecuted for a subsequent issue of the *Freethinker* at the Central Criminal Court. He cited Starkie's definition of blasphemous libel (*vide infra*), and went into the details of the publications upon which the indictment was based, adding that if a verdict of "guilty" was returned by the jury, it might be proper for his Lordship then to take the previous sentence into consideration. It was proved that the Director of Public Prosecutions had given his fiat for the prosecution, that on the 26th Nov. 1881, and the 2nd Aug. 1882, Ramsay's name had been entered in the registry of newspapers as proprietor of the *Freethinker*, and that in Feb. 1883 Foote's name had been so entered; but his Lordship held that this last entry, as being subsequent to the indictment, was not material evidence to connect Foote with the publication of the paper. It was not substantially disputed that Foote was the editor and Ramsay the publisher of the *Freethinker*, but in the course of the evidence his Lordship held that it was not admissible to ask a printer who the editor of a paper was, as the question was complex, and it was possible for a man to know for purposes of society that which he did not know sufficiently for purposes of evidence. He also held that the evidence must be limited to the publication of the particular numbers of the paper which were incriminated, and that it was not permissible to ask a witness what he supposed to be the meaning of certain cartoons, that being a subject upon which the jury must exercise their own judgment.

Ramsay, in defence, cited various works by Professor Huxley, Shelley and others; and complained of the uncertainty of the definition of blasphemy.

Foote, in defence, followed the same argument as Ramsay. He also said that blasphemy was only a new name for heresy, which used to be tried in the Ecclesiastical Courts, and consisted in fact of heresy against the State religion. He also quoted the criticisms made in Stephen's Digest of the Criminal Law upon the definitions of blasphemy.

Lord COLERIDGE, C.J.—The two defendants are indicted for the publication of blasphemous libels; and the two questions which arise for your con-

sideration are: First, are these publications in themselves blasphemous libels? Secondly, if they are so, is the publication of them traced home to the defendants so that you can find them guilty? I will begin with the last question, though it is reversing the logical order, because it is the shorter and more simple of the two. Both questions are entirely for you. When you have heard what I have to say to you as to the state of the law, as I understand it, it will then be for you to pronounce a general verdict of guilty or not guilty. Now, for the purpose of this question, which I deal with first, I will assume for the moment that these are blasphemous libels, but though I assume it now I will discuss it with you afterwards. Assuming them, then, to be blasphemous libels, is the publication of them traced home to the defendants? As you are not the same jury who tried Mr. Bradlaugh, it is necessary for me to repeat to you the direction on this subject which I gave a few days ago to the jury which tried him. As to the matter of publication, the law has been altered in most important respects by a statute passed early in the reign of the present Queen (6 & 7 Vict. c. 96). It used to be the law that the proprietor of a newspaper was criminally, not merely civilly, but criminally responsible for a libel inserted in his paper, and that a bookseller or publisher was criminally responsible for a libel in any book which was sold or published under his authority, even though the newspaper proprietor, or the bookseller or publisher, did not know of or authorise the insertion of any libel, and did not even know of its existence. But this in the criminal law was an anomaly and a grievance, which the statute I have referred to was, in its seventh section, intended to remedy. That section came to be considered in the case of *Reg. v. Holbrook*, in which a gross libel on the town clerk of Portsmouth had been published in a Portsmouth newspaper. The case was twice tried at Winchester, first before Lindley, L.J., and secondly before Grove, J. On each occasion the ruling of the judge who tried the case was questioned in the Queen's Bench in the time of my predecessor in this seat; on each occasion by the same three judges, Cockburn, L.C.J. and Mellor and Lush, J.J.; on each occasion there was the same difference of opinion, the Lord Chief Justice and Lush, J. holding one way and Mellor, J. the other. But, notwithstanding this difference of opinion, the case is a binding authority upon me, and I lay down the law to you in the terse and clear language of Lush, J.: "The effect of the statute," says he (4-L. Rep. Q. B. 50), "read by the light of previous decisions, and read so as to make it remedial, must be, that an authority from the proprietor of a newspaper to the editor or publisher to publish what is libellous, is no longer to be, as it formerly was, a presumption of law, but a question of fact. Before the Act the only question of fact was, whether the defendant authorised the publication of the paper, now it is whether he authorised the publication of the libel. . . .

Criminal intention is not to be presumed, but it is to be proved, and in the absence of evidence to the contrary, a person who employs another to do a lawful act, i.e., to publish, is to be taken to authorise him to do it in a lawful and not in an unlawful manner." Such is now the law laid



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down in admirable language by great authority; and it is for you to say whether, according to the law as laid down, these defendants (either or both of them) did or did not authorise the publication of these libels. On the trial of Mr. Bradlaugh this question of fact was the question in the case; he grounded his defence upon the contention, that whatever was the character of the published matter, the publication was not by his authority. That was his defence; and upon that defence, so far as I may presume to assign reasons for the general verdict of a jury, he was acquitted. In the trial before us the process has been reversed. The fact of publication by the defendants has hardly been contested. The evidence is all one way; it is uncontradicted, and it is overwhelming. It is proved that the defendant Ramsay sold the papers which contained the libels. It is proved that the articles charged as libellous were inserted by the express direction of the defendant Foote. There is nothing to qualify this proof; the defendants, in fact, do not deny their liability; and though the case is for you, I do not know that I need refrain from saying that, if upon the evidence you have heard, you think both the defendants liable for the publication of these alleged libels, I shall entirely agree with you. That, however, is, comparatively speaking, the least matter you have to decide; for the proof is clear, and it is not disputed. The great point still remains, are these articles within the meaning of the law blasphemous libels? Now that, as you have been truly told, is a matter absolutely for you. On you is the responsibility, after looking at them and reading them, of saying whether they are or are not blasphemous libels. My duty is to explain to you as clearly as I can what is the law upon the subject. My duty, further, is not to answer the speeches of the defendants, (that is no part of the duty of a judge), but to point out to you what in their arguments is in my judgment well-founded, and what is not; and then, when you have listened to me, the question is entirely for you. I am sure from my experience of juries that, in a criminal case especially, they will obey the law as declared by the judge; they will take the law from the judge, whether they like it or do not like it, and apply it honestly to the facts before them. Gentlemen, I have said before, and I take the freedom to repeat, that it is far more important the law should be administered with absolute integrity, than that in this case or in that the law should be a good law or a bad one. The moment juries or judges go beyond their functions, and take upon themselves to lay down the law or find the facts, not according to the law as it is, but according to the law as they think it ought to be, then the certainty of the law is at an end; there is nothing to rely upon; we are left to the infinite variety and uncertainty of human opinion; to caprice which may at any moment influence the best of us; to feelings and prejudices, perhaps excellent in themselves, but which may distort or disturb our judgment, and distract our minds from the single simple operation of ascertaining whether the facts proved bring the case within the law as we are bound to take it. Forgive me if I seem to press too earnestly upon a special jury of Middlesex these obvious commonplaces. If at my age, with so much to bring about a temper of indifference, with the training which a whole life spent in judicial pursuits ought to have brought

with it; if I feel, as I confess I do, that it is hard in a case like this to be perfectly just and absolutely impartial, it may perhaps be that to some of you at least my earnest warning may not be absolutely useless; at any rate, I am sure you will pardon me for having presumed to utter it. Gentlemen, you have heard with truth that these things are, according to the old law, if the dicta of old judges, dicta often not necessary for the decisions, are to be taken as of absolute and unqualified authority—that these things, I say, are undoubtedly blasphemous libels, simply and without more, because they question the truth of Christianity. But I repeat what I said on the former trial that, for reasons which I will presently explain, these dicta cannot be taken to be a true statement of the law, as the law is now. It is no longer true, in the sense in which it was true when these dicta were uttered, that Christianity is part of the law of the land. In the times when these dicta were uttered, Jews, Roman Catholics, Nonconformists of all sorts were under heavy disabilities for religion, were regarded as hardly having civil rights. Everything almost, short of the punishment of death, was enacted against them. The epithet “ferocious,” which has been applied to the statute of William III., to which so much reference has been made, is hardly stronger than that statute deserves. Jews, it is true, were excluded from Parliament in a sense by accident, for the oath which excluded them was not pointed at them; but no one can doubt that at that time if it had occurred to anyone that they were not excluded, a law would have been forthwith passed to exclude them. Historically, and as matter of fact, such was the state of things when these dicta were pronounced. But now, so far as I know the law, a Jew might be Lord Chancellor, most certainly he might be Master of the Rolls. The great and illustrious lawyer whose loss the whole profession is deploring, and in whom his friends know that they lost a warm friend and a loyal colleague; he but for the accident of taking his office before the Judicature Act came into operation, might have had to go circuit, might have sat in a criminal court to try such a case as this, might have been called upon, if the law really be that “Christianity is part of the law of the land” in the sense contended for, to lay it down as law to a jury, amongst whom might have been Jews, that it was an offence against the law, as blasphemy, to deny that Jesus Christ was the Messiah, a thing which he himself did deny, which Parliament had allowed him to deny, and which it is just as much part of the law that anyone may deny, as it is your right and mine, if we believe it, to assert. Therefore, to base the prosecution of a bare denial of the truth of Christianity, *simpliciter* and *per se* on the ground that Christianity is part of the law of the land, in the sense in which it was said to be so by Lord Hale, and Lord Raymond, and Lord Tenterden, is in my judgment a mistake. It is to forget that law grows; and that though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression, I call it progression of human opinion. Therefore, to take up a book or a paper, to discover merely that in it the truth of Christianity is

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denied without more, and thereupon to say that now a man may be indicted upon such denial as for a blasphemous libel, is, as I venture to think, absolutely untrue. I for one, positively refuse to lay that down as law, unless it is authoritatively so declared by some tribunal I am bound by. Historically, I cannot think I should be justified in so doing, for Parliament, which is supreme and binds us all, has enacted statutes which make that old view of the law no longer applicable. Nor is it any disrespect whatever to the great men of elder days to hold that what they said in one state of things is not applicable under another. Gentlemen, when I last addressed a jury on this subject, I put a case to them which I thought was a *reductio ad absurdum* of the argument. I said that, if the law was as contended for, it would be enough to say that anything was part of the law of the land, and that thereupon there could be no discussion and no reform; for that to attack any part of the law, however gravely and respectfully, would be, if not blasphemous yet seditious. Monarchy is part of the law of the land; primogeniture is part of the law of the land; the laws of marriage are part of the law of the land, and so forth. But if the doctrine contended for be true, to republish Algernon Sydney, or Harrington, or Locke, or Milton, would expose a man to a prosecution for a breach of the law of libel. But it shows how dangerous it is for some men at least to presume upon their knowledge. What I put as a *reductio ad absurdum* I have since discovered actually occurred, and was decided to be law by a judge early in the last century. There is a case reported by Lord Chief Baron Gilbert, *B. v. Bedford*, from which it appears that a man was actually convicted of a seditious libel for discussing gravely and civilly, and as the report of the case in Bacon's Abridgment, tit. "Libel," says, "without any reflection whatever upon any part of the then existing Government," the respective advantages of an hereditary or elective monarchy. I need hardly say that if such a case arose now no judge would follow that authority, no jury would convict, the whole proceeding would be denounced, and rightly denounced, as altogether monstrous. It is clear, therefore, to my mind that the mere denial of the truth of the Christian religion is not enough alone to constitute the offence of blasphemy. What then is enough? No doubt we must not be guilty of taking the law into our own hands, and converting it from what it really is to what we think it ought to be. I must lay down the law to you as I understand it, and as I read it in books of authority. Now, Mr. Foote, in his very able address to you, spoke with something like contempt of the person he called "the late Mr. Starkie." He did not know Mr. Starkie; he did not know how able and how good a man he was. Mr. Starkie died when I was young; but I knew him, and everyone who knew him knew that he was a man not only of remarkable power of mind, but of opinions liberal in the best sense; and if ever the task of lawmaking could be safely left in the hands of any man perhaps it might have been in his. But, what is more material to the present purpose, the statement of the law by Mr. Starkie has again and again been assented to by judges as a correct statement of the existing law. I will read it to you, therefore, as expressing what I lay down to you as law in words far

better than any at my command. "There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of His creation; and though, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also, legally speaking, to publish his opinions for the benefit of others. When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering that society is more than compensated for the partial and limited mischief which may arise from the mistaken endeavours of honest ignorance, by the splendid advantages which result to religion and to truth from the exertions of free and unfettered minds. It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. "A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals—a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong." Now that I believe to be a correct statement of the law. Whether it ought to be or not is not for me to say. I tell you the law as I understand it, leaving you to apply it to the facts of the particular case before you. There was much force, no doubt, in the way in which Mr. Foote dealt with the passage in his address to you. The vagueness, the uncertainty which he insisted upon are possibly, however, inherent in the subject, and there is perhaps more to be said in favour of Mr. Starkie's view than may appear without reflection. There is a passage in his book taken, I believe, from Michaelis, in which it is pointed out with great truth that in one view the law against blasphemous libel may be for the benefit of the libeller himself, who, if there were no law, might find its absence ill exchanged for the presence of popular vengeance and indignation. "Now to the man who from his heart believes his religion, and regards it as the way to eternal bliss, and as the comfort both of life and death, and who of course wishes to educate his family in the knowledge and belief of it, nothing can be more offensive than to hear another speaking against it, and employing, not arguments (although even these he might let alone, because every man has a right even to err, without our forcibly interfering to rid him of his

errors), but insolent and contemptuous language, and blaspheming its gods, its prophets, saints, and sacred things. Were the religion in question only tolerated, still the State is bound to protect every person who believes it from such outrages, or it cannot blame him if he has not the patience to bear them. But if it be the established national religion, and of course the person not believing it be only tolerated by the State, and though he enjoys its protection just as if he were in a strange house, such an outrage is excessively gross; and unless we conceive the people so tame as to put up with any affront, and of course likely to play but a very despicable part on the stage of the world, the State has only to choose between the two alternatives, of either punishing the blasphemer himself or else leaving him to the fury of the people. The former is the milder plan, and, therefore, to be preferred, because the people are apt to gratify their vengeance without sufficient inquiry, and of course it may light upon the innocent. Nor is this by any means the treatment which I only claim for the religion which I hold to be the true one, I am also bound to admit it when I happen to be among a people from whose religion I dissent; were I in a Catholic country to deride their saints or insult their religion by my behaviour, were it only by rudely and designedly putting on my hat when decency would have suggested the taking it off; or were I in Turkey to blaspheme Mahomet, or in a heathen city its gods, nothing would be more natural than for the people, instead of suffering it, to avenge the insult in their usual way, that is, tumultuously, passionately, and immoderately; or else the State would, in order to secure me from the effects of their fury, be under the necessity of taking my punishment upon itself, and if it does so, it does a favour both to me and other dissenters from the established religion, because it secures us from still greater evils." It is not so clear, therefore, that some sort of protection for the constituted religion of the country is not a good thing, even for those who differ from it; for if there were no such protection, the consequences pointed out by Michaelis might too probably ensue. It does not follow that because the objects of popular dislike differ in different ages; it does not follow (I wish it did) that the populace of our age are much wiser than the populace of earlier times. It is not so very long ago in our history since the populace of Birmingham wrecked the house and burnt the library of Dr. Priestley, a true philosopher and excellent man. It was not the State which did that, it was the populace. And it is therefore not so clear to my mind that some sort of blasphemy laws reasonably enforced may not be an advantage, even to those who differ from the popular religion of a country, and who desire to oppose and to deny it. Further, therefore, it must not be taken as so absolutely certain that all these laws against blasphemy are in principle tyrannical. Whether, however, they are so or not, if they exist we must administer them, and the principle upon which we are to administer them is to be found in the passage I have read from Starkie. But I think I ought to go further, and to say that such study as I have been able to make of the cases has not satisfied me that the law ever was laid down differently from the law as laid down by Mr. Starkie. I do not pretend to have the time or

learning to discuss with you exhaustively all the cases on the subject. I have taken a few of the leading ones, speaking roughly a century apart from each other, and I find the law, as I understand it and have laid it down to you, to be laid down practically in the same way in all these cases. It is perhaps worth observing that this law of blasphemous libel first appears in our books—at least, that cases relating to it are first reported—shortly after the curtailment or abolition of the jurisdiction of the Ecclesiastical Courts in matters temporal. Speaking broadly, before the time of Charles II. these things would have been dealt with as heresy; and the libellers so-called of more recent days would have suffered as heretics in earlier. But I pass to the cases which are reported. The first of them is a case decided by that great lawyer Lord Hale, of whom Mr. Foote spoke with some respect. He was indeed a man of great intellectual power, of absolute integrity, whose life was that of a Christian saint. If Mr. Foote had read the full report of the trial of the witches before Lord Hale, he would have seen that Lord Hale was there doing what many a judge has had to do, was administering a law he did not like, and so gave to the accused persons every advantage which his great skill in the law fairly allowed him to give; but neither the prisoners nor the jury would take the advantage which he offered them. The case is curious, and he who reads it I think will say that it is a very terse and a very misleading analysis of it, that Lord Hale hung witches because of the language of the Bible; though no doubt the passages in Exodus and Deuteronomy were referred to. Anyone who takes the pains to read the case through will see that, judging him even by the standard of the present day, there is much more to be said for Lord Hale's conduct on that occasion than the run of mankind believe. But in the case of Taylor (which I cite from Ventris, who was himself a judge, and who gives the best report) Lord Hale had the following words before him; and you must always take a case and an opinion with reference to the subject-matter as to which the case was decided or the opinion given. The words, as Ventris says, were "blasphemous expressions horrible to hear," viz., "that Jesus Christ was a bastard and a whoremaster, that religion was a cheat, and that he feared neither God, the devil, or man." Those were the words on which Lord Hale had to decide in that case, and what he says is this: "Such kind of wicked blasphemous words are not only an offence to God and religion, but a crime against the laws, State, and Government, and therefore punishable in this court." That is what Lord Hale held, in one of the earliest cases on the subject. You may find expressions which seem to go further in the reasons which he gives, but before these cases are so glibly cited as they sometimes are, you should look and see what is the subject-matter of the decision. Lord Hale held "such kind of wicked blasphemous words" to be a blasphemous libel, and if they came before me I too should hold them without hesitation to be a blasphemous libel, though I am no more disposed to hang witches than Lord Hale really was. The next case, on which much stress has been laid, and which is usually cited from Strange, though it is more fully and better reported in Fitzgibbons, is the case of Woolston, who was convicted of blasphemous discourses upon the miracles of our

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Lord, and the court, as reported by Fitzgibbons, lay very great stress on what they call "general and indecent attacks," and carefully state that they did not intend to include disputes between men on controverted matters. That is the law as laid down by Lord Raymond, a great lawyer, no doubt, and a man of high character, though of much which Lord Raymond says and of many of the expressions in his judgment I think that time and change have destroyed the authority. There is then the case which is commonly cited as bringing the law down almost to our own time—the case of *B. v. Waddington*, tried before Lord Tenterden, and reported in 1 B. & C. The words of the libel were that "Jesus Christ was an impostor, a murderer, and a fanatic." The Lord Chief Justice laid it down that it was a libel, and a jurymen asked the Lord Chief Justice whether a work which denied the divinity of Our Saviour was a libel. Now mark the answer given by Lord Tenterden, one of the most cautious and justly respected of men. "He answered that a work speaking of Jesus Christ in the language referred to was a libel." That ruling was questioned in the King's Bench before Lord Tenterden himself, and Bayley, Holroyd, and Best, JJ. The three judges first named were as great lawyers as ever adorned our Bench; and though Best, J. was a much abler judge than it is nowadays the fashion to call him, still no one but would consider him the inferior of the other three. But when the case was moved in the King's Bench, Lord Tenterden said, "I told the jury that any publication in which Our Saviour was spoken of in the language used in this publication was a libel, and I have no doubt whatever that it is so. I have no doubt it is a libel to publish the words that Our Saviour was an impostor, a murderer, and a fanatic." Bayley, J. says: "It appears to me that the direction of the Lord Chief Justice was perfectly right. There cannot be any doubt that a work which does not merely deny the Godhead of Jesus Christ, but which states him to have been an impostor and a murderer, is at common law a blasphemous libel." Holroyd, J. says: "I have no doubt whatever that any publication in which Jesus Christ is spoken of in the language used in this book is a blasphemous libel, and that therefore the direction was right in point of law." Best, J. gives a longer judgment, in more rhetorical language, but to the same effect, and he concludes: "It is not necessary for me to say whether it be libellous to argue from the scriptures against the divinity of Christ. That is not what the defendant professes to do. The Legislature has never altered the law, nor can it ever do so while the Christian religion is considered to be the basis of that law." Now this is the case which is often cited, I must think by those who have not read it, as an authority that any attack upon Christian doctrine, however respectful and decent in language, is by law a blasphemous libel. It is authority, as I think, for nothing of the kind. It binds me here no doubt, and I shall direct you according to what I conceive is its meaning. There is another case, the last with which I shall trouble you, not indeed exactly in point, but which is sometimes cited in support of the proposition that to attack Christianity is to expose yourself to an indictment for libel. It is the case of *Cowan v. Milbourn*, decided in 1867, and reported in 2 L. Rep. 230, Ex. It was an action in which the owner of some rooms justified a breach of

his contract to let them, on the ground that they were to be used for lectures directed against the character of Christ and his teaching, and the defendant's justification was upheld by the court. The late Lord Chief Baron undoubtedly goes the full length of the doctrine contended for, and from his reasons, on the grounds I have already stated, I respectfully dissent. But Lord Bramwell puts his concurrence in the judgment on a totally different ground. He bases it on the fact that the statute of William III. is still unrepealed; that these lectures were to be in contravention not of the common law—on that he is silent—but of this statute; and he is careful moreover to point out the distinction between a thing, such as prostitution for example, being "unlawful in the sense that the law will not aid it, which it may be, and yet that the law will not punish it." So that, if I understand him, his authority cannot be invoked for the proposition that the proposed lectures were necessarily blasphemous libels or the subjects of indictment. I think therefore that anyone who calmly and carefully considers the cases will very much doubt whether the old law is really open to the attacks which have been made upon it. I doubt extremely whether if you carefully read through—not merely look at—the cases and master the facts upon which the decisions were pronounced, I doubt if they will be found to be so harsh and illiberal as it has been the fashion in modern times to describe them. But whether this is so or not, Parliament at least has altered the law on these subjects; it is no longer the law that none but professors of Christianity can take part or have rights in the State; others have now just as much right in civil matters as any member of the Church of England has. The condition of things is no longer what it was when these great judges pronounced the judgments which I think have been misunderstood, and strained to a meaning they do not warrant. It is a comfort to think that things have been altered. I observe that in the case of the *Attorney-General v. Pearson*, decided by Lord Eldon in 1817, and reported in *Merivale*, he expressed a doubt whether the provisions of 9 & 10 Will. 3 as to persons denying the Trinity were or were not repealed by a later statute of Geo. 3. Some old things, and amongst them this statute, are shocking enough, and I do not defend them; but it must be remembered what was the state of the country when that statute passed—who was the king, what was the succession, what were the factions which divided the country, what were the feelings which naturally agitated Parliament. In these regards the statute is not perhaps defensible, but at least it is explicable. At all events, no man would dream of enacting such a statute now, and I trust that Lord Eldon's doubts will never be solved by a court pronouncing them to be well founded. Such are the rules, as I tell you, by which you are to judge of these libels. But further, you have heard a great deal, powerfully put by Mr. Foote, about the inexpediency of these laws in any view of them, and as to the way in which they are worked. To observe on this is the least pleasant part of my unpleasant duty, and I wish I could avoid it. It might perhaps be enough to say that these are things with which you and I have nothing to do. We have to administer the law as we find it, and if we do not

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like it we should try to get it altered. In a free country, after full discussion and agitation, a change is always effected if it approves itself to the general sense of the community. Mr. Foote has told you that this movement against him and his friends is to be regarded as persecution; and it is true, as he has said, that persecution, unless thorough-going, seldom succeeds. Irritation, annoyance, punishment which stops short of extermination, very seldom alter men's religious convictions. Entirely without one fragment of historical exaggeration, I may say that the penal laws which fifty or sixty years ago were enforced in Ireland were unparalleled in the history of the world. They existed 150 years; they produced upon the religious convictions of the Irish people absolutely no effect whatever. The Irish people could not be exterminated. Everything possible by law short of actual extermination and personal violence was done, and done without the smallest effect. No doubt, therefore, persecution, unless it is far more thorough-going than anyone in England and in this age would stand, is, speaking generally, of no avail. It is also true, that persecution is a very easy form of virtue. A difficult form of virtue is to try in your own life to obey what you believe to be God's will. It is not easy to do, and if you do it, you make but little noise in the world. But it is easy to turn on some one who differs from you in opinion, and in the guise of zeal for God's honour, to attack a man whose life perhaps may be much more pleasing to God than is your own. When it is done by men full of profession and pretension, who choose that particular form of zeal for God which consists in putting the criminal law in force against some one else, many quiet people come to sympathies, not with the prosecutor but with the defendant. That will be so as human nature goes, and all the more if the prosecutors should by chance be men who enjoy the wit of Voltaire, who are not repelled by the sneer of Gibbon, and who rather relish the irony of Hume. It is still worse if the prosecutor acts not from the strange but often genuine feeling that God wants his help and that he can give it by a prosecution, but from partisan or political motives. Nothing can be more foreign from one's notions of what is high-minded, noble, or religious; and one must visit a man who would so act, not for God's honour, but using God's honour for his own purposes, with the most disdainful disapprobation that the human mind can form. However, the question here is not with the motives, of which I know nothing, nor with the characters, of which I know if possible less, of those who instituted these proceedings, but with the proceedings themselves, and whether they are legal. The way in which Mr. Foote defends himself is able, and well worthy of your attention; and you must say, after a few words from me, what you think of it. Mr. Foote's case, as I understand it, is this (he will excuse me if I do not state it accurately): "I am not going to maintain," says he, "that this is all in the best taste; some of it may be coarse; some of it to men of education may give offence. It is intended to be an attack on Christianity; it is intended distinctly to be an attack on what I have seen attacked in the publications of cultivated agnosticism. It is meant to point out that in the books which your professing Christians call sacred are to be found records of detestable crimes, of

horrible cruelties, of the lives of sensual, selfish, cruel men, all of which are said to have been pleasing to Almighty God. I do mean to attack your representation of Almighty God. I say your books are not true; I say your religion is what Tacitus called it—a detestable superstition. I mean this, and if I have said it in a coarse language, that is because I have not sufficient culture or education to cull my words carefully. But I will bring before you a number of books sold on every bookstall of Mr. Smith, written by persons admitted to the very highest society in the land, in which not only are the same things to be found in point of matter, but I will read you passages in which there is very little difference in manner—passages, for example, from John Stuart Mill, from Grote, from Shelley" (I mention the dead that I may not wound the feelings of the living). "No one ever dreamed of attacking Shelley." (He is wrong in fact, for Shelley's publisher was prosecuted, and Shelley himself was deprived by Lord Eldon of the custody of his children.) "I will show you things written by these men quite as strong and quite as coarse, as anything to be found in these publications of mine; and it is plain the law cannot be as suggested, because it can never be true that a poor man cannot do what a rich man may; it cannot be true that you may blaspheme if you blaspheme in civil language." Such I understand, put into my own words, to be Mr. Foote's contention. On that I have two things to say: one in Mr. Foote's favour, and one against him. He wished to have it impressed upon you that he is not, and never has been, a licentious writer in the sense in which Mr. Starkie uses the word licentious. He has not, he says, pandered to the sensual passions of mankind. You will have the documents before you, and you will judge for yourselves. For myself I should say that in this matter he is right. It is a thing in his favour, and he is entitled to have it said. But upon the other point, if the law as I have laid it down to you is correct—and I believe it has always been so—if the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel. There are many great and grave writers who have attacked the foundations of Christianity. Mr. Mill undoubtedly did so; some great writers now alive have done so too; but no one can read their writings without seeing a difference between them and the incriminated publications, which I am obliged to say is a difference not of degree but of kind. There is a grave, an earnest, a reverent, I am almost tempted to say, a religious tone in the very attacks on Christianity itself, which shows that what is aimed at is not insult to the opinions of the majority of Christians, but a real, quiet, honest pursuit of truth. If the truth at which these writers have arrived is not the truth we have been taught, and which, if we had not been taught it, we might have discovered, yet because these conclusions differ from ours, they are not to be exposed to a criminal indictment. With regard to many of these persons, therefore, I should say they were within the protection of the law as I understand it. With regard to some of the others, passages from whose writings Mr. Foote read, I heard them yesterday for the first time, I do not at all question that Mr. Foote read them correctly. I con-

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ness, as I heard them, I had, and have, a difficulty in distinguishing them from the alleged libels. They do appear to me to be open to the same charge, on the same grounds, as Mr. Foote's writings. He says many of these things are written in expensive books, published by publishers of known eminence; that they are to be found in the drawing-rooms, studies, libraries, of men of high position. It may be so. If it be, I will make no distinction between Mr. Foote and anyone else; if there are men, however eminent, who use such language as Mr. Foote, and if ever I have to try them, troublesome and disagreeable as it is, if they come before me, they shall, so far as my powers go, have neither more nor less than the justice I am trying to do to Mr. Foote. If they offend against the blasphemy laws they shall find that so long as the laws exist, whatever I may think about their wisdom, there is but one rule in this court for all who come to it. This much Mr. Foote may depend upon. So far as I can judge, some of the expressions which he read seemed to be strong, shall I say, coarse?—expressions of contempt and hatred for the generally recognised truths of Christianity and for the Hebrew Scriptures which are said to have been inspired by God himself. But Mr. Foote must forgive me for saying that this is no argument whatever in his favour. Let me explain. It is no argument for a burglar or a murderer (I mean no offence to Mr. Foote, I should be unworthy of my position if I insulted anyone in his)—it is no argument, I say, in favour of a murderer or a burglar that some other person has also committed a burglary or a murder. Because in the infinite variety of human affairs some persons may have escaped, that is no reason why others should not be brought to justice. If he is correct in his citations from these writers, it seems to me that some of them are fairly liable to such a prosecution as his. Suppose they are; that does not show that he is not. What Mr. Foote had to show was not that other people were bad, but that he was good; not that other persons were guilty, but that he was innocent. It is no answer to bring forward these other cases. It is not enough to say these other persons have done these things, if they are not brought before us. Gentlemen, I not only admit, but I urge upon you, and on everyone who hears me, that whilst laxity in the administration of the law is bad, the most odious laxity of all is discriminating laxity, which lays hold of particular persons and lets other persons equally guilty go scot free. That may be, that is so, but it has nothing to do with this case. The question here is not whether other persons ought to be standing where Mr. Foote and Mr. Ramsey now stand; but what judgment we ought to pass on Mr. Foote and Ramsey, who do stand here. In short and in fine, we have to administer the law whether we like it or no. It is undoubtedly a disagreeable law, or may become so, but I have given you some reasons for thinking it not so bad nor so indefensible as Mr. Foote has argued that it is. I think it, on the contrary, a good law that persons should be obliged to respect the feelings and opinions of those amongst whom they live. I assent to the passage from Michaelis, that in a Catholic country we have no right to insult Catholic opinion, nor in a Mohammedan country have we any right to insult Mohammedan opinion.

I differ from both, but I am bound as a good citizen to treat with respect opinions with which I do not agree. Take these publications with you; look at them; if you think they are permissible attacks on the religion of the country you will find the defendants not guilty. Take these cartoons. Mr. Foote says they are not attacks upon, and are not intended for caricatures of, Almighty God. If there be such a being, says Mr. Foote, he can have no feeling for Almighty God but profound reverence and awe, but this he says in his mode of holding up to contempt what he calls a caricature of that ineffable Being as delineated in the Hebrew Scriptures. That is for you to try. Look at them and judge for yourselves whether they do or do not come within the widest limits of the law. If they do, then as with the libels find the defendants not guilty. But if you think that they do not come within the most liberal and largest view that anyone can give of the law as it exists now, then find them guilty. Whatever may be the consequences—you may think the prosecution unwise, you may think the law undesirable, you may think no publications of this sort should ever be made the subject of criminal attack (I do not say you do think so, but you may), it matters not—your duty is to obey the law; not to strain it in favour of the defendants because you do not like the prosecution; not to strain it against them because you do not yourselves agree with the statements they advocate, as you are certain entirely to disapprove of the manner in which they advocate them. Take all these alleged libels into your consideration and say whether you find Mr. Foote or Mr. Ramsay, both or either, guilty or not guilty of this publication.

The jury then retired, and upon an intimation being received from them that they were not likely to come to an unanimous verdict, Lord Coleridge, O.J. intimated to Sir Hardinge Giffard that it was unusual to continue a trial when "another conviction had been obtained against a defendant for substantially the same sort of thing," and in addition, that the prosecution would be called upon to decide without delay upon the course to be adopted under the circumstances.

The jury did not agree upon a verdict, and on Tuesday, May 1, the Attorney-General issued his fiat for a *nolle prosequi*.

Solicitor for the prosecution, *Sir T. J. Nelson*.  
Solicitors for the defence, *Lewis and Lewis*.

Monday, April 30, 1883.

(Before DENMAN and HAWKINS, JJ.)

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*Street—Conversion into "new street"—Intention—Sufficient evidence of—Public Health Act 1848 (11 & 12 Vict. c. 63), s. 2—Local Government Act 1858 (21 & 22 Vict. c. 98), s. 34—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 4, 157.*

*The appellant built six cottages upon a piece of garden ground in a lane 6 feet wide and 250 feet long, which was admitted to be a street within the meaning of the definition of that word in the Public Health Acts.*

*Held, that the justices were not justified in coming to the conclusion that the land had been converted*

(a) Reported by H. D. BONSER, Esq., Barrister-at-Law.



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*into a "new street," and therefore they were wrong in convicting the appellant for having violated certain bye-laws made by the urban sanitary authority pursuant to the powers contained in the Public Health Act 1848, and the Local Government Act 1858, one of which provided that every new street not being a carriage road should be laid out and formed at least 18 feet wide.*

THREE several informations were preferred by William Charles Powning (the respondent) clerk to the mayor, aldermen, and citizens of the city of New Sarum, acting as the urban sanitary authority against Robert Rideout Williams (the appellant).

The first information charged the appellant that he being a person intending to construct a new street within the meaning of certain bye laws made pursuant to the powers and provisions of the Public Health Act 1848, the Local Government Act 1858, and the Public Health Act 1875, did afterwards actually commence the construction of a new street, and failed to give the notice required by the said bye-laws.

The second information charged the appellant that he did on the 20th March last unlawfully and contrary to the bye-laws, lay out and form a certain new street of a less width than 18 feet, although the urban sanitary authority had never allowed the width of such new street to be so reduced.

The third information charged the appellant that, being a person intending to construct certain new buildings within the meaning of the bye-laws, failed to give the required notices.

The three informations were heard together, and the justices convicted the appellant in the sum of 5s. for the three offences, and stated a case for the opinion of the court under 20 & 21 Vict. c. 48.

The material part of the case is as follows :

1. For many years previous to the passing of the Public Health Acts 1848 and 1875, and the Local Government Act 1859, and the formation of the urban sanitary authority for the district of New Sarum, there existed and still exists a public highway for foot passengers in the parish of Milford within the said district, called St. Martin's Church-lane, which is 254 feet in length and leads from a public highway called St. Martin's Church-street to another public highway called Southampton-road.

2. St. Martin's Church-lane is 5ft. 6in. wide at the opening into St. Martin's Church-street, and at the opening into Southampton-road it is 6ft. 5in. wide. Between those points it varies in width, but it is on an average about 6 feet wide. Previous to the commencement of the erection of the appellant's cottages, hereinafter mentioned, it was bounded on one side at either end by the sides of the houses and walls of the gardens at the backs of the houses at the corners of St. Martin's Church-street and Southampton-road respectively, and for the whole of the intervening space by a wall forming the boundary of the half acre of ground belonging to the appellant hereinafter mentioned, and on the other it was bounded by a wall which is still standing.

3. The house at the corner of St. Martin's Church-street was built before the passing of the Public Health Acts and before the formation of the urban sanitary authority. The house at the corner of Southampton-road, the back of which

bounds St. Martin's Church-lane for a distance of 63 feet, was built five or six years ago, with the sanction of the sanitary authority; the last-mentioned house has windows in the side fronting St. Martin's Church-lane, and the only entrance is from the said lane.

4. The appellant's land has a frontage of 95 feet, and was formerly cultivated as garden ground. The land on the opposite side of the lane belongs to the rector for the time being of the parish of St. Martin.

5. The bye-laws have been made under the Public Health Act 1875.

6. In the month of November 1881, the appellant being desirous of erecting six cottages on his land fronting the said St. Martin's Church-lane, sent to the surveyor of the urban sanitary authority a certain plan, which was submitted to the urban sanitary authority and not approved of.

7. On the 23rd March 1882 the appellant commenced building the said cottages, which were erected in the position shown on the plan, and continued the work down to the hearing of the informations. The cottages stood 15 feet back from the lane, with gardens in front, leaving the lane the same width as before.

8 and 9 (immaterial)

10. It was admitted that if St. Martin's Church-lane was not and would not after the erection of the cottages become a new street, the appellant had given the usual and proper notices in accordance with the bye-laws.

11. It was also admitted that if St. Martin's Church-lane was, or would, after the erection of the cottages, become a new street, the appellant had not given the notices required by the bye-laws, and the lane was not the width required by the bye-laws for a new street.

12. At the hearing it was contended by the respondent that the erection of the cottages in accordance with the plan would have, and had, converted St. Martin's Church-lane into a new street within the meaning of the Public Health Act 1875, and the said bye-laws.

13. On the part of the appellant it was contended that he had not made, laid out, or constructed, or intended to make, lay out, or construct a new street within the meaning of the Public Health Act 1875 or the said bye-laws, but that all he had done or intended to do was to build six cottages in a garden.

14. The appellant further contended that St. Martin's-lane never could be made of the required width for a new street by the appellant without pulling down the houses at either end or acquiring the land on the opposite side.

15. We found as facts on the facts proved or admitted that the erection of the said cottages in accordance with the said plan would have and had converted the said St. Martin's Church-lane into a new street within the meaning of the Public Health Act 1875, and the said bye-laws, and that the respondent was not precluded from objecting to the building of the appellant's cottages in the lane as above mentioned, and we convicted the appellant on all the said three informations and inflicted penalties amounting in the aggregate to 5s. and costs. The question for the opinion of the court is, whether we were justified under the whole of the circumstances as detailed in the foregoing statement of facts in convicting the



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WILLIAMS (app.) v. POWNING (resp.).

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appellant. If we were, then the convictions are to stand, and if not they are to be quashed.

By sect. 34 of the Local Government Act 1858 (21 & 22 Vict. c. 98):

Every local board may make bye-laws with respect to the following matters (that is to say): (1) with respect to the level, width, and construction of new streets, and provisions for the sewerage thereof.

By sect. 157 of the Public Health Act 1875 (38 & 39 Vict. c. 55) the same powers are given to every urban authority.

The following were the bye-laws material to the case:

1. Every new street not being a carriage road shall be laid out and formed at least 18 feet wide, and there shall be one entrance at least to every such street, of the full width thereof, and open from the ground upwards; provided always, that when any street shall exceed the length of 100 feet it shall be at the option of the local board to determine whether such street shall or shall not be laid out and formed of sufficient width for a carriage road.

2. In any case in which an open space shall be left along one or both sides of any new street throughout its whole length in front of the houses, or in which any new street shall not be the principal or only approach to dwelling-houses, the local board may allow of a reduction of the widths herein specified for such streets, whether carriage roads or not, as they shall see fit.

28. Every person who shall intend to make or lay out any new street, whether the same shall be intended to be used as a public way or not, shall give one month's notice to the local board of such intention, by writing delivered to the local surveyor, or left at his office, and shall at the same time leave or cause to be left at the said office a plan and section of such intended new street drawn to a scale of not less than one inch to every forty-four feet, &c.

*Charles, Q.O. (Mackey with him)* for the appellant.—I contend that the justices were wrong in convicting the appellant for having commenced to lay out a new street without complying with the bye-laws, and in fact for having laid out the street. Before the cottages were built I admit that it was a street within the definition clauses of the Public Health Acts, and the only question is whether in consequence of the cottages having been built the justices were justified in finding that it became a new street. In no possible sense could that transform it into a new street. My contention is that the appellant has merely built six cottages in a garden without any intention of converting the lane into a new street. It cannot make any difference whether he built six cottages or one. [DENMAN, J.—Is it not a question of fact which the justices have to decide?] Yes, but I say there was no evidence upon which they could so find; and they have moreover set out the whole of the facts in the case, and asked the court whether, as a point of law, they were justified in finding as they did. The appellant could not have complied with the bye-laws and have made the lane eighteen feet wide, for he had no control over any of the other property. The local board sanctioned the building of one of the houses at the corner some few years ago, and did not insist upon the lane being widened, and therefore they have shown their intention not to convert it into a new street. In *Robinson v. The Local Board for Barton* (47 L. T. Rep. N. S. 286; 21 Ch. Div. 621), Brett, L.J. points out three ways in which a street may be converted into a new street; and if those tests are applied to this case, it will be found that in no possible sense can it be said that this lane has been laid out as, or converted into, a new street.

One case is where a person owns the whole land on both sides, and makes a plan laying it out in building plots, then it is said that when he begins to build he begins to form a street. Another case is where the land belongs to several owners, and then it cannot be said that a street is formed until you can conclude from the acts of each that they all intend to build. A third case is where, although the land belongs to different owners, it has not been designed for building purposes, and one owner begins to build, and in that case it is said that a street is not formed until you are able to see by the course of building that there is a common intent to build. I submit that in the present case nothing has been done upon which, in point of law, the magistrates can find that this old lane has become a new street, and the convictions are wholly unwarrantable.

*Grantham, Q.O. (Meek with him)*, for the respondents.—The appellant has filled up all the land he has, and therefore he could not do more to show his intention of converting the lane into a street. It is purely a question of fact for the magistrates, and they have found that what was done did convert it into a street. It cannot be said there was no evidence, and if there is any evidence upon which the magistrates could act it is not subject to appeal. [HAWKINS, J.—Laying one brick would be some evidence, but the question is, whether there was sufficient evidence to give the magistrates an option.] What more could the appellant do than build cottages on the whole of his land? In the case of *Robinson v. The Local Board for Barton*, the Master of the Rolls says: "It must be a question in each particular case when the road becomes a street; and as soon as it does so it is a new street, and not the less a new street because some of the houses were built before it was a street." I contend that it was entirely a question of fact for the magistrates, and there was sufficient evidence upon which they could find an intention on the part of the appellant to convert this lane into a new street.

*May 8.—DENMAN, J.*—This was an appeal against a conviction for the violation of certain bye-laws made by the corporation of Salisbury acting as the urban sanitary authority. The matter in respect of which the appellant was convicted is put in three different ways by the convictions. The first is that, being a person intending to construct a certain new street, and who thereafter actually commenced the construction of such street, he failed to give the notices required by the bye-laws; the second is, that he laid out and formed a new street of a less width than eighteen feet, although the urban sanitary authority had never allowed the width of such new street to be so reduced; and the third had some slight variation to which it is not necessary to refer. There is one admission in the course of the case which renders it unnecessary to go much into details. In paragraph 10 it was admitted that, if St. Martin's Church-lane was not, and would not, after the erection of the cottages in accordance with the plan, become a new street, the appellant had given the usual and proper notices and plan for the building of the cottages in accordance with the bye-laws, and had complied with all the requirements of the bye-laws in relation to new buildings. It was

also admitted that, if St. Martin's Church-lane was or would after the erection of the cottages in accordance with the plan become a new street, the appellant had not given the notices required by the bye-laws, and that St. Martin's Church-lane was not of the width required by the bye-laws for a new street. So that the whole question turns upon whether St. Martin's Church-lane was or was not, or would become, a new street if the appellant did what his plan showed he intended to do. At the end of the case in paragraph 15 the finding of the magistrates was given in this way: "We found, on the facts proved or admitted, that the erection of the said cottages in accordance with the said plan would have and had converted the said St. Martin's Church-lane into a new street within the meaning of the Public Health Act 1875 and the said bye-laws." A considerable difficulty occurred to me to make out from that paragraph in the case what the magistrates really found, whether they were finding a fact in the proper sense of the word, or whether they were in substance and reality giving a finding of law. But I am of opinion, looking at the whole case, that what they have done is that, though they found certain facts, they felt themselves bound in point of law to find it was a new street. The question at the end of the case is, "whether the court was justified, under the whole of the circumstances as detailed in the foregoing statement of facts, in convicting the appellant." Reading that with paragraph 15, what I think the court was really meant to do was to ask us whether on the facts we are of opinion in point of law that this street became a new street within the meaning of the bye-laws. Now the bye-laws are these [reads bye-laws 1 and 2]. The sole question is therefore whether this is a new street. On the north there is a wide road called Southampton-road, and on the south a wide road called St. Martin's Church-street. On the north, that is where it runs into Southampton-road, it is 6ft. 5in. wide, and on the south where it runs into St. Martin's Church-street, it is 5ft. 6in. wide, and it is found in the case that it is of an average width of 6 feet. On the east side throughout the whole length there is a wall which separates the lane from some glebe land, and on the west at the north end for 63 feet there is a building and garden wall, and at the other end on the west side there is precisely the same state of things for a distance of 96 feet. The appellant has property extending 95 feet along the west side. The appellant wished to build some cottages, and he deposited a plan showing six cottages in a row, with a garden in front; the garden being 15 feet from the cottages to the old lane, and leaving the lane the same width as it was before. That being the state of things, the view the magistrates have taken is, that the building of these six cottages would necessarily convert St. Martin's Church-lane into a new street, and that it was a violation of the bye-laws because between the outer wall of the garden and the opposite wall he had not left a width of 18 feet. I am of opinion that the magistrates were wrong, and that they have taken an erroneous view of their duty in considering themselves bound to find it became a new street. Great stress was laid upon the case of *Robinson v. The Barton Local Board* (*ubi sup.*). I have looked carefully through that case both in the Court of Appeal and the

court below, and I do not entertain a doubt that the decision of the magistrates would be an extension of the decision of that case, and would be a violation of the tests there laid down as to these cases. Fry, J. held that the street was not a new street for the simple reason that it was an old street before the acts were done which it was said converted it into a new street, and therefore it could not be a new street; but that view was entirely negatived by the Court of Appeal. Though the judges all use different expressions, their judgments seem to be based on this, that in the particular case the street had become a new street because there had been such an entire alteration by the acts of different persons on a great part of both sides, and it had so altered in character that it had become a different street, and in that sense a new street, not only by the acts of the appellant, but by the acts of other persons also, all contemplating a street by their several acts. They do not all put it on exactly the same ground, but that appears to be the result of their judgment. Now, it would be quite competent for the sanitary authority in this case to purchase the land and make this street of sufficient width to be a new street within the meaning of the bye-laws, but there is no indication of their intention to do anything of the kind. This is one circumstance which seems to negative, as applicable to this case, the principle of the decision in *Robinson v. The Barton Local Board*, namely, the indication to convert it into a new street by the acts of several persons. Now, has Mr. Williams shown any intention of making this a new street? He certainly sent a plan showing that he intended to build six cottages on his land, but that in itself is not any evidence of his intention, because he was bound to do that wholly irrespective of whether he was building with the view to making it a new street. I see no evidence to show more than that Mr. Williams, having land on which he was entitled to build, determined to build six cottages without contemplating the formation of a new street. That being so, I think we ought to answer the question in favour of the appellant, and give judgment for him.

HAWKINS, J.—I am of the same opinion. It was conceded that St. Martin's Church-lane was a street within the meaning of the interpretation clauses of the Public Health Acts, or one of them, and *Robinson v. The Local Board for Barton* is an authority for showing that an old street may be converted into a new street. Therefore the question is, whether what has been done in this case has converted what was formerly a street into a new street. The only act which can be put forward to support this contention is, that the appellant has built six cottages upon his own land on one side of the lane, and Mr. Grantham says that is sufficient to justify the magistrates in coming to the conclusion that the lane was converted into a new street. A street in the popular acceptance of the term is a road with houses for the most part on either side, though not necessarily contiguous. Now, how may an old lane which is an old street be converted into a new street? In *Robinson v. The Local Board for Barton* it is pointed out that a street may become a new street in a variety of ways. If the land on both sides belongs to one owner, and he lays it out in building plots, and begins to build on one

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plot, he would begin to form a new street, having an intention to go on to make a street. Another way is, where the land belongs to different owners, and by their united acts you can find an intention indicated to make a new street in the popular sense of the term. In that case it would be impossible to come to any other conclusion than that it was a new street. Another case is where the land belongs to different owners, and no tribunal could say that there ever was at the same time an intention amongst them all to build. In that case the precise time at which it does become a new street may be a question of some difficulty, and it is a question of fact to be decided by the justices. How can it be said that either of those things has been done here? The appellant has only half an acre of land on one side of the lane, and has no power or control over the land on either side of his. In building the cottages I think he must be taken to have built them simply to make use of his own land, and without any intention of converting it into a new street. There is nothing to justify the magistrates in coming to the conclusion that this lane became a new street by the act of the appellant alone, without the aid of the other owners. Nor is there any evidence that the owner on the opposite side of the lane has any intention to use his land for building purposes. Therefore I have to consider whether by the mere fact of the appellant having built six cottages on one side of the street, and having no power or control over the remaining portions of the street, he has converted it into a new street. I think he did not, and that in proposing to convict the appellant the magistrates were wrong, and he is entitled to our judgment.

#### Convictions quashed.

Solicitors for the appellant, *Taylor, Hoare, and Taylor*.

Solicitors for the respondent, *Clarke, Rawlins, and Co., for W. O. Powning, Salisbury*.

Wednesday, May 2, 1883.

(Before DENMAN and HAWKINS, JJ.)

REG. v. THE CATHOLIC LIFE AND FIRE ASSURANCE AND ANNUITY INSTITUTION LIMITED. (a)

*Companies Act 1862 (25 & 26 Vict. c. 89), ss. 26 and 27—Penalty for not forwarding list of members to Registrar of Joint Stock Companies—Continuing offence—11 & 12 Vict. c. 43, s. 11.*

*By sect. 26 of the Companies Act 1862 every company having a capital divided into shares shall make once a year a list of persons who were members on a certain day, and send the same to the Registrar of Joint Stock Companies; and by the 27th section, any company making default in complying with the above provision shall incur a penalty not exceeding five pounds for every day during which such default continues.*

*A company made default in the years 1877, 1879, 1880, 1881, and 1882.*

*Held, that it was a continuing offence, and penalties could be recovered for default made in each year for a period not extending over more than six months.*

Case stated by one of the metropolitan police

magistrates under 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act 1879.

#### CASE.

1. On the 15th Feb. 1883 thirty informations were laid before me sitting at the Police Court at Bow-street, against the respondent company, whose registered office is 114, Beaconsfield-road, Tottenham. Each of such informations was (with the exception of dates) in the form and in the words of the copy information set out in the appendix hereto. Upon each of such informations I issued a summons, which was (with the exception of dates) in the form and in the words of the summons in the appendix hereto.

2. The matter of complaint in each summons is a default in complying with the provisions of the 26th section of the Companies Act 1862, which requires (*inter alia*) a company to make once at least in every year a list of all persons who on the 14th day succeeding the day on which the ordinary general meeting is held were members thereof, and to forward a copy of such list and a summary as in the said section is mentioned to the Registrar of Joint Stock Companies forthwith after their completion. By the 27th section a penalty is imposed of 5*l.* for every day during which such default continues.

3. The respondent company is a company incorporated in 1869 under the Companies Act 1862, having a capital of 1,000,000*l.* divided into 100,000 shares of 10*l.* each. A copy of the memorandum of association is annexed.

4. During the years 1877, 1879, 1880, 1881, and 1882 the respondent company made default in forwarding to the Registrar of Joint Stock Companies the list of its members and the summary as required by the Companies Act 1862 in each of those years respectively, and did not in fact forward such a list and summary for any of those years to the said registrar before the 5th Jan. 1883. A list for 1877 never was forwarded. Copies of these lists together with that for 1883 are annexed in the appendix.

5. The several matters of complaint which arose in respect of the defaults made for the years 1877, 1879, 1880, 1881, and 1882 respectively, are all laid as continuing offences on the same six days in 1882, that is to say:

On Oct. 2nd, 1882	
" " 3rd, "	In respect of the default in not forwarding the list of members and summary in and for the year 1877.
" " 4th, "	
" " 5th, "	
" " 6th, "	
" " 7th, "	
On Oct. 2nd, 1882	
" " 3rd, "	In respect of the default in not forwarding the list of members and summary in and for the year 1879.
" " 4th, "	
" " 5th, "	
" " 6th, "	
" " 7th, "	

And so on for the years 1880, 1881, and 1882.

6. I convicted the respondent company on six summonses for the offences laid to have been committed by them on the 2nd, 3rd, 4th, 5th, 6th, and 7th days of October 1882 in not forwarding the list of the members and the summary as required by the Companies Act to the Registrar of Joint Stock Companies for the year 1882, but I declined to convict the said company on the remaining twenty-four summonses for the like

(a) Reported by H. D. BONSEY, Esq., Barrister-at-Law.

offences alleged to have been committed in respect of the years 1877, 1879, 1880, and 1881, on the ground that the information in respect to the offences in the last-mentioned years had not been laid within six calendar months from the time when the matter of such information arose as required by 11 & 12 Vict. c. 43, s. 11.

7. It was contended on behalf of the prosecution that a fresh offence under the 27th section of the Companies Act 1862 was completed at the end of every day during which the default therein mentioned continued, that the offence was the continuing in default during the whole of such day, and that the penalty was imposed for and in respect of such continuance. In support of this contention the cases of *Hardy v. Ryle* (9 B. & C. 808) and *Whitehouse v. Fellows* (10 C. B. N. S. 765) were cited. I was of opinion that the cases cited did not apply to this case, and further that, though a penalty accrued for every day's default, the time for commencing a prosecution for its recovery was limited to six months after each day's default.

The question submitted to the court is :

Were the said twenty-four informations laid in time ?

If the court should answer the above question in the negative, my decision is to stand ; if the court should answer the same in the affirmative, the case is to be remitted in order that the respondent company may be convicted in respect of them.

By the Companies Act 1862 (25 & 26 Vict. c. 89), s. 26 :

Every company under this Act, and having a capital divided into shares, shall make, once at least in every year, a list of all persons who on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company ; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars :

1. The amount of the capital of the company, and the number of shares into which it is divided ;
2. The number of shares taken from the commencement of the company up to the date of the summary ;
3. The amount of calls made on each share ;
4. The total amount of calls received ;
5. The total amount of calls unpaid ;
6. The total amount of shares forfeited ;
7. The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the Registrar of Joint Stock Companies.

By sect. 27 :

If any company under this Act, and having a capital divided into shares, makes default in complying with the provisions of this Act with respect to forwarding such list of members or summary as is hereinbefore mentioned to the registrar, such company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

By 11 & 12 Vict. c. 43, s. 11, it is enacted :

That in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such com-

plaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.

*Dankwerts* for the appellant.—This is a prosecution instituted under the 26th section of the Companies Act 1862, and the short question is, whether the information was laid in time. The magistrate refused to convict for those offences which were first committed in the years prior to 1882, on the ground that under Jervis's Act the information must be laid within six months from the time when the matter of the information arose. I admit that Jervis's Act applies to this case, but my contention is, that a new offence was committed on every day that default was made in forwarding a list and summary provided by the statute, and therefore the respondent company is liable to pay penalties for six months in respect of the offence committed in each year. The case of *Reg. v. Waterhouse* (26 L. T. Rep. N. S. 761 ; L. Rep. 7 Q. B. 545) is directly in point. That was a case under the Nuisances Removal Act of 1855. Nineteen separate informations were laid, and the same number of summonses issued in respect of as many acts of disobedience, each committed on a separate day by sending forth black smoke, and it was held that each daily emission of smoke was a separate act of disobedience for which a separate summons might be lawfully issued. Blackburn, J. there says, in the course of the argument : " Each emission of smoke on a separate day was a separate offence of disobedience, just as in a recent case where we held that a parent having been fined for disobeying an order to have his child vaccinated may be proceeded against from time to time so long as the child remains unvaccinated." I submit that the learned magistrate was wrong, and that he ought to have convicted upon all the summonses.

No one appeared for the respondent.

DENMAN, J.—We must give our judgment for the appellant in this case. The words of the statute are these : " Such company shall incur a penalty not exceeding five pounds for every day during which such default continues." It appears to me that the default continues notwithstanding any number of days have elapsed, and it still going on the penalties are sought within six months. I think the magistrate had jurisdiction, and therefore the appellant ought to succeed.

HAWKINS, J.—I am of the same opinion.

*Case remitted.*

Solicitor for the appellant, *The Solicitor to the Board of Trade.*

CR. CAS. RES.]

REG. v. THOMAS JONES—REG. v. THOMAS LOWE.

[CR. CAS. RES.]

**CROWN CASES RESERVED.***Saturday, June 2, 1883.*

(Before Lord COLERIDGE, C.J., POLLOCK, B., LOPES, MANISTY, and STEPHEN, JJ.)

REG. v. THOMAS JONES. (a)

*Bigamy—Cohabitation—Continuance of cohabitation doubtful—Presumption of law.*

*It was proved that the prisoner and his wife were married in 1865, and that they lived together after marriage, but how long did not appear. There was no evidence of separation, or when they last saw each other. In 1882 the prisoner married a second time, and was indicted for and convicted of bigamy.*

*Held, that there was no evidence to displace the presumption arising on this state of facts that the first wife was living at the date of the second marriage.*

CASE stated for the opinion of this court by Stephen, J.

Thomas Jones was convicted before me at the last Stafford Assizes on a charge of bigamy.

It was proved that he was married to Winifred Dodds, on the 13th March 1865, and that he went through the ceremony of marriage with Phoebe Jones on the 11th September 1882, Dodds being then alive.

One witness said that the prisoner and his wife had lived together after marriage, but how long she did not know. There was no evidence at all as to their having ever separated, or as to when, if separated, they last saw each other.

In *Reg. v. Ourgerwen* (L. Rep. 1 C. C. R. 1) it was proved that the prisoner and his wife had lived apart for many years before the second marriage, and it was held that in that state of facts the prosecution were bound to prove that the prisoner had known that his wife was alive within seven years of the second marriage. As there was no proof that Jones and his wife had ever separated, I thought that *Reg. v. Ourgerwen* did not apply, and directed the jury to convict the prisoner if they believed he had married a second time in his wife's lifetime.

He was found guilty, and I sentenced him to two months' imprisonment and hard labour, but suspended the execution of the sentence and committed him in default of bail till this case should be determined.

The question for the court is, whether, in these circumstances, I ought to have directed an acquittal. J. F. STEPHEN.

No counsel appeared to argue on either side.

Lord COLERIDGE, C.J.—We are all of opinion that this conviction should be affirmed. The prisoner married his first wife in 1865, and it was proved that the prisoner and his wife lived together after the marriage, but how long they lived together did not appear, and there the matter was left. There was no evidence to show that they had ever been separated or when they last saw each other. There is nothing, therefore, stated in the case to displace the presumption that the first wife was still alive, created by the affirmative evidence that they had lived together as married husband and wife. In *Reg. v. Ourgerwen* (L. Rep. 1 C. C. 1) it was proved that the prisoner

and his wife had lived apart for seven years preceding the second marriage, and it was held that it was incumbent on the prosecution to show that during that time the prisoner was aware of her existence. In the present case there was no such evidence forthcoming, and, therefore, a state of things once set up must be presumed to continue unless there is evidence to displace that presumption. Here there was no evidence to displace the presumption arising from the original state of things that the second marriage took place in the lifetime of the first wife. The conviction was perfectly right and must be affirmed.

The rest of the Court concurring,

*Conviction affirmed.*

*Saturday, June 2, 1883.*

(Before Lord COLERIDGE, C.J., POLLOCK, B., MANISTY, LOPES, and STEPHEN, JJ.)

REG. v. THOMAS LOWE. (a)

*Evidence—Bankruptcy—Notices in the London Gazette—Cuttings from the Gazette.*

*A petition in bankruptcy having been presented against the prisoner in the D. County Court, the court made an order that the publication of a notice of the petition in the London Gazette should be deemed service of the petition on the prisoner. The prisoner did not appear according to this notice, and there was no evidence that it had come to his knowledge. The prisoner was adjudicated bankrupt in his absence, and divers proceedings in the bankruptcy took place. Subsequently thereto the prisoner was arrested, and afterwards examined in court touching his affairs by the trustee in the bankruptcy, and the result was that he was indicted and convicted for various offences under the Bankruptcy Act. On the trial, in proof of the publication of the order of the County Court in the Gazette, the file of the proceedings in the Bankruptcy Court was produced, containing a cutting from the Gazette of the advertisement of the order of the County Court and notice to appear.*

*Held, that this cutting from the Gazette was improperly received as evidence of the publication of the notice in the London Gazette, and that the conviction could not be sustained.*

CASE stated by the Chairman of the Quarter Sessions for the county of Derby, held at Derby on the 3rd April 1883.

The prisoner was indicted at the above sessions under the 1st, 2nd, and 3rd sub-sections of the 11th section of the Debtors Act 1869.

1. For that he, being duly adjudged a bankrupt, did not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof except such part as had been disposed of in the ordinary way of his trade, or laid out in the ordinary expenses of his family.

2. And that he did not deliver up to such trustee, or as he directed, all such part of his real and personal property as was in his custody or under his control, or which he was required by law to deliver up.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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3. And that he did not deliver up to such trustee, or as he directed, all books, documents, and papers in his custody or under his control relating to his property or affairs.

The following facts were proved at the trial:—

Early in Jan. 1874 the prisoner (who was a trader at Chesterfield) sold his effects by auction, received the proceeds of the sale, and immediately left the neighbourhood, without paying his debts or disclosing his address.

A petition in bankruptcy was presented against him on the 26th Jan. 1874, in the County Court of Derbyshire, held at Chesterfield.

On the 25th March 1874 the County Court made an order that the publication of a notice of the petition in the *London Gazette* should be deemed service of the petition on the prisoner. (a)

On the file of the bankruptcy proceedings under the seal of the County Court produced at the trial was an entire page of a printed document, headed "*London Gazette*, 31st March 1874," in which an advertisement occurred, addressed to the prisoner, giving him notice of the petition and the order of court for substituted service, and that the petition would be heard in the said County Court on the 22nd April 1874, on which day he (the prisoner) was required to appear, and if he should not, the County Court judge might adjudge him bankrupt in his absence.

Prints of the same advertisement appeared also on the file of proceedings with memoranda subscribed, stating that they had respectively been inserted in the *Derbyshire Times* and *Derbyshire Courier* (two newspapers published at Chesterfield) on the 28th March 1874.

The prisoner did not appear according to this notice.

There was no evidence that it had come to his knowledge.

On the 22nd April 1874 he was adjudged bankrupt.

The first meeting of creditors was held on the 20th May 1874, when John Edey, an accountant, was appointed trustee of the prisoner's estate, and received the registrar's certificate of his appointment.

The 17th June 1874 was the day fixed for the public examination of the prisoner under his bankruptcy, but he did not attend, and his examination was adjourned *sine die*.

On the 19th Nov. 1874 the County Court ordered the trustee to prosecute the prisoner for offences against sect. 11, sub-sects. 1, 2, and 3, of the Debtors Act 1869, and in May 1875 a warrant was issued for the prisoner's apprehension on those charges.

The prisoner, who on leaving Chesterfield had passed under the assumed name of John Bosworth, was not arrested on the above charges until the

(a) By the Bankruptcy Rules, r. 60: A bankruptcy petition shall be personally served seven days before the day of its hearing by delivering to the debtor a sealed copy of the filed petition.

Rule 61: In the case of a petition the court may order that a notice according to the form in the schedule be gazetted requiring the debtor to appear at the hearing of the petition on the day named, being not less than fourteen days after the publication of the notice, and that such notice shall be deemed to be served on the debtor.

Rule 62: Notice of the publication in the *Gazette* of the order of the court shall be given in one local paper according to the form in the schedule.

26th Feb. 1883, at Shrewsbury, when he was brought to Chesterfield by a police officer, who read over to him the warrant on which he was apprehended.

On the 28th Feb. 1883, while the prisoner was still in custody at the police office at Chesterfield, he was examined on oath touching his affairs by John Edey, the trustee (who administered the oath), and the prisoner's deposition on such examination was reduced into writing at the time, and was then and there read over to the prisoner and signed by him.

This written deposition was tendered in evidence at the trial on behalf of the prosecutor as part of his case.

Two questions of law were raised at the trial on the prisoner's behalf: First, that the page alleged to be part of the *London Gazette* of the 31st March 1874 did not contain the imprint of any printer or purport to be published by authority, and therefore should not be admitted in evidence; secondly, that the prisoner's deposition on his examination by the trustee on the 28th Feb. 1883 should not be admitted in evidence because the trustee had no authority to administer the oath, or to examine the prisoner on the charge for which he was arrested while he was in custody on such charge.

The Court of Quarter Sessions admitted in evidence the page of the *London Gazette* and the prisoner's deposition bearing his signature.

The prisoner was convicted and judgment thereupon passed, and he was sentenced to four calendar months' imprisonment with hard labour, the Court of Quarter Sessions reserving the said questions of law for the consideration of this honourable court.

The prisoner has been discharged on recognisance of bail to appear at the next quarter sessions to render himself in execution.

If the page of the *London Gazette* and the prisoner's deposition, or either of them, were wrongly admitted in evidence on his trial then the conviction was to be quashed, but otherwise was to be affirmed.

T. W. EVANS, Chairman.

No counsel appeared to argue on either side.

LORD COLERIDGE, C.J.—In order to make out the case for the prosecution, it was necessary to show that a notice of the petition in bankruptcy had appeared in the *London Gazette*, and the prosecution produced only a cutting of that part of the *London Gazette* which contained the advertisement of the notice of the petition having been filed instead of the entire *Gazette*. The Court of Quarter Sessions received that as evidence of the notice without anything more, and assumed that because it came from the Bankruptcy Court, and was filed with the other proceedings, it was all right. It is obvious that it would be dangerous to allow cuttings from the *Gazette* to be assumed to be all that the statute requires to be produced in evidence of publication in the *London Gazette*. It seems to us that this objection is fatal, and that the cutting from the *Gazette* was improperly received, and on that ground, without entering into the second objection, we think that the conviction must be quashed.

The rest of the Court concurring,

Conviction quashed.

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YATES (app.) v. CHORLTON-UPON-MEDLOCK UNION (resp.).

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## HIGH COURT OF JUSTICE.

## QUEEN'S BENCH DIVISION.

Tuesday, May 22, 1883.

(Before CAVE and SMITH, JJ.)

YATES (app.) v. CHORLTON-UPON-MEDLOCK UNION (resp.).

ALMOND (app.) v. SAME (resp.). (a)

*Rating Acts—Liability to be rated for the relief of the poor—Caretaker—Servant—Tenant.*

Y. had been put into a dwelling-house, No. 157, Plymouth Grove, in the township of Chorlton, by his own master, who was one of two joint owners of the house, and in whose employment Y. had been for some time previously. At the time the dwelling-house was empty, and Y. was put into it with his wife and children, for the purpose of taking care of it while it was so empty. Y. was not otherwise in the employment of the said owners, and, except the benefit of living rent free with his wife and children in two rooms of the said dwelling-house, he received no remuneration for his services in taking care of the same.

A. had been for some years previously in the employment of the joint owners of the dwelling-house, No. 163, Plymouth Grove. His duties were to look after and attend to any houses in the neighbourhood of Plymouth Grove, belonging to the said owners, which might from time to time be vacant, to prevent trespass being committed thereon, to look after the gardens, and to show unlet houses to persons coming to see the same. The dwelling-house, No. 163, Plymouth Grove, being vacant, A. with his wife and children was put into it by the owners, as caretaker, performing the same duties to the owners as before.

A. was liable and ready to leave the said house at the command of the owners at any time. Under these circumstances Y. and A. were assessed by the rating authority to the relief of the poor as

occupiers of the said houses respectively. Upon appeal to the general quarter sessions of the peace for the city of Manchester, the Recorder allowed the appeal, but stated two cases for the opinion of the court.

Held, by Cave and Smith, JJ., that Y. and A. were not liable to be rated for the relief of the poor in respect of the said premises, on the ground that the occupation in each case was that of a servant and not that of a tenant.

THESE were cases stated by the Recorder of Manchester for the opinion of the court, raising the question in each case whether a caretaker, who has been put into an otherwise empty dwelling-house by the owners of it, simply for the purpose of taking care of it while it is so empty, is liable to be rated, as occupier, for the relief of the poor within the Rating Acts. The appellant Yates was put into the house, No. 157, Plymouth Grove, by his own master, who was one of two joint owners of the house, for the purpose of acting as caretaker of the house while it was empty. Under these circumstances the rating authority for the township of Chorlton-upon-Medlock held that Yates was liable to be rated as a caretaker, and accordingly on or about the 26th Feb. 1882 rated him to the relief of the poor as the occupier of the said dwelling-house. Against this rate Yates appealed to the general quarter sessions of the peace, holden in and for the city of Manchester, in the county of Lancaster, on the 20th Oct. 1882, and the Recorder, Henry Wyndham West, Esq., Q.C., allowed the appeal, but granted the following case for the opinion of the Queen's Bench Division of the High Court:—

1. A rate for the relief of the poor for the township of Chorlton-on-Medlock, was duly made on the 26th Feb. 1882, and was duly allowed by two of Her Majesty's justices of the peace for the city of Manchester on the 26th June 1882. The said rate was duly published according to law.

2. In the said rate the appellant was assessed as follows:

Name of Occupier.	Name of Owner.	Description of Property.	Number of House.	Street.	Gross Rental.	Rateable Value.	Rate.
3011 Enos Yates	Ex. Oocleshaw	House	House, No. 157	Plymouth Grove	£90	£75	£14 7s. 6d.

3. The said dwelling-house (No. 157, Plymouth Grove) was left vacant in Sept. 1881, and remained so till June 1882, when the owners of the said house, described in the said rate as "Executors of Oocleshaw," found that the said dwelling-house had been broken into and some of the fixtures stolen.

4. Thereupon Mr. George Langford, one of the said executors, asked the appellant, Enos Yates, who was in his employment as cellarman at his business premises, to go and reside in the said dwelling-house with his wife and children, rent free, and take care of the same, and the said Enos Yates, with his wife and children, occupied two rooms in the said house.

5. The appellant Enos Yates was not otherwise in the employment of the executors, and except the benefit of living rent free in the said two rooms in the said dwelling-house, received no remuneration for taking care of the said dwelling-house.

6. The said dwelling-house was to be let, and had

bills in the windows "To be let" during all the time that the appellant resided in the said house as aforesaid, and the appellant was liable and ready to leave upon the command of the said owners at any time.

7. Prior to the date when the said house became vacant as hereinbefore mentioned, it had been let at a rental of 90l. a year.

8. The appellant duly appealed to the assessment committee of the Chorlton-on-Medlock Poor Law Union, and failed to obtain relief. All notices, formalities, and conditions precedent to the hearing of the said appeal were duly given and fulfilled by the appellant. It was contended by the appellant that he resided in the said house as the servant of the owners, and was not liable to be rated to the relief of the poor as the occupier of the said dwelling-house, No. 157, Plymouth Grove.

9. I was of that opinion, and allowed the appeal, with costs to be paid by the respondents.

10. If the court are of opinion that, upon the above facts, the said appellant, Enos Yates, was



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liable to be rated to the relief of the poor, as occupier of the dwelling-house, No. 157, Plymouth Grove, then my said decision is to be reversed; otherwise my said decision is to be affirmed.

The following case was stated with respect to the appellant John Almond, who had been rated as the occupier of the dwelling-house, No. 163, Plymouth Grove:—

Name of Occupier.	Name of Owner.	Description of Property.	No. of House.	Street.	Gross estimated Rental.	Rateable Value.	Rate.
John Almond	Ex. Oocleshaw	House	163	Plymouth Grove	£95	£70 5s. 0d.	£15 3s. 9d.

3. The owners of the said dwelling-house, described in the said rate as "Executors of Oocleshaw," also own several other dwelling-houses in the immediate neighbourhood of the dwelling-house, No. 163, Plymouth Grove. The appellant, John Almond, for some years prior to the date of the making of the said rate, had been, and at the time of the making of the said rate still was, in the employment of the said owners, and his duties were to look after and attend to any houses in the neighbourhood of Plymouth Grove belonging to the said owners, which might from time to time be vacant and unlet, and to prevent trespass being committed thereon, and to keep the gardens of any such houses in good order. It was also his duty to show unlet dwelling-houses, belonging to the owners, to persons who might come to inspect the same with a view of becoming tenants thereof.

4. Shortly before the date of the making of the said rate appealed against, the appellant was put into the said house, No. 163, Plymouth Grove, as caretaker thereof, by the trustees, and the appellant continued to reside in the house as such caretaker down to and at the time of the making of the said rate. The appellant, as such caretaker as aforesaid, lived in three rooms of the said house, and his wife and children lived with him in the said three rooms. In the kitchen garden the appellant had planted some curly greens and a few turnips. One of the children kept some rabbits in the stable attached to the said house.

5. The said dwelling-house, No. 163, Plymouth Grove, was to be let and had bills "To be let" in the windows during all the time that the appellant resided therein as such caretaker as aforesaid, and the appellant was liable and ready to leave upon the command of the said owners at any time.

6. The appellant continued to look after the said houses and gardens as before.

7. Before the said house became vacant, it had been occupied by a tenant from year to year, at the rental of 95*l.* a year.

8. The appellant duly appealed to the assessment committee of the Chorlton Poor Law Union, and failed to obtain relief, and all notices, formalities, and conditions precedent to the hearing of the said appeal were duly given and fulfilled by the appellant. It was contended by the appellant that he resided in the house as servant of the owners, and that he was not liable to be rated to the relief of the poor as the occupier of the said house, No. 163, Plymouth Grove.

9. I was of that opinion, and allowed the appeal, with costs to be paid by the respondents.

10. If the court are of opinion that, on the above

1. A rate for the relief of the poor of the township of Chorlton-on-Medlock was duly made on the 26th Feb. 1882, and the said rate was duly allowed by two of Her Majesty's justices of the peace for the city of Manchester on the 26th June 1882. The said rate was duly published according to law.

2. In the said rate the appellant was assessed as follows:

facts, the said appellant, John Almond, was liable to be rated to the relief of the poor, as the occupier of the dwelling-house, No. 163, Plymouth Grove, then my said decision is to be reversed; otherwise my said decision is to be affirmed.

*Smily* for the respondents.—The question here is whether the occupiers of these houses are ratable to the poor. It will be contended on the other side that the houses occupied by these persons as mere caretakers are not ratable; but I submit, in the first place, that these houses were ratable; and, in the next place, that they were ratable to the persons occupying them. The overseers wish to make the persons actually occupying them ratable. By the Act 28 & 29 Vict. c. 79, at the end of one year, these persons would acquire a status of irremovability in the parish. This case has not actually been decided in the English courts, but there is an Irish decision on the point. The Act under which the rate is levied is 43 Eliz. c. 2, the first section of which directs the overseers to raise the rates weekly or otherwise by taxation of every inhabitant . . . and of every occupier of houses, &c. In the cases of *The Mersey Docks v. Cameron and Jones v. The Mersey Docks* (11 H. of L. 443; 12 L. T. Rep. N. S. 643; 35 L. J. Rep. N. S., M. C. 1), the Lords have laid down some principles which apply to the rate in these cases. [CAVE, J.—Nothing turns in these cases on the amount of the rate.] That is so. There is no dispute as to the amount of the rate, but only as to the liability to be rated. [CAVE, J.—There is no doubt of this property being capable of beneficial occupation as in *The Mersey Docks* case.] Lord Chelmsford, at p. 519, clearly puts the test, as to who is the person in actual occupation. The property here is clearly ratable, and the only question is whether Yates and Almond occupy as servants, so as to make the owners liable. The case of *Reg. v. Ponsonby* (3 Q. B. 54; 11 L. J. Rep. N. S., M. C. 65), establishes the proposition that, if a person allows another to occupy a house, the latter is liable. [SMITH, J.—In that case exemption was claimed on the ground of the property being Crown property.] If a person occupies a house, paying for it by his services, thereby living rent free, surely this person is ratable? Here Yates is not a servant of the executors in any sense whatever. [CAVE, J.—If a man lets a poor relation live in a house rent free, that person is therefore ratable.] If so, what is the difference between the occupation of Yates in this case and that of the poor relation? [SMITH, J.—In this case does he not occupy as servant? Suppose you have your coachman with his wife and family in your house, who is liable?] Clearly the owner. The question whether a person

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is a servant or an occupier is a question of fact in each case:

*Hughes v. Overseers of Chatham*, 5 M. & G. 14.; 13 L. J. Rep. N. S. 44, C. P.; 7 Scott N. R. 581.

If Yates does certain services, he receives the whole of his remuneration by living rent free in the premises. The case of *Bev v. The Inhabitants of Tynemouth* (12 East, 46), in which a person occupying as servant was held not to be ratable, differs from the present case in two important particulars: the person there was a servant, and residence in the lighthouse could only be for the purpose of keeping up the lights. [CAVE, J.—How do you distinguish the case of Yates from the case in 12 East?] In that case it was found expressly that the person was a servant. As to the appellant Almond, his duty was to act as a kind of house agent to show the other houses to people coming to see them. [CAVE, J.—But with regard to this house he lives in it as caretaker and servant.]

*Smith v. Overseers of Seghill*, L. Rep. 10 Q. B. 422; 44 L. J. Rep. N. S. 114, M. C.; 32 L. T. Rep. N. S., 859.

[CAVE, J.—There the occupation was that of a tenant and not that of a servant; the person was occupying for his own benefit, and not that of his master.]

*Martin v. The Assessment Committee of the West Derby Union*, 52 L. J. 66, M. C.

Anstie, Q.C. and Leese, for the appellants, were not called on.

CAVE, J.—I am of opinion that this appeal of the assessment committee should be dismissed, on the ground that the occupation here was the occupation of a servant, and not that of a tenant. The cases which have been cited with great ability are all distinguishable from the present, as being cases in which the occupation was as tenants and not as servants. The case last cited, and reported in the Weekly Notes, in which it was held that the residence of the superintendent of police was ratable to the poor rates, differs very materially from the present case, in this respect, that the house was hired and prepared for the police superintendent; but, in the present case, the houses are not built nor brought into existence for the caretaker, but the reverse; this being the conclusion which must be drawn from the case. Then, as to Almond's case, the executors have the houses already prepared, he is put into one of them simply as caretaker, to look after the house, and to show the other houses to persons wishing to see them. It is necessary, therefore, that he should live in the house for those purposes, and his occupation of the house is the occupation of a servant, and not that of a tenant.

SMITH, J.—I am of the same opinion. Here we have in the first place two empty houses, in the second place the necessity of having someone to take care of them, and in the third place the fact of Yates and Almond being put into the houses to occupy them as caretakers. The question at once arises, in what character do Yates and Almond occupy these houses? It seems to me that they occupied as servants, and not as tenants. It was said by Mr. Smyly that they might have their wives and families there; but this does not take away their position as servants, just as a coachman, who lives with his wife and children in

premises belonging to his master, is a servant notwithstanding.

*Appeal of the assessment committee dismissed with costs.*

Solicitors for the appellants, *Gregory, Bowcliffe, and Co.*, for *Hampson*, Manchester.

Solicitors for the respondents, *Bower, Cotton, and Bower*.

Tuesday, March 6, 1883.

(Before POLLOCK and HUDDLESTON, BB. and NORTH, J.)

MAUDE AND OTHERS (apps.) v. THE LOCAL BOARD OF BAILDON (resps.). (a)

*Local Government Board—Public Health Act 1875* (38 & 39 Vict. c. 55), sects. 4, 150—Summary proceedings against owners to recover expense of works under sect. 150—Road or street—Definition of "street" in sect. 4—Finding of fact by justices—Justices not bound by definition in sect. 4 to find as a matter of law contrary to the fact.

*The Public Health Act 1875* (38 & 39 Vict. c. 55) by sect. 150 enacts that "where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriage-way, footway, or any other part of such street is not sewered, levelled, paved, &c., to the satisfaction of the urban authority," such authority may, by notice as therein mentioned, "require the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, &c., to sewer, level, pave, &c., the same," and in default of compliance with such notice the urban authority may execute the required works themselves, and recover the expenses thereof summarily from such owners or occupiers in proportion to their respective frontages. The interpretation clause (sect. 4) of the said Act enacts that "In this Act if not inconsistent with the context, the following words and expressions shall have the meanings hereinafter respectively assigned to them, that is to say . . . street includes any highway not being a turnpike road, and any public bridge, not being a county bridge, and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not.

The respondents as the urban authority for the district of B., having proceeded summarily under sect. 150 to recover from the appellants their proportion of the expense of sewerage, &c., a certain road or street within the district, not being a highway repairable by the inhabitants at large, the justices determined and adjudged that the appellants should pay the amount so claimed from them; but, in a case stated by them for the court, the justices stated as follows, "We held as a matter of fact the road in question was not a street, but that we considered ourselves bound by the definition in sect. 4 of the Public Health Act 1875 to declare it to be a street."

Held, by the court (Pollock and Huddleston, BB., and North, J.) giving judgment for the appellants, that it was for the justices to find, as a matter of fact, whether or not the road was a "street" within sect. 150, and that their finding on that fact was final and conclusive; and that they were not bound to find, as a matter of law, that it was

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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a "street" within the definition of that word in sect. 4.

*Reg. v. Dayman* (7 E. & B. 672; 26 L. J. 128, M. J.), approved and followed.

CASE stated by two justices of the West Riding of Yorkshire under 20 & 21 Vict. c. 43.

The respondents, the Local Board for the district of Baildon, in the county of York, as the urban authority for the said district, preferred a complaint against the appellant Maude, and also against the other appellants, the trustees of one Richard Goldsborough, deceased, as owners respectively of premises fronting, adjoining, or abutting upon a certain street or road called West-lane, within the said district, to recover from them, under sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55), their respective proportions of the expense of sewerage, levelling, paving, and channelling the said street or road, and, after hearing the parties and the evidence adduced before them, the justices determined and adjudged that the appellants should respectively pay the sums so claimed from them; but, upon the application and request of the appellants, stated and signed for the opinion of the Queen's Bench Division of the High Court of Justice a case setting out the facts, of which the portions material for this report are as follows:—

At the hearing of the several complaints evidence was called on behalf of the respondents, but none was called on behalf of the appellants, and the following facts were proved:

West-lane, the road in question, is within the urban district of Baildon, and leads from the westerly end of the village of Baildon, out of Westgate-street, at a point marked A. in a plan accompanying the case, and thence proceeds, in a south-westerly direction for a distance of about 1420 lineal yards, to the junction of a lane, called Banktop-lane, with the said road at the spot marked M. on the said plan, and thence in a north-westerly direction to a house called Lacy Hall, and there joins a bridle way leading to Eldwich, and places beyond.

Between the point A. and Lacy Hall the road is laid out as a cart road, but for a period long prior to 1835 the public have enjoyed a right of way on foot and on horseback along the said road from the said village to the point M. and beyond.

It was proved to our satisfaction that repairs had been done to the said road by the owners of the land on the northerly side thereof for a period of sixty years and upwards, under a custom for the owners of land on the northerly side of the said road to repair the whole of such road in proportion to the extent of their respective frontages. No repairs have been done by the respondents, or by the highway authority, or the parish authorities. The appellants' premises are situated on the southerly side of the said road. There is no continuous line of houses on the said road between the points A. and M. At the westerly end of the said road, nearest to the said village, however, namely, from the point A. to a point marked D. on the plan, there are numerous houses on both sides of the road; but along the whole of the remainder, and by far the greater and longer portion of the said road, viz., from D. to M. there are only two houses, and

the lands on each side of the said road between D. and M. are of a purely agricultural character.

The appellants failing to pay the amounts apportioned by the surveyor, and awarded by a duly appointed arbitrator under the Act, to be paid by them, summonses were issued, and proceedings were taken against them before the justices as above mentioned; and at the hearing of the information (the case of the appellant Maude and of the other appellants, the Goldsborough trustees, being identically the same), the following, amongst other points, were taken on their behalf; that there was no continuous line of houses on the said road between the points A. and M.; and that the said road by reason thereof, "and by reason also of its being, for by far the greatest portion of its length, a purely agricultural lane used as an occupation road by the owners and occupiers of the adjoining lands, was not a "street" within the meaning of sect. 150 of the Public Health Act 1875."

The justices held that the road in question was a street within the meaning of sect. 150 of the statute, as being within the definition of the word "street" given by sect. 4 of the same Act; and they also held that the other points were insufficient in point of law, and they accordingly adjudged and determined that the appellants should respectively pay to the respondents the amounts claimed, but without costs.

The question for the opinion of the court is whether the determination of the justices upon the points arising upon the construction of the Public Health Act 1875 was correct in point of law; and if not, what should be done in the premises.

The case came on for argument some months ago, when the court (Field and Stephen, JJ.), not thinking it clear whether the justices had found it to be a street as a matter of fact, apart from the definition of the word in sect. 4, sent the case back to the justices for them to state whether the road in question was found by them to be a street as a matter of fact, or whether they considered themselves bound by the definition clause so to find, and thereupon it subsequently came back, with the following memorandum signed by the justices, appended thereto:

Nov. 17 1882.—We held that as a matter of fact the road in question was not a street, but that we considered ourselves bound by the definition in sect. 4 of the Public Health Act 1875 to declare it to be a street.

March 6.—The case now came on again for argument, and

*Forbes*, Q.C. (with whom was *H. E. Stansfield*) appeared for the appellants.—The simple question here is, What is the meaning of the word "street" in sect. 150 of the Act of 1875? For nearly three-quarters of a mile along the road in question, viz., from points A. to M. there are but two houses, and the land is purely agricultural. Originally the justices found it was a street within sect. 150, as being within the definition of "street" in sect. 4, by which they thought they were bound. But now it appears from the further statement at foot of the case that the justices found that, as a matter of fact, it was not a street, though they had thought they were bound to declare it to be one under sect. 4. Their finding, therefore, as to the fact now is that it is not a street, and the case of *Reg. v. Dayman* (26 L. J. 128, Mag. Cas.; 7 E. & B. 672) is an authority showing that such finding

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is conclusive and final. The question in that case arose under the 18 & 19 Vict. c. 120, by which a parish vestry had power to pave any new street, and to recover the expense of so doing, from the owners of the houses forming the street, by summons before two justices; and the police magistrate, after hearing the evidence, dismissed the complaint against an owner on the ground that the street having been dedicated to the public as a highway before the passing of the Act then in question was not a "new street" within the meaning of the Act; and on a motion under sect. 5 of 11 & 12 Vict. c. 44, calling on the magistrate to show cause why he should not hear and adjudicate, the majority of the Court of Queen's Bench (Lord Campbell, C.J., and Wightman and Crompton, JJ.) held (Erle, J. *dissentiente*) that he had done so, and that the court could not interfere. The definition of the word "street" in that Act of Parliament was this: "The word 'street' shall apply to and include any highway, road, &c.," which is in substance and effect the same as the definition in sect. 4 of the present Act. [He was here stopped by the Court, who called on]

*Wagh* (with whom was *H. Wills*) for the respondents, *contra*, who contended that as a matter of law this was a "street" notwithstanding the magistrate's finding on the matter of fact. The interpretation clause (sect. 4) of the Public Health Act 1875 says: "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them, that is to say, 'street' includes any highway not being a turnpike road, and any public bridge not being a county bridge, and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." [HUDDLESTON, B.—That section, in other definitions there given, uses the word "means," as, for instance, "Borough means" so-and-so and "Local Government district means" &c., "Parish means a place," &c., and so on; but, when we come to "street," it does not say "means," but "street includes" so-and-so.] In *Reg. v. Fullford* (10 L. T. Rep. N. S. 346; L. & C. Cr. Cas. Res. 403; 9 Cox Cr. Cas. 522; 33 L. J. 122, M. C.; 10 Jur. N. S. 522) will be found the explanation of the difference between these terms. [HUDDLESTON, B.—The case of *Reg. v. Kershaw* (6 E. & B. 999; 26 L. J. 19, M. C.; 2 Jur. N. S. 1139) shows that the word "means" in an interpretation clause limits the interpretation to the expressions there used; but it is different where the word is "includes." Take "house," for instance, which by the section includes schools, but you surely would not say that therefore a house must be a school?] No; but the cases go to this, that the ordinary and *prima facie* meaning of any well-known term is not excluded; but, in addition thereto, if there be a definition clause giving an artificial meaning to certain ordinary terms, then, wherever it can be done, in addition to the ordinary, an artificial meaning is applicable if not inconsistent with the context. The matter of fact for the magistrates in such a case is to find whether those words are included in the general meaning, and it is for the court then to apply the definition and say whether in the particular case it applies or not. [POLLOCK, B.—You must first get over the objection raised by *Reg. v. Dayman* (*ubi sup.*). If the Court of Queen's Bench held that, notwithstanding the interpretation clause there, it was a matter

of fact for the magistrates, and they considered themselves bound by that matter of fact, why is this court not now so bound?] There it was calling on the magistrate to hear and determine, which he had already done, and determined that it was not a street. [POLLOCK, B.—Substantially the justices have done so here. They report to the court that, *de facto*, they found that this was not a street, which must be taken as imported into the original case, and, as to what they add as to sect. 4, we think they were not bound by that section, and so their finding of the fact is unfettered. The one is a proper exercise of their function, the other is a mere matter of opinion upon the point of law.] Where there is a meaning in common and daily use, that meaning is a matter of fact; but, where a definition clause gives an artificial meaning to certain words, the matter of fact for the justices is, whether those words are included in the general meaning, and it is for the court to apply the definition in the particular instance, and say whether it must conclusively and necessarily be a street within that definition. As a matter of fact they say it is not a "street," but, as a matter of law under the section of the Act, it is a "street." In *Coverdale v. Charlton* (38 L. T. Rep. N. S. 687; 3 Q. B. Div. 376; 47 L. J. 446, Q. B.) Cockburn, C.J., in his judgment said: "It is certainly rather startling to find that under the term 'urban district' may be included an area of a thoroughly rural character such as this, and that under the term 'street' a green lane may be included; but it has pleased the Legislature so to enact, and of course it must be so." That case was supported on appeal (see 40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104; 48 L. J. 128, Q. B.). If that construction is not inconsistent with the context it must be accepted. Again, in *Robinson v. The Barton Local Board* (47 L. T. Rep. N. S. 286; 21 Ch. Div. 621; 52 L. J. 5, Ch.), on appeal from a decision of Fry, J. below (46 L. T. Rep. N. S. 193; 51 L. J. 467, Ch.), Brett, L.J. in his judgment, referring to this same sect. 4, said: "The Act clearly dealt with at least two different kinds of streets; one, a street which nobody in ordinary language, without the help of an Act of Parliament, would have called a street; the other which everybody without that aid would have called a street. The interpretation clause includes under the word 'street' things which no one in ordinary parlance would call 'streets,' as, for instance, a highway which has not a house on either side of it." [POLLOCK, B.—Do you say that the justices are bound by reason of this interpretation clause to say that every highway without a house on either side of it is a street?] Yes, within the meaning of sect. 150, in an urban as opposed to a rural district. The last paragraph of sect. 150 is "The same proceedings may be taken and the same powers exercised in respect of any street or road of which a part is or may be a public footpath, or repairable by the inhabitants at large, as fully as if the whole of such street or road was a highway repairable by the inhabitants at large." Now, if this is not a street in fact, it is found to be a road, and also that part of it is a public footpath; and sect. 150 favours the respondents' contention as showing the Legislature's intention that the definition clause should apply to sect. 150, because it uses the words "street or road;" the context, therefore, not only not excluding, but actually

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inviting the meaning of the definition in sect. 4. Nor is *Reg. v. Dayman* (*ubi sup.*) opposed to this view. The *mandamus* applied for in that case was refused on the ground that the magistrate had already heard and determined the matter, and held that it was not a street, and therefore the application for the rule was wrong in form.

POLLOCK, B.—The question for the opinion of the court as it originally stood in this case was as follows: "Whether our determination upon the construction of the various points, hereinbefore set forth, arising upon the Public Health Act 1875, was correct in point of law; and, if not, what should be done in the premises." Now, as there was a doubt as to what the finding of the magistrates here in point of fact was, the case was sent down by the court for a further finding in that respect, and on the 17th Nov. last, the justices added the following memorandum to their previous finding, namely, "We held that as a matter of fact, the road in question was not a 'street,' but that we considered ourselves bound by the definition in section 4 of the Public Health Act 1875 to declare it a street." Now, from that addendum to the case, it is clear to my mind that the magistrates have acted properly within what was said in the case of *Reg. v. Dayman* (*ubi sup.*) to be their duty. That case clearly laid down that it was the duty of the magistrates in all such cases to find in the first place, whether, in point of fact, the road in question was or was not a street. Mr. Waugh says, and very properly, that if the magistrates were so placed that they were bound by the definition given in the statute to find a certain thing, they could not find in fact anything contrary thereto; for instance, if the definition clause in the Public Health Act had said that a "street shall mean all passages, ways, roads, &c," giving certain definitions, they could not find contrary to that. But in truth that is not the difficulty here. What the justices here say is this, having said that they held as a matter of fact that the road in question was not a street, they go on to say, "but we considered ourselves bound by the definition in sect. 4 to declare it a street." The question therefore now is whether they were or not so bound? I am clearly of opinion that they were not so. As my brother Huddleston has already pointed out in the course of the argument, it is one thing to say that "street shall mean" so-and-so, or that "roads and passages and so forth shall be deemed to be streets," and another and a very different thing to say that "street shall include" so-and-so, which does not intend that the magistrates are to have no power at all to find the fact. It merely means to say that if a certain place, way, or road be a street in other respects, then that the word "street" in the Act of Parliament shall include that place, way, or road. Now that seems to me to dispose of that branch of the argument on the part of the respondents, and to enable the court to say that, having before them the finding of the magistrates on a point of fact, there is no matter for any further argument. There is, however, one other matter to which our attention was properly called by Mr. Waugh, who argued that by sect. 150 of the Act of 1875 it was provided that the power declaring it to be a street is not to be ousted by reason of there being a public footpath running parallel with the so-called street, and in the present case there was,

as a matter of fact, such a footpath; but I cannot help thinking that that was not the intention, nor is it the effect, of sect. 150. Its effect, in my opinion, is not to say that, wherever there is a footpath running parallel, the rest of the ground is in such a case to be deemed a street. It merely, I think, means to say that, in all those cases in which the magistrates could properly find the residue to be a street, that power of so finding is not to be taken away in consequence of the fact that there is a public footpath. That, I think, is quite understandable, nor is it necessary to illustrate it now, though there are many cases which might arise in which that power would be of importance. None of those possible cases, however, affect the present case. We have here merely to say whether or not sect. 4 compels the magistrate so to find, and my opinion is clearly that it does not. The judgment of the court will therefore be for the appellants.

HUDDLESTON, B.—I am of the same opinion. The moment that the case went back to the justices the question was one of fact only, namely, whether this place is or is not a "street," and the finding of the justices on that matter is that it is not a street.

NORTH, J.—I also am entirely of the same opinion.

*Judgment for the appellants with costs. Leave to appeal refused.*

Solicitors for the appellants, *Sharps, Parkers, Pritchard, and Sharpe*, agents for *Weatherhead and W. and G. Burr*, Bingley.

Solicitors for the respondents, *Emmett, Son, and Stubbs*, agents for *Peel, Stanford, and Hines*, Bradford, Yorkshire.

Friday, Dec. 1, 1882.

(Before Lord COLERIDGE, C.J., FIELD and STEPHEN, JJ.)

FRIEND (app.) v. TOWERS (resp.). (a)

REGISTRATION APPEAL.

*Parliament—Registration of voters—Borough vote—Description of qualification in third column as "house"—Sufficiency of, under Representation of People Act 1867 (30 & 31 Vict. c. 102), s. 3—Amendment of description to "dwelling-house"—Power of revising barrister to amend—Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28, sub-sects. 12, 13—Sched. Form D., No. 1, Division 1—Form O., note P. (4)—Reform Act 1832 (2 & 3 Will. 4, c. 45), s. 27.*

*The qualification of the respondent, a resident occupier of a dwelling-house in a parliamentary and municipal borough, which conferred on him a sufficient qualification for the borough franchise under sect. 3 of the Representation of the People Act 1867 (30 & 31 Vict. c. 102), but was not of sufficient value (10l. a year) to give the franchise under the Reform Act of 1832 (2 & 3 Will. 4, c. 45), s. 27, was described in the third column of the occupiers' list (Form D., No. 1, Division 1), as "house." An objection was taken at the revision court that that description was incorrect and insufficient for the purpose of the inhabitant occupiers' franchise under the Act of*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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1867, inasmuch as by sect. 5 of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), such description was made applicable and appropriated exclusively to the 10l. franchise under the Reform Act of 1832, and that proof of an inhabitant occupier's "dwelling-house" qualification under the Act of 1867 was thereby absolutely precluded; and further that to amend the description by altering it to "dwelling-house" would be to substitute another and different qualification, which the revising barrister had no power to do. The revising barrister was of opinion that the qualification was sufficiently described as it stood, the two terms "house" and "dwelling-house" being substantially the same; but that, if not, he could, "for the purpose of more clearly and accurately defining the same," amend the description under sub-sect. 12 of sect. 28 of the Act of 1878, by prefixing the word "dwelling" to the word "house" in the third column, which he accordingly did and retained the voter's name in the list.

Held, on appeal therefrom, that, whether or not the original description in the third column was sufficient, which it was not necessary now to decide, the revising barrister clearly had power under the provisions of sub-sect. 12 to amend the description as he did, and was right in so amending it.

THIS was an appeal from the decision of the revising barrister for the city and county of the city of Exeter at a court held for the revision of the list of voters for the said city, at which court the appellant duly objected to the name of the respondent being retained on the original list (Form D., No. 1, Division 1) for the parish of St. David, of persons entitled to vote at the election of members to serve in Parliament for the said city, upon the ground that the qualifying property of the respondent was of insufficient value.

The following facts were proved before the revising barrister:—

1. The name of Thomas Hoskin Towers appeared in the said list in the following form:

Names of Voters in full, Surname being first.	Place of Abode.	Nature of Qualification.	Name and Situation of Qualifying Property.
Towers, Thomas Hoskin.	Bonhay-road.	House.	Bonhay-road.

2. The clear yearly value of the said property is less than 10l.

3. The said Thomas Hoskin Towers had, during the whole of the qualifying period, been in occupation of the said property as tenant, and had used and occupied the same as his dwelling-house.

4. No declaration, under sect. 24 of the Parliamentary and Municipal Registration Act 1878 had been made or filed, nor had the said Thomas Hoskin Towers made any claim under 6 & 7 Vict. c. 18, s. 15; but he appeared in person, and gave evidence in accordance with the above facts.

5. The names of 269 other persons, whose names and qualifications are set out in the schedule hereto annexed, were objected to by the appellant on similar grounds and under similar circumstances.

It was contended for the objector (the appellant)

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(1) That the description "house" was, by sects. 5 and 8, and the schedule and notes thereto, of the Parliamentary and Municipal Registration Act 1878, so appropriated to the franchise created by the Reform Act of 1832 (2 Will. 4, c. 45, s. 27) as to exclude proof under it of a "dwelling-house" within sect. 3 of the Representation of the People Act 1867 (30 & 31 Vict. c. 102). (2) That the revising barrister had no power to amend the said description by substituting "dwelling-house" for "house," on the ground that by so doing he would be inserting another qualification, and in support of that contention the case of *Nicholls v. Bulwer* (23 L. T. Rep. N. S. 542; 1 Hop. & C. 472; L. Rep. 6 C. P. 281; 40 L. J. 82, C. P., 19 W. R. 284) was cited. (3) That if the revising barrister had the power to amend, such power could only be exercised on proof that the voter had duly made and filed a declaration under sect. 24 of the Parliamentary and Municipal Registration Act 1878, or a claim under sect. 15 of 6 & 7 Vict. c. 18. (4) That the several cases cited on behalf of the respondent (*ubi infra*) had been decided prior to the passing of the Parliamentary and Municipal Registration Act 1878.

On behalf of the respondent it was contended:

(1) That the description of the nature of the qualification as "house" was sufficiently comprehensive to include "dwelling-house." (2) That the terms "house" and "dwelling-house" were not dependent for their nomenclature on the fact of the value being 10l., or under that sum. That it was no more necessary, in any case, in the third column, to prefix the word "dwelling" to "house," than it was under the Reform Act of 1832 to add "value of 10l. per annum," or under the Parliamentary and Municipal Registration Act 1878, to add "separately occupied as an inhabitant occupier," for in each case the value and occupation of the house by dwelling in it was a subject of proof only, and not of description. (3) That by Form D. of the schedule to such Registration Act 1878, given for a person "entitled under any right conferred by the Reform Act 1832, or by sect. 3 of the Representation of the People Act 1867," the term "house" was used, and not "dwelling-house." (4) That it was not necessary, under the Reform Act 1832, to follow the words of the statute, and therefore not necessary to do so under the Representation of the People Act 1867. (5) That a declaration under sect. 24 of the Parliamentary and Municipal Registration Act 1878 was no more than a mode of receiving evidence in order to save the personal attendance of the voter, and could have no greater effect than the evidence of the voter given in person. (6) That the term "house" was not so exclusively appropriated to the 10l. franchise created by sect. 27 of the Reform Act of 1832 as to exclude proof under it of a "dwelling-house" within sect. 3 of the Representation of the People Act 1867. (7) That it was in the revising barrister's power and obligatory upon him to amend (if it were necessary) by prefixing the word "dwelling" to "house" under sect. 28 of the Parliamentary and Municipal Registration Act 1878.

The following are the cases cited before the revising barrister in support of the above-mentioned contention on behalf of the respondent:

*Score v. Huggett*, 1 Lutw. 198; 8 Scott N. R. 919; 7 M. & G. 95; 14 L. J. 74, C. P.; B. & Arn. 335; 9 Jur. 70;

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*Jolliffe v. Rice*, 2 Lutw. 90; 6 C. B. 1; 18 L. J. 25, C. P.; 18 Jur. 39;  
*Toms v. Luckett*, 2 Lutw. 19; 5 C. B. 23; 17 L. J. 27, C. P.; 11 Jur. 993;  
*Thompson v. Ward*, 24 L. T. Rep. N. S. 679; 1 Hop. & C. 530; L. Rep. 6 C. P. 327; 40 L. J. 169, C. P.,

in which latter case the description of the nature of the qualification was "house," but the rent or value was under 10l.;

*Townshend v. Marylebone*, 25 L. T. Rep. N. S. 749, 1 Hop. & C. 606; L. Rep. 7 C. P. 143; 41 L. J. 25, C. P.; 20 W. R. 148;  
*Ford v. Boon*, 25 L. T. Rep. N. S. 830; 1 Hop. & C. 668; L. Rep. 7 C. P. 150; 20 W. R. 251; 41 L. J. 28, C. P.;  
*Ellis v. Burch*, 24 L. T. Rep. N. S. 679; 1 Hop. & C. 537; L. Rep. 6 C. P. 329; 40 L. J. 169, C. P. (judgment of Bovill, C.J.).

The revising barrister decided that the description "house" was a sufficient description of a "dwelling-house" under sect. 3 of the Representation of the People Act 1867, and that it was not so appropriated to the franchise created by the Reform Act of 1832, s. 27, as to exclude proof under it of a "dwelling-house" under sect. 3 above mentioned; but that it was a matter of evidence whether a house was a "house" as required by the Reform Act of 1832, of the value of 10l., or whether it was a "dwelling-house" under the Representation of the People Act 1867; and that, although it was not absolutely necessary for him to do so, he should, and he did, "for the purpose of more clearly defining the qualification," amend the description by prefixing the word "dwelling" to the word "house;" and he retained the name of the said Thomas Hoskin Towers, and also the names of the said other respondents (whose names are set forth in the said schedule, the validity of the objections to whom depended upon evidence decided by the revising barrister upon the same points of law, and the appeals in relation to which he ordered to be consolidated) in the occupiers' list of parliamentary voters for the said city.

If the court should be of opinion that such decision of the revising barrister was wrong, the register was to be amended by erasing the names of the said Thomas Hoskin Towers, and the names of the said several other persons whose names were set out in the said schedule, from the said list.

*Charles*, Q.C. (with whom was *T. T. Bucknill*) appeared for the appellant, and contended that the decision of the revising barrister was wrong. The qualification created by sect. 27 of the Reform Act 1832 (2 & 3 Will. 4, c. 45) consists of and arises from the occupation of a "house" of the specified value of 10l. a year, whereas the occupation franchise under sect. 3 of the Representation of the People Act 1867 (30 & 31 Vict. c. 102) is that of an "inhabitant occupier of a dwelling-house," no matter of what value, whether more or less than 10l., it may be. The two qualifications are entirely different and distinct the one from the other. By sect. 5 of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26) it is enacted that in and for the purposes of the Reform Act 1832 the term "house, warehouse, counting-house, shop, or other building" shall include any part of a house where that part is separately occupied for the purpose of any trade, &c. and that in and for the purposes of the Representation of the

People Act 1867 the term "dwelling-house" shall include any part of a house where that is separately occupied as a dwelling. In the directions for the guidance of overseers in making out the lists, given in note P. to form O., in the schedule to the Act of 1878, it is said that "the nature of the qualification should be entered as nearly as possible in the words of the statute creating the franchise;" for instance—(a) The nature of the qualification of a person under the Reform Act 1832, or, under the Municipal Acts, should be stated thus: "house;" or in the case of a joint occupation, "house (joint);" or "warehouse" "counting-house," "shop" or "building;" or in the manner provided by the Parliamentary and Municipal Registration Act 1878 as the case may be. (b) The nature of the qualification of a person under sect. 3 of the Representation of the People Act 1867 should be stated thus: "dwelling-house." These portions of the several Acts of 1832, 1867, and 1878 clearly show that "house" and "dwelling-house" are not convertible terms, but are descriptions of two entirely distinct qualifications; and that the term "house," in the third column under the heading "Nature of Qualification," precludes and negatives the idea of a qualification grounded on the occupation of a "dwelling-house." In the case of two franchises overlapping, as where a man claims for the occupation of a house under the Act of 1832, which he himself inhabits, his qualification may be described in the third column either as "house" or "dwelling-house:"

*Townshend v. Marylebone*, 25 L. T. Rep. N. S. 749; 1 Hop. & C. 606; L. Rep. 7 C. P. 143; 41 L. J. 25, C. P.; 20 W. R. 148.

*Willes*, J., in *Ford v. Boon* (25 L. T. Rep. N. S. 830; 1 Hop. & C. 668; L. Rep. 7 C. P. 150; 20 W. R. 251; 41 L. J. 28, C. P.), explains the meaning of the decision in *Townshend v. Marylebone*. He says: "After our decision in *Townshend v. Marylebone* (*ubi sup.*) it must be taken to be law that, if there be a description of a qualification which is sufficient when the claim to vote is in respect of a house of the annual value of 10l., and that description is such as to fall under some other qualification, as, for instance, a qualification in respect of a dwelling-house under the Act of 1867, the claimant may prove his qualification in respect of the genus "house" under sect. 27 of the Act of 1832, or in respect of the species "dwelling-house" under the Act of 1867. The head of qualification is the same in either case. But here the claim is for a new franchise, viz., as an "inhabitant occupier of a dwelling-house," and the description therefore should have been stated in the third column as "dwelling-house." In his judgment in *Townshend's case* (*ubi sup.*) *Brett*, J. (differing from the majority of the court) said: "Sect. 27 of the Reform Act 1832 gave various different qualifications, viz., 'house, warehouse, counting-house, shop, or other building.' Now, irrespective of the statute, some of these expressions include others of them; e.g., 'house' includes 'warehouse,' and a 'shop' is a 'house;' yet, in interpreting the Act, it has been always held that a person claiming as for the one of them could not prove for the other; as, if he claimed in respect of a 'shop,' and the proof was that in addition to the 'shop' he occupied the rest of the house as his residence, that would oust his claim to the vote. Now the Act of 1867 has given a



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new qualification in respect of the inhabitant occupier of a dwelling-house, and sect. 59 expressly enacts that the new Act shall be construed as one with the enactments for the time being in force relating to the representation of the people and with the Registration Acts, and it appears to me that sect. 27 of the Reform Act 1832 must be read as if 'dwelling-house' had been one of the qualifications inserted therein. Then, according to the old decisions, the claimant, if he had claimed for a 'dwelling-house' qualification, could not have proved his qualification as simply 'house.' It is argued that this construction of sect. 3 takes away the right of the voter; but if it does so it is because his qualification is misdescribed. The court ought to be as careful of the rights of the objector as of the rights of the voter." It comes to this, that where there is an overlapping of franchises, it is the same either way, "house" or "dwelling-house;" but where, as here, there is no overlapping, it is not so, and the qualification must be stated with strict correctness and accuracy. He cited also *Bradley v. Baylis* in the Court of Appeal, and the judgment of Brett, L.J. there (46 L. T. Rep. N. S. 253; 1 Colt. Reg. Cas. 163; 8 Q. B. Div. 195-210; 51 L. J. 183, Q. B.), and submitted that the present was a clear case of another and different qualification. Next, as to the power of the revising barrister to amend and to change the description from 'house' to 'dwelling-house.' Sect. 28, sub-sect. 12, of the Act of 1878 empowers the barrister to amend in cases where the matter stated in any list or claim is, in his judgment, insufficient to constitute a legal qualification of the nature or description claimed, &c.; but here the barrister was of opinion that the description stated, "house," was a sufficient description, and yet he amended for the purpose of "more clearly and accurately defining it;" but sub-sect. 12 cannot be made use of for that purpose where the description is found to be sufficient. The effect of this amendment, moreover, is to change the nature of the qualification itself, and to substitute an entirely different franchise, viz., that of an "inhabitant occupier of a dwelling-house" under the Act of 1867, for that of the "occupier of a house" under the Act of 1832, which it is expressly enacted, both by sect. 40 of the Parliamentary Registration Act 1843 (6 & 7 Vict. c. 18), and sub-sect. 13 of the Act of 1878 (40 & 41 Vict. c. 26), that the barrister shall not be at liberty to do. [Lord COLERIDGE, C.J.—The revising barrister made the amendment, saying in substance when he did so that, although he did not concur with the appellant's objection to the description in the third column, yet, in order to obviate any possible objection, he would amend. Is it then material under which of the two sub-sections, 12 or 13, of sect. 28, he made or intended to make the amendment?]

*Bompas*, Q.C., for the respondent *contra*, was not called upon to argue.

Lord COLERIDGE, C.J.—I am of opinion that the decision of the revising barrister in this case was correct, and should therefore be affirmed. The argument adduced before us by Mr. Charles, with respect to the question whether the use of the word "house" in the third column was or was not a sufficient description of the qualification of an "inhabitant occupier of a dwelling-house" under

sect. 3 of the Representation of the People Act 1867, was certainly very ingenious; but, although I was much impressed by it, I pronounce no further opinion upon it, and do not propose to decide this case upon any such ground as that suggested by Mr. Charles; but I decide it on the ground that, in my opinion, the case is precisely met by the enactment contained in sub-sect. 12 of sect. 28 of the Parliamentary and Municipal Registration Act 1878, which I think must have been passed with the intention of expressly giving to revising barristers the power to do the very thing which the barrister has done in the present case. That 12th sub-section enacts as follows: "Where the matter stated in a list or claim, or proved to the revising barrister in relation to any alleged right to be on any list, is, in the judgment of the revising barrister, insufficient in law to constitute a qualification of the nature or description stated or claimed, but sufficient in law to constitute a qualification of some other nature or description, the revising barrister, if the name is entered in a list for which such true qualification in law is appropriate, shall correct such entry by inserting such qualification accordingly, and in any other case shall insert the name with such qualification in the appropriated list, and shall expunge it from the other list, if any, in which it is entered." Now, surely, in a case where it is proved to the revising barrister's satisfaction that the voter has a qualification given by and to all intents good under one statute, but which is described in the list in words that refer to and are applicable to a qualification given by another statute, the barrister may, and ought, so to alter and amend the description as to bring it within and make it a good and sufficient one under the former statute. Then, if that be so, this is precisely and simply what was done by the revising barrister in this case, and on that ground I am of opinion that his decision was right, and must therefore be affirmed. I purposely avoid expressing any opinion upon the difficult and subtle question of two franchises overlapping one another, as well as the question whether the word "house" in the third column is a sufficient description of the qualification of an "inhabitant occupier of a dwelling-house" under sect. 3 of the Representation of the People Act 1867, on neither of which questions is it necessary in the present case that we should pronounce any opinion.

FIELD, J.—I entirely agree with everything that has fallen from my Lord in this case.

STEPHEN, J.—I am of the same opinion.

*Decision of the revising barrister affirmed.*

Solicitor for the appellant, *Hamilton*, agent for *J. W. Friend*, Exeter.

Solicitors for the respondents, *J. E. Fox and Co.*, agents for *H. and B. J. Ford*, Exeter.

Q.B. Div.]

SMITH (app.) v. THE MAYOR, &amp;c., OF BIRMINGHAM (resps.).

[Q.B. Div.]

May 8 and June 6, 1883.

(Before DENMAN and HAWKINS, JJ.)

SMITH (app.) v. THE MAYOR, &amp;c., OF BIRMINGHAM (resps.). (a)

*Water rate—"Annual rent"—Houses let to weekly tenants—"Voids," deduction for—Owner paying rates—Composition for—Deduction on account of—Birmingham Waterworks Act 1855 (18 Vict. c. cxxiv. s. 83).*

*S. was the owner of certain houses in the town of B., which were let to weekly tenants at weekly rents, S. paying all rates, &c., charged upon the premises, including the charge for water, and also paying for all repairs, insurances, &c., in respect thereof. The houses were supplied with water by the corporation of B., and by sect. 83 of the B. Waterworks Act 1855 they can charge the following rates: "Where the annual rent of the house, or part of a house or premises, supplied shall not exceed 5l., the yearly rate of 6s." and so on, the rate increasing with the increase in the annual rent, and ending as follows: "Where such annual rent shall exceed 50l., at a rate not exceeding 6l. per cent. on the amount of such annual rent." S. was rated to the poor rate instead of the occupiers, and was allowed a deduction of 30 per cent. from the full rate, and was voluntarily rated to the water rate.*

*Held, that, in determining what was the "annual rent" of these houses, upon which the water rate was to be charged, S. was entitled, besides the deduction for rates, to have a further deduction made on account of "voids," i.e., the estimated loss owing to the houses, or any part of them, being unlet, but that in deducting the rates, he was only entitled to a deduction of the amount of the composition paid by him, and not to a deduction of the full rates, which would be payable by the tenants if they paid them.*

*Held, also, that the words "annual rent" did not mean "net annual rent" or "rateable value," but "gross estimated rental."*

THIS was a case stated by the stipendiary magistrate for Birmingham.

A summons was taken out by the appellant against the respondents, under sects. 68 and 85 of the Waterworks Clauses Act 1847, to determine a dispute which had arisen as to the "annual rent," within the meaning of sect. 83 of the Birmingham Waterworks Act 1855 and the Birmingham Corporation Water Act 1875, of certain houses the property of the appellant, which had been supplied with water by the respondents.

The houses in question were let at weekly sums varying from 2s. 7½d. to 5s. 6d., which were the full payments obtainable for them on the terms upon which they were let, and such houses were supplied with water by the corporation. These weekly sums were the only payments made by the tenants in respect of the premises under any circumstances.

The magistrate dismissed the summons, intimating, however, an opinion, that the appellant was entitled to a deduction on account of "voids."

The opinion of the court was asked as to whether the appellant was entitled to any, and if so, to which, of the deductions claimed by him.

The contention on the part of the respondents,

and the various contentions and claims for deductions on the part of the appellant, and the facts and the statutes bearing on the case, are fully set out in the judgment.

*Hugo Young* for the appellant.—(The arguments are fully stated in the judgment, with the exception of the following, which alone it is necessary to set out.)—As to the amount which ought to be deducted from the rents paid by the tenants for rates and taxes, the full amount of such rates and taxes, if payable by the tenants, ought to be deducted, and not merely the amount paid by the landlord under the terms of his composition. The landlord compounded for the rates and taxes, and an allowance of 30 per cent. was made to him. The composition is made between the landlord and the corporation, and is founded on the basis that the landlord takes the risk and expense of collecting the rates, and the risk of his houses being empty during some part of the year; and so in consideration of these risks and expenses the landlord is allowed a deduction of 30 per cent. The tenant is not interested in the arrangement in any way. The corporation have only allowed a deduction from the rents paid by the tenants of the amount of the composition. They ought to have allowed the full amount of the rates and taxes, if payable by the tenants. Supposing a tenant pays the landlord 10l. a year as rent; this rent includes, say, 2l. for the rates and taxes; but the landlord pays the rates and taxes, and compounds for them for the sum of 1l.; the corporation clearly ought to deduct the 2l. from the rent of 10l.; but, according to their contention, they would only deduct 1l. The landlord, therefore, gets no benefit at all from the composition. He is in a worse position, owing to having compounded, because the house may be empty during part of the year, or the tenants may not pay. For example, two houses of an exactly similar character, belonging to the same landlord, are let to tenants: in the one case the landlord compounds and pays the rates and taxes; in the other case the tenants pay the rates and taxes: according to the contention of the corporation the "annual value" would be different in each case. He cited

*Reg. v. Bileton*, 35 L. J. 97, M. C.

*Alfred Young* (R. E. Webster, Q.C. with him) for the respondents.—The landlord is allowed under the statutes to compound, and he gets a certain deduction on account of his trouble and expense, and the losses he may sustain; but the statutes nowhere say that, in estimating the rent upon which certain charges are based, he can deduct more than the amount he actually pays. He cited

The Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41), s. 4, sub-sect. 2.

*Cur. adv. vult.*

June 6.—The judgment of the court was delivered by

DENMAN, J.—This was a case stated by the stipendiary magistrate for Birmingham, in order that the court might decide the proper mode of assessing the amounts payable by the appellant for water rates. The Corporation of Birmingham, the respondents, had vested in them by 38 & 39 Vict. c. clxxxviii. (the Birmingham Corporation Water Act 1875) all the powers and authority of the Birmingham Waterworks Company. The power and authority of the Birmingham Waterworks

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

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Company as to the supply and charging for water is to be found in sect. 83 of 18 Vict. c. xxxiv. (the Birmingham Waterworks Act 1855). By that section it is provided as follows: "The company shall at the request of the owner or occupier of any house or part of a house, in any street in which any pipe of the company is or shall be laid, or on the application of any person who under the provisions of this Act is entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for domestic use, at rates not exceeding the yearly rates hereinafter specified, that is to say: Where the annual rent of the house or part of a house or premises supplied shall not exceed 5*l.* the yearly rate of 6*s.*" Then follows a scale increasing with the increase in the "annual rent," and ending as follows: "Where such annual rent shall exceed 50*l.*, at a rate not exceeding 6 per cent. on the amount of such annual rent." The property in respect of which our opinion is desired consists of small houses, let at weekly sums on the terms that the appellant, who is the owner, pays all rates, taxes, and assessments of all kinds, charged upon or in respect of the premises including the charge for water, and pays for all repairs and insurances and other matters relating to the premises. He is rated to the poor rate instead of the occupiers under 32 & 33 Vict. c. 41, s. 4, and is allowed the deduction of 30 per cent. therein provided for; also to the borough and street rates under the Birmingham Improvement Act 1851 (14 & 15 Vict. c. xciii.), being allowed the deductions therein provided for (sect. 135). The appellant has been voluntarily rated instead of the occupiers to the water rates. The question for our determination is, what is the true meaning of the expression "the annual rent" in sect. 83 of the Act of 1855? The corporation charged the appellant on the following basis: They multiplied the weekly rents by fifty-two, and deducted from the amount so arrived at the actual sums paid by the appellant for poor and borough and street and water rates, and then charged the water rates in question upon the difference. The appellant claimed further deductions for insurance, repairs, and "voids." As to the last, we understand the case to mean that the stipendiary magistrate was willing to accede to that contention, but that, being in favour of the respondents on all other points, our opinion is desired as to the whole matter. The appellant further contended that the Public Health Act 1875 (which was passed nine days after the Birmingham Corporation Waterworks Act 1875) has superseded any provisions as to the mode of charging the water rates which are inconsistent with its provisions, and made the "net annual value" the amount upon which the water rate is to be assessed. He also contended that he was entitled by way of deduction, not only to the amounts actually paid by him under 32 & 33 Vict. c. 41, s. 4, and the Birmingham Improvement Act 1851, s. 135, but the full rates which would be payable if the occupiers paid the rates. If this case were unaffected by the authority of decided cases, it might seem to admit of a short decision in favour of the respondents. Turning as it does upon the meaning of the words "annual rent," it is possible to arrive at the conclusion at which the stipendiary magistrate has arrived by an easy process. Having ascertained the actual

amount of the weekly rents, he has multiplied these by the number of weeks in the year, intimating, however, that he is prepared to allow a proper deduction for "voids," and for the actual amounts paid by the appellant for rates. The balance so arrived at he holds, or is prepared to hold, to be the proper sum representing the "annual rent" within the meaning of the 83rd section, upon which it is admitted that the question mainly turns. In the case of *Sheffield Waterworks v. Bennett* (27 L. T. Rep. N. S. 199; L. Rep. 7 Ex. 409; aff., 28 L. T. Rep. N. S. 509; L. Rep. 8 Ex. 196) an action was brought by the plaintiffs for water rates for water supplied to houses of which the defendant was owner. The words of the clause regulating the amount to be paid for water required to be supplied were these: "At the following rate per annum; that is to say, where the rent of such dwelling-house, or part of a dwelling-house, shall not amount to 7*l.* per annum, at a rate not exceeding 6 per cent. per annum on such rent," and so on. The dispute in that case was in substance whether the plaintiffs were entitled to charge a sum for water calculated at so much per cent. on the rents actually received, as the plaintiffs contended, or whether the true meaning of the word "rent" in the clause was "annual value;" that is to say, the annual value of the property ascertained by deducting from the proper rent those outgoings which the landlord pays, viz., poor rates, water rates, and district rates. The words there in question, "where the rent shall not amount to 1*l.* per annum" seem to us to be undistinguishable for any purpose from the words of sect. 83 of the Act here in question, "where the annual rent shall not exceed 1*l.*," and the words in that case, "at a rate not exceeding 1 per cent. per annum on such rent," are practically the same as the words of sect. 83, "at a rate not exceeding 1 per cent. on the amount of such annual rent." So far, then, as concerns the allowance to the landlord of the amount of the rates paid by him, and so far as concerns the calculation of the annual value not being tied down to the actual rents received, we think that the case of *Sheffield Waterworks Company v. Bennett* is in the appellant's favour, and shows that the proper rental, not the actual rental, is the test, and that the proper rental is the amount which the landlord would put into his pocket after deducting the rates paid by him. But the appellant contends that, in deducting the rates paid by him, he is entitled to a deduction of the full amount to which such rates would be payable if paid by the tenants, and not by himself, i.e., to 30 per cent. more than the actual amount paid by him in respect of such rates. We cannot accede to this contention. The composition into which the appellant enters where he is voluntarily rated, and the percentage allowed by the statute to the landlord where he pays the rates under the provisions of the statutes, are calculated roughly with the view of compensating the landlord for the trouble he incurs, and the losses he may sustain, by payment of charges *prima facie* payable by the occupiers of his property; and we do not think that the Legislature intended, nor has it anywhere provided, that in estimating charges which he has to pay he can deduct in respect of such outgoings from the annual value upon which he is to be rated more than the sums which he in fact pays. We think that the

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stipendiary magistrate was right in disallowing this deduction. The case of *Reg. v. Bilston* (35 L. J. 97, M. C.), which was cited to the contrary, turned wholly on the words of the Parochial Assessment Act, which authorised a deduction of the usual tenants' rates, and held that, when the landlord compounded, he was still entitled to deduct the usual amount paid by tenants where the tenants pay rates, in order to arrive at the net annual value of the premises within the meaning of 6 & 7 Will. 4, c. 96, s. 1. But inasmuch as, for reasons to be given presently, we do not think that that Act applies, we are left to decide the meaning of "annual rent" in sect. 83 without any assistance from *Reg. v. Bilston*. The appellant also contended that he was entitled to an allowance for "voids," i.e., as we understand the word, that, inasmuch as the property is let at weekly rents, the proper "annual rent" was not the weekly rent multiplied by fifty-two, but what, after making a fair calculation of the loss to the landlord by the want of tenants, incident to property of the kind let to weekly tenants, would be in practice the total value received in the year for the property in question. Here we think his contention is right, and we understand that the stipendiary magistrate is prepared to hold accordingly, and to vary his decision in that respect. But beyond these contentions the appellant has raised a question of greater importance, and which does not seem to have been expressly decided by the case of the *Sheffield Waterworks Company v. Bennett*, or any other case. His contention is that, in addition to the deductions for rates and "voids," he is also entitled to a further deduction for the annual average cost of repairs, insurance, and other expenses necessary to maintain the premises in a state to command the present weekly payments of the tenants; in other words, to have the water rate assessed upon the rateable value of the premises after making all the allowances required by 6 & 7 Will. 4, c. 96, s. 1, in the case of poor rates. Reverting to the words of the section with which we have to deal, they are, "where the annual rent of the house or part of a house supplied shall not exceed , the yearly rate of ;" and, "where such annual rent shall exceed 50l. at a rate not exceeding 6 per cent. on the amount of such annual rent." The arguments of the appellant may be stated shortly as follows: The question, being reduced to whether the words "annual rent" in sect. 83 of the Act of 1875 mean "net annual value," or "gross estimated rental," is to be decided by reference to all the statutes relating to the water rates to be charged either by the corporation, or by the company whose rights the corporation has purchased; and, though some of these Acts are not now in force, they may be looked at for the purpose of putting a construction upon the words "annual rent" in sect. 83. The decisions also prior to the Parochial Assessments Act may be referred to, and throw light upon the subject. By a local and personal Act of 7 Geo. 4, c. cix., the Birmingham Waterworks Company were incorporated for the purpose of supplying Birmingham with water. This Act was repealed by the Birmingham Waterworks Act 1855 (except so far as the incorporation of the company was concerned). In the meantime, by the Birmingham Improvement Act 1851, the council were (sect.

109) empowered to provide water for the purposes of that Act, and for private use, and for that purpose to contract with the Birmingham Waterworks Company for a supply of water, and after twelve months' notice to purchase the whole works of the company, in which case all the powers of the company, *inter alia* in regard to receiving and recovering of rents or rates for water, were from the date of the purchase to belong to the council. By sect. 124 of that Act the council were empowered "as long as any building should be supplied with water by the council for domestic use, to make a special rate, called the water rate, upon the occupier, and the rate so made shall be assessed upon the annual value of the building ascertained in manner prescribed by clauses 175, 176 of the Towns Improvement Clauses Act 1847." Turning to those clauses it is provided by clause 175, that the annual value of all property rateable under that Act is to be "ascertained according to the next preceding assessment for the relief of the poor;" but clause 176 provides that if the poor rate be in the judgment of the commissioners an unfair criterion they may cause a valuation to be made, "and in every such valuation the property rateable shall be computed at its net annual value as defined by 6 & 7 Will. 4, c. 96, or any other Act for the time being in force for regulating parochial assessment." Clause 130 of the Birmingham Improvement Act 1851 further provided that a new valuation should be made according to sect. 176 of the Towns Improvement Clauses Act 1847, within eighteen months from the 1st Jan. 1852. No purchase of the waterworks by the corporation having been made under the powers of the Act of 1851, it was contended by Mr. Webster that that Act could have nothing to do with the argument; but it was relied on by Mr. Hugo Young, for the appellant, as showing that the Legislature throughout, in dealing with the rates to be charged for water, when it uses the expression "annual value," contemplates "net annual value," and not "gross estimated rental." Other Acts were referred to for the same purpose, especially 38 & 39 Vict. c. 55 (the Public Health Act 1875), which by sect. 56 provides that "where a local authority supply water to any premises, they may charge a water rate assessed on the net annual value of the premises ascertained in the manner prescribed by this Act with respect to general district rates," which by sect. 211 is, "on the full net annual value" ascertained by the valuation list, if there be one; if not, by the last poor rate. The Union Assessment Act (25 & 26 c. 103) was also quoted as showing that the Legislature habitually uses the words "annual value," "net annual value," and "rateable value," when dealing with questions of rating, as convertible terms. The case of *Reg. v. Tomlinson* (9 B. & C. 163) was also relied on by Mr. Hugo Young for the appellant, but it certainly does not assist his argument, for Bayley, J. there says, on page 167, "Annual rent is not annual profit or value," and the expression, "net yearly rent" used in that case is held to be equivalent to "the rent paid by the tenant after deducting taxes and charges of collection," and not "the clear annual rent after every deduction, including therefore the part to be set aside for repairs and reproduction of the subject of the rate:" (*Ibid.* p. 166.) He also relied on *Baker v. Marsh* (24 L. T. Rep. N. S. 72; 4

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E. & B. 144), in which it was held that a town councillor was not "rated to the relief of the poor upon the annual value of not less than 15l.," where his rateable value was only 11l. 15s. But this case appears to us to have turned wholly upon the construction of the clause relating to the qualification in question, and not to throw any light upon the meaning of "annual rent" in the clause now in question. In paragraph 9 of the case it is stated that the appellant contends, and the corporation admits, that the words "annual rent" in sect. 83 of the Birmingham Waterworks Act 1855 are equivalent to the words "annual value," in the Waterworks Clauses Act 1847, sect. 68. But we do not see that this admission assists us in deciding the meaning of either term, for the Waterworks Clauses Act 1847 contains no definition or explanation of the words "annual value," but merely provides that water rates "shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices." The respondent's counsel, Mr. Alfred Young, contended that no assistance was to be derived from the other Acts referred to by the appellant's counsel, and that the question was to be decided by reference only to the words of sect. 83 of the Act of 1855, assisted by the construction put by the Court of Appeal upon the words "annual value" in the case of *Dobbs v. Grand Junction Waterworks Company* (47 L. T. Rep. N. S. 504; 10 Q. B. Div. 337). He contended that the Act of 1851, never having been acted upon by the corporation (who had purchased the waterworks and obtained their powers solely under the Acts of 1875 and 1855), had no application to the case, and consequently that clauses 175 and 176 of the Towns Improvement Clauses Act had no application, or, if they applied, that the words in sect. 176, "property rateable shall be computed at its net annual value as defined by 6 & 7 Will. 4, c. 96," only required such allowances to be made as would be required in order to get at the letting value of the house; in other words, at the "gross estimated rental" upon which the rateable value is afterwards to be computed. Great reliance was placed by the respondent's counsel on the decision of the Court of Appeal in *Dobbs v. Grand Junction Waterworks Company*. There the question was as to the meaning of the following words: "According to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor rate is computed." The Court held that these words did not mean the rateable value as appearing in the rate, but the "gross estimated rental;" but the decision turned to a great extent upon the ground that the words, "upon which the assessment is computed," showed that the amount of the assessment itself could not be intended, and upon the fact that at the time of the passing of the Act the 6 & 7 Will. 4, c. 96, had not come into existence; and upon the absence of the word "rateable," and other similar considerations. It did, however, contain many observations applicable to the present case, and to all cases in which the question arises, what is the value in respect of which a water rate is to be calculated, and which seem to us to throw light upon the true meaning to be assigned to

such words as "annual rent" in connection with the calculation of the amount to be paid for water supplied. For instance, Lord Coleridge, C.J., in discussing the words "actual amount or annual value upon which the assessment to the poor rate is computed," says that they mean "the full amount at which the house to be rated would before the 6 & 7 Will. 4, c. 96, have been valued by the persons who were to rate it, that amount not being subject to be afterwards reduced by those various heads of allowance with which we are all familiar, and which were to be made" (and as he afterwards observes "which we know historically were made" before 6 & 7 Will. 4, c. 96) "by the overseers before the actual assessment upon any individual was arrived at." Baggallay, L.J. (p. 352) says: "Annual value is not the annual value at which the house is assessed to the poor rate, but the annual value upon which the assessment to the poor rate is computed." Lindley, L.J. in his judgment (p. 353) lays stress upon the omission of the words "net" or "rateable," and concludes that the meaning of the words "annual value" is, whether the house is let or not let, what it would let for" (p. 355). Having regard to these expressions as to the true meaning of the words "annual value," and to the words "annual rent," in sect. 83 of the Act of 1855, and to the construction put upon the very similar words in *Sheffield Waterworks Company v. Bennett*, we think it would be running counter to the cases cited, and laying down a rule inconsistent with them, if we were to hold that the words "annual rent" are equivalent to "rateable value ascertained in the manner provided by 6 & 7 Will. 4, c. 96." It would have been so very easy for the Legislature to use language showing such intention, if any such had existed, that we cannot help thinking that the absence of any such language is a strong reason for holding that the words used have no such meaning. The argument derived from other statutes containing very different words seems to us on the whole to tell against such an intention. Nor is there any reason why the one mode of arriving at the amount on which the payment for water should be assessed should be preferred to the other. The object of the Legislature apparently is that houses, or parts of houses, supplied with water should pay water rates, calculated with reference to the class of the house, or to the value of the part of a house, which is supplied; but this object will not be attained by adopting the rateable value better than the gross estimated rental as the value upon which the amount is to be assessed. Either will suffice for the purposes of calculation, and the Legislature may equally well be supposed to have adopted either. Looking at the words of sect. 83, and putting the best construction we can upon the words "annual rent," we have come to the conclusion that, in the main, the stipendiary magistrate has taken the right view, and that, when he has calculated the allowance to be made for "voids" as above explained, he will do right in allowing the rate to stand, with the necessary alteration occasioned by that allowance.

*Judgment accordingly.*

Solicitors: for the appellant, *Oottrell and Son*, Birmingham.; for the respondents, *Sharpe, Parkers, Pritchard, and Sharpe*, for *E. O. Smith*, Birmingham.

H. OF L.]

YOUNG AND CO. v. MAYOR AND CORPORATION OF LEAMINGTON.

[H. OF L.]

## HOUSE OF LORDS.

May 1 and 2, and June 5, 1883.

(Before Lords BLACKBURN, WATSON, BRAMWELL, and FITZGERALD.)

YOUNG AND CO. v. MAYOR AND CORPORATION OF LEAMINGTON. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Public Health Act 1874, s. 174—Contract not under seal—Corporation—Urban sanitary authority.*

*The provisions of sect. 174 of the Public Health Act 1875 (38 & 39 Vict. c. 55), requiring contracts for more than 50l. to be in writing, are mandatory, and not merely directory; and therefore where the duly authorised agent of a corporation, acting as an urban sanitary authority under the Act, contracted for the execution of certain works, which were duly executed, such contract not being under seal:*

*Held (affirming the judgment of the court below), that the contractors could not recover against the corporation.*

*Hunt v. Wimbledon Local Board (4 O. P. Div. 48; 40 L. T. Rep. N. S. 115) approved.*

THIS was an appeal from a judgment of the Court of Appeal (Brett, Cotton, and Lindley, L.JJ.), reported in 8 Q. B. Div. 579, and 46 L. T. Rep. N. S. 555, affirming a judgment of the Queen's Bench Division (Williams and Mathew, JJ.) upon a special case.

The facts appear from the judgment of Lord Blackburn, and the special case is set out in the report in the court below.

*Davey, Q.C. and Edwyn Jones*, for the appellants, argued that the sole question was, whether the absence of the seal was fatal to the plaintiffs' right to recover, and this must be considered as it stood, apart from the Public Health Act 1875, and then as affected by the provisions of that Act. We contend that sect. 174 is merely directory, not obligatory. When a corporation have taken the benefit of an executed contract, they cannot plead their own disability for want of a seal, and an action can be maintained upon an executed contract, if made for the purposes for which the corporation was created, though not under seal:

*Clarke v. Cuckfield Union*, 21 L. J. 349, Q. B.; *Church v. Imperial Gas Company*, 6 A. & E. 846.

*Lamprell v. Billericay Union* (3 Ex. 283), which appears to lay down a different rule, is distinguishable. In this case one of the reasons for which the corporation existed was to supply water to the district. See

*Paine v. Strand Union*, 8 Q. B. 326.

*Clarke v. Cuckfield Union* was followed in *Nicholson v. Bradfield Union* (L. Rep. 1 Q. B. 620; 14 L. T. Rep. N. S. 830) and *Haigh v. North Bierley Union* (28 L. J. 62, Q. B.; E. B. & E. 873). *London Dock Company v. Sinnott* (8 E. & B. 347; 27 L. J. 129, Q. B.) was a case of an executory contract. See also

*Sanders v. St. Neots Union*, 8 Q. B. 810.

Down to *Clarke v. Cuckfield Union* the current of authority was no doubt not uniform, but since that decision three exceptions to the rule that a corporation can only contract under seal have been upheld: (1) Where the contract is executed; (2)

in matters of small amount necessary for carrying on its ordinary business; (3) where it is impossible to affix a seal in the time. This case comes under the first exception. See also

*Mayor of Stafford v. Till*, 4 Bing. 75;

*East London Waterworks Company v. Bailey*, 4 Bing. 283;

*London and Birmingham Railway Company v. Winter*, Cr. & Phil. 57;

*Beverley v. Lincoln Gas Company*, 6 A. & E. 829;

*Horn v. Ivy*, 1 Vent. 47;

*Mayor of Ludlow v. Charlton*, 6 M. & W. 815;

*Finlay v. Bristol and Exeter Railway Company*, 7 Ex. 409.

That being the general state of the law, the further question is the effect of the Public Health Act 1875. In municipal boroughs no new corporation is created, and we say that sects. 173, 174 are merely directory, not imperative, so as to create conditions precedent. See *Nowell v. Mayor of Worcester* (9 Ex. 457; 33 L. J. 139, Ex.), decided under the Public Health Act 1848 (11 & 12 Vict. c. 63). *Freud v. Dennett* (4 C. B. N. S. 576; 5 L. T. Rep. N. S. 73) will be cited against us. It was also a decision under the Act of 1848, but it is distinguishable, for in that case the corporation was the creature of the statute. See also

*Kirk v. Bromley Union*, 2 Phill. 640; 17 L. J. 127, Ch.; *Andrews v. Mayor of Ryde*, L. Rep. 9 Ex. 302.

The court below relied on *Hunt v. Wimbledon Local Board* (4 C. P. Div. 48; 40 L. T. Rep. N. S. 115), but it does not cover this case.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Mellor, Q.C.*, and *Dugdale, Q.C.*, who appeared for the respondents, were not called upon to address the House.

At the conclusion of the argument for the appellants, their Lordships took time to consider their judgment.

June 5.—Their Lordships gave judgment as follows:

LORD BLACKBURN.—My Lords: This is an appeal against an order of the Court of Appeal, dismissing with costs an appeal against the judgment of the Queen's Bench Division of the High Court of Justice, in favour of the respondents, on a special case. I believe that all the noble and learned Lords who heard the argument agree with me that the order appealed from must be affirmed. By the special case it appears that the municipal corporation of the Royal Leamington Spa are, under sect 6 of the Public Health Act 1875 (38 & 39 Vict. c. 55), acting by their council, the urban authority for the district consisting of the borough. The defendants, as such urban authority, had made a contract under their seal with one Powis for the execution of works for supplying the district with water. Powis failed to complete his contract, and it was put an end to. The council, in their capacity of urban authority, as far as they could do so by resolutions not under seal, authorised their engineer and surveyor, Mr Jerrom, to enter into a contract for completing the works left uncompleted by Powis. The special case then proceeds: "Thereupon the said Jerrom, as the engineer, agent, and servant of the corporation, and acting within and according to his duties, powers, and authorities as such, and also acting in accordance with and in fulfilment of the provisions of the said condition 115 of the said Charles Powis, employed the plaintiffs to execute, carry out, and complete the said unfinished works, according to

(a) Reported by C. E. MALDEN, Esq., Barrister-at Law.

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the contract and specification aforesaid, and also to execute and complete the said additional works upon certain terms then agreed upon between them; and the plaintiffs accepted and entered upon the said employment upon the said terms, and completed the whole of the works, including what has been described as the 'contract works' and the 'additional works,' to the entire satisfaction of the said engineer. The said employment of the plaintiffs was, in fact, an employment of them by the corporation through the said Jerrom as their engineer, agent, and servant, and the relation of employer and employed never in fact existed or was created between the plaintiffs and the said Jerrom. A memorandum, in writing, of the said employment, and of the agreement between the said Jerrom and the plaintiffs, was made on the 19th Sept. 1878, and was signed by both parties, and a copy of this memorandum is annexed to and forms part of this case. The plaintiffs and the said Jerrom fully performed the said agreement on their several and respective parts, and the said Jerrom gave to the plaintiffs certificates for the payment of the moneys due to them from the corporation for all the works completed by them as aforesaid. The execution of the said additional works was necessary, and was incidental to the completion of the works left unfinished and incomplete by the said Powis, and the employment of the plaintiffs to execute them was within the duties, powers, and authorities of the said Jerrom, as the engineer of the corporation. The defendants, the corporation, have taken possession of and accepted and received the benefit of all the works and materials, the subject of this action, and still enjoy the benefit thereof. The corporation paid to the plaintiffs large sums of money from time to time upon the said certificates, but refused to pay other large sums amounting to between 6000*l.* and 7000*l.*, which is the said balance now claimed by the plaintiffs as still due. The above-mentioned contract between the said Charles Powis and the defendants, the corporation, was made by them as urban authority under the Public Health Act 1875 (38 & 39 Vict. c. 55), and all the subsequent matters and things were done by them in that capacity. The corporation resists the plaintiffs' claim upon several grounds, some of which would involve a long and costly investigation, but they also resist the claim upon the ground that the employment of the plaintiffs was an employment of them not under the common seal of the corporation, and this special case has been stated to raise that point alone. It is agreed between the parties that either party shall be at liberty to refer to the pleadings and particulars in the action and to the contract and specification with Powis, the appointment of Jerrom as borough surveyor, and the printed particulars of duties therein referred to, and that the court is to have power to draw any inferences of fact. The question for the opinion of the court is, whether the absence of the common seal of the corporation in the employment of the plaintiffs, as above stated, is fatal to the plaintiffs' right to recover against the corporation. If the court shall be of opinion in the affirmative, then the judgment is to be for the defendants, the corporation; if in the negative, the judgment is to be for the plaintiffs. The Queen's Bench Division answered the question in the affirmative, and gave judgment

for the defendants, and the Court of Appeal affirmed that judgment. Lindley, L.J. ends his judgment by saying: "The last point urged for the plaintiffs was, that as the contract has been performed, and the defendants have the benefit of the plaintiffs' work, labour, and materials, they are at all events liable to pay for these at a fair price. In support of this contention cases were cited to show that corporations are liable at common law, *quasi ex contractu*, to pay for work ordered by their agents, and done under their authority. The cases on this subject are very numerous and conflicting, and they require review and authoritative exposition by a Court of Appeal. But, in my opinion, the question thus raised does not require decision in the present case. We have here to construe and apply an Act of Parliament. The Act draws a line between contracts for more than 50*l.* and contracts for 50*l.* and under. Contracts for not more than 50*l.* need not be sealed, and can be enforced whether executed or not, and without reference to the question whether they could be enforced at common law by reason of their trivial nature. But contracts for more than 50*l.* are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament, and depriving the ratepayers of that protection which Parliament intended to secure for them. The case of *Fremd v. Dennett* (4 C.B. N.S. 576; and in Chancery, before Wood, V.C., 5 L.T. Rep. N.S. 73) is an authority in support of this view, and was, in my opinion, rightly decided. The additional works then in question had been executed, and there was the common count for work and labour done and materials, as well as a special count on the alleged contract, but the defendant was held not liable either at law or in equity. It may be said that this is a hard and narrow view of the law; but my answer is, that Parliament has thought expedient to require this view to be taken, and it is not for this or any other court to decline to give effect to a clearly expressed statute because it may lead to apparent hardship. For these reasons I am of opinion that the decision of the court below was correct, and that this appeal ought to be dismissed with costs. I am requested by Cotton, L.J. to say that he concurs in this judgment." Brett, L.J. adds: "I should wish to say that I have come to the same conclusion after weeks spent in attempting to come to another, upon the ground that, although this was a municipal corporation, yet in the transaction in question it was acting as a board of health, and that, therefore, it was bound by the statute, and that as to the construction of that statute we are bound by a former decision of this court, which held that the enactment as to the necessity for a seal is mandatory, and not merely directory. Therefore, assuming that everything was done according to the statute except the seal, and that the work was done after every inquiry which is directed by the statute had been made by the corporation, I am of opinion that the mere want of seal prevents the plaintiffs from recovering in this action. Further, after having read all the cases with regard to the doctrine of work done for and accepted by a corporation, I am bound to say that I have come to the conclusion that, even if this were a municipal



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corporation not bound by the statute, the proper decision in point of law according to the cases and principle is, that the want of seal prevents, in such a case as the present, the plaintiffs from succeeding." Brett, L.J. has, I observe, in the revised report, somewhat altered what I have taken from the shorthand note, and abstains from expressing an opinion as to how the law would have been if this had been the case of a municipal corporation not bound by the Public Health Act 1875. I suppose because on reflection he saw that it was not necessary for the decision of the case to decide this, and that what he had said on that point was only *obiter dictum*. I agree in this latter view, and also in what Lindley, L.J. says, that the cases are numerous and conflicting, and that they require revised and authoritative exposition by a Court of Appeal. If I thought that this case now at bar gave an opportunity for such a review, I should certainly wish, at least, to hear the case fully argued. As it is I do not think it necessary, and therefore do not think it right, to examine previous decisions and doubts further than is required for the purpose of construing the Public Health Act 1875, s. 174, which is in the following terms: "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed, namely, 1. Every contract made by an urban authority whereof the value or amount exceeds 50*l.*, shall be in writing. 2. Every such contract shall specify the work, materials, matters, or things, to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify what pecuniary penalty is to be paid in case the terms of the contract are not duly performed." The third and fourth regulations are as to things to be done by the urban authority before entering into any contract. It was pointed out that they were no negative words added to the first regulation; that it was not said, "shall be sealed with the common seal and not otherwise;" and it was argued that, as the third and fourth regulations clearly were only directory, and the second might at least plausibly be argued to be only directory, the first regulation should be construed as also only directory, that the common seal ought to be affixed whenever the subject matter of the contract exceeded 50*l.*, but that if the contract was such as, but for the statute in question, to bind a corporation without seal, then it was said, *Fieri non debet factum valet*. I think, however, that when we look at the state of the decisions existing in 1875, and what was the point on which there was, I think, a difference of opinion sufficiently marked to make it uncertain what the ultimate decision of the Supreme Court of Appeal upon them might be, and then inquire what was the intention of the Legislature in passing this enactment, it is impossible to construe it in the manner ingeniously suggested. The Court of Queen's Bench had, in *Church v. The Imperial Gas Company* (6 A. & E. 846) thus expressed its view on the law: "The general rule of law is, that a corporation contracts under its common seal; as a general rule it is only in that way that a corporation can express its will, or do any act. That general rule, however, has from the earliest traceable periods been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its

application, but are not to be taken as so prescribing in terms the exact limit that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience amounting almost to necessity. Whenever to hold the rule applicable would occasion very great inconvenience or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the seal, are established exceptions; on the same principle stands the power of accepting bills of exchange, and issuing promissory notes by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereto." This was said in 1838. In 1840 the case of *The Mayor, &c., of Ludlow v. Charlton* (16 M. & W. 815) was decided in the Court of Exchequer. The considered judgment of the court, comprising on that occasion Parke, Alderson, and Rolfe, BB., was delivered by Rolfe, B. After citing the passage I have just read from *Church v. The Imperial Gas Company*, he says: "To every word of this we entirely subscribe; and, applying the language of Lord Denman to the present case, it is quite clear that there was nothing to enable the corporation of Ludlow to contract with the defendant otherwise than in the ordinary mode under the corporate seal." So far there is no difference between the Courts of Exchequer and Queen's Bench as to the law, though there was evidently room for considerable difference as to its application. I pass by many subsequent decisions, and only quote two. In 1853 Wightman, J., sitting alone in the Bail Court, decided *Clarke v. Cuckfield Union* (21 L. J. 349, Q. B.) on the ground, I think, that a poor-law union created by statute for the purpose, amongst others, of supporting the paupers in a workhouse, could not be required to affix their seal to every contract for things necessary for that purpose without such inconvenience as would defeat the object within the principle laid down in *Church v. The Imperial Gas Company*. In 1855, in *Smart v. The West Ham Union* (10 Ex. 867), Parke and Alderson, BB. each expressed dissent from *Clarke v. Cuckfield Union*. They could not, as they were not in a court of error, overrule it, but they undoubtedly questioned it. In 1866, in *Nicholson v. Bradfield Union* (L. Rep. 1 Q. B. Div. 620; 14 L. T. Rep. N. S. 830), where the union had bought coal to keep the paupers warm, the Court of Queen's Bench, in a considered judgment, say: "The case of *Clarke v. Cuckfield Union* is in its facts undistinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision; and, as pointed out in the judgment in that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that as far as it extends to such a case as the present at least, the case was rightly decided. There may be cases in which the circumstances are different from those in *Clarke v. Cuckfield Union* and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise; but, so far as those prior decisions are inconsistent with the decision in *Clarke v. Cuckfield Union*, we prefer to follow the authority of that case, which we think founded on justice and convenience."

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There was not, I believe, any decision on this question between 1866 and 1875. The Legislature, in the earlier part of the Act of 1875, had incorporated all urban authorities which were not already corporations; those which were already corporations continued such; and then in Part V. of the Act it makes provisions as to contracts. We ought in general, in construing an Act of Parliament, to assume that the Legislature knows the existing state of the law, and in the present case I have no doubt that in fact those who prepared the Act of 1875 knew of the differences of opinion that had been expressed, and the difficult questions that might yet have to be decided, and really intended to provide that those difficulties should not arise with respect to the urban authorities they were creating. I think that, bearing in mind this, it is not possible to construe sect. 174 as meaning anything else than that when the subject-matter of a contract exceeds 50*l.* in value, the contract must be under seal, and that the distinctions and differences which, according to the opinion of the Court of Queen's Bench, might dispense with a seal in the case of an ordinary corporation, should not do so when the contract was by an urban authority, and related to a subject-matter above that value. This was the construction put upon the Act in *Hunt v. The Wimbledon Local Board* (4 C. P. Div. 48; 40 L. T. Rep. N. S. 115), as well as in the court below. I think it is right, and it disposes of this difficulty. It is true that this works great hardship on the now appellants. They had an agreement, but it was not sealed; and though it is possible that if the agreement had been under seal the defendants might have established a defence on the merits to all or part of what is claimed, it is hard on the appellants that they should not be allowed to raise the question. It is, however, for the Legislature to determine whether the benefits derived from enforcing a general rule are, or are not, too dearly purchased by occasional hardships. A court of law has only to inquire what the Legislature thought fit to enact. I therefore move that the order appealed against be affirmed, and the appeal dismissed with costs. Lord Watson, who is unavoidably absent, has read, and desires me to say that he concurs in, this opinion.

LORD BRAMWELL.—My Lords: I agree that this judgment should be affirmed. It is clear, and it is admitted by the appellants, that it must be affirmed if the Public Health Act 1875, s. 174, is obligatory, and not merely directory. I have no doubt that it is obligatory, and I must say that I think better reasons can be given for that opinion than I gave in the case of *Hunt v. The Wimbledon Local Board* (*ubi sup.*). In the first place, considering the state of the law as to contracts by corporations, it was desirable that some rule should be laid down as to how contracts could be made by urban authorities. Then we have plain and positive words in sub-sects. 1 and 2: "Every contract made by any urban authority whereof the value or amount exceeds 50*l.* shall be in writing, and sealed with the common seal of such authority. Every such contract shall specify the work and materials, &c." The only reason given at your Lordships' bar for holding that this is directory only was, that it is in company with other provisions in sub-sects. 3 and 4, which certainly are directory only, and that sub-sect. 5 says that every

contract entered into by an urban authority in conformity with the provisions of this section, "and duly executed by the parties thereto, shall be binding." And it was said that, as the contract need not be in conformity with some of those "provisions," it need not be in conformity with any. But sub-sects. 3 and 4 do not deal with the contract, or the making of the contract, but say, "Before contracting," and "before any contract of the value of 100*l.* and upwards is entered into, &c." There are things to be done before contracts are entered into, and to be done by the urban authority, the contractor having nothing to do with the matters mentioned. The contracts are "entered into" afterwards. If sub-sects. 3 and 4 had been put before sub-sects. 1 and 2, the matter would have been too plain for argument, if indeed it is not so as it stands. As I think the case turns on the construction of the statute, I have not thought it necessary to go into the doubtful and conflicting cases governed by the common law. I must add that I do not agree in the regret expressed at having to come to this conclusion. The Legislature has made provisions for the protection of ratepayers, shareholders, and others who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say that there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into. Whether that has been so in this case I have no notion, but certainly the ratepayers of Leamington may well be astonished at the amount claimed of them. The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement.

LORD FITZGERALD concurred.

*Order appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *John Mackrell and Co.*

Solicitor for the respondents, *H. Tyrrell*, for *H. O. Passman*, Leamington.

## Supreme Court of Judicature.

### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

*Tuesday, March 13, 1883.*

(Before POLLOCK, B. and NORTH, J.)

FORSDIKE (app.) v. COLQUHOUN (resp.). (a)

*Sunday Closing (Wales) Act 1881 (44 & 45 Vict. c. 61)—Licensing Acts 1872-1874 (35 & 36 Vict. c. 94, and 37 & 38 Vict. c. 49)—"Sunday"—Christmas-day and Good Friday—Six-day licences.*

*By the 3rd section of the Licensing Act 1874 (37 & 38 Vict. c. 49) "all premises in which intoxicating liquors are sold by retail, wherever situate, shall be closed on Christmas-day and*

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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*Good Friday as if Christmas-day and Good Friday were respectively Sunday; and by the 1st section of the Sunday Closing (Wales) Act 1881 (44 & 45 Vict. c. 61), "in the principality of Wales all premises in which intoxicating liquors are sold or exposed for sale by retail shall be closed during the whole of Sunday."*

*On an information against F., the holder of a six-day licence under the 49th section of the Licensing Act 1872 (35 & 36 Vict. c. 94), for keeping open his premises (situate in Wales) for the sale of intoxicating liquors during the afternoon of Christmas-day, F. was convicted:*

*Held, on case stated, that the effect of the 1st section of the Sunday Closing (Wales) Act 1881 is not extended by the 3rd section of the Licensing Act 1874 to Christmas-day and Good Friday:*

*Held, also, that the 3rd section of the Licensing Act 1874 does not compel the holder of a six-day licence under the 49th section of the Licensing Act 1872 to close his premises during the whole of Christmas-day and Good Friday, and that the conviction must be quashed.*

THIS was a case stated by John Coke Fowler, Esq., the stipendiary magistrate for the borough of Swansea, under 20 & 21 Vict. c. 43, on the hearing of an information preferred before him by one Isaac Colquhoun, the respondent, against William Thomas Forsdike, of Swansea, the appellant, for an offence against the 1st section of the Sunday Closing (Wales) Act 1881 (44 & 45 Vict. c. 61).

The material facts are as follows:—

The charge laid in the information was that the appellant, being the keeper of certain licensed premises in Swansea, and the holder of a six-day licence under the 49th section of the Licensing Act 1872 (35 & 36 Vict. c. 94) in respect thereof, did on the 25th Dec. 1882, being Christmas-day, unlawfully keep open his premises for the sale of intoxicating liquors therein at twenty-five minutes past twelve o'clock in the afternoon.

The appellant pleaded guilty to the charge as laid out in the information, but contended by his solicitor that the Sunday Closing (Wales) Act 1881 (44 & 45 Vict. c. 61) did not apply, nor include the day on which the offence was alleged to have been committed, viz., Christmas-day.

The solicitor for the respondent contended that the Act did apply, and after hearing the arguments the learned stipendiary gave it as his opinion that, by virtue of the 2nd section of the Sunday Closing (Wales) Act 1881, the 3rd section of the Licensing Act 1874 (37 & 38 Vict. c. 49) was applicable to and must be read with the 1st section of the Sunday Closing (Wales) Act 1881, the effect of the two clauses taken together being that the regulations for closing on Christmas-day and Good Friday follow the regulations for closing on Sunday, and consequently that licensed houses in the Principality are by law to be closed on Christmas-day. In consequence of that opinion the learned stipendiary convicted the appellant in the penalty of one shilling and costs, but on his application stated a case requesting the opinion of the court as to whether the conviction was correct in law or otherwise.

The 3rd section of the Licensing Act 1874 (37 & 38 Vict. c. 49) is:

3. All premises in which intoxicating liquors are sold by retail shall be closed as follows; (that is to say,)

... such premises wherever situate shall be closed on Christmas-day and Good Friday, and on the days preceding Christmas-day and Good Friday respectively, as if Christmas-day and Good Friday were respectively Sunday, and the preceding days were respectively Saturday, but this provision shall not alter the hours during which such premises shall be closed on Sunday, when Christmas-day immediately precedes or succeeds Sunday.

The preamble to the Sunday Closing (Wales) Act 1881 (44 & 45 Vict. c. 61) is:

Whereas the provisions in force against the sale of fermented and distilled liquors during certain hours of Sunday have been found to be attended with great public benefits, and it is expedient and the people of Wales are desirous that in the principality of Wales those provisions be extended to the other hours of Sunday: Be it therefore enacted, &c.

And the 1st and 2nd sections of the Act are:

1. In the principality of Wales all premises in which intoxicating liquors are sold or exposed for sale by retail shall be closed during the whole of Sunday.

2. The Licensing Acts 1872-1874, shall apply in the case of any premises closed under this Act as if they had been closed under those Acts.

Charles, Q.C. (with him *W. D. Benson*) for the appellant.—The magistrate was wrong in convicting the appellant. The Sunday Closing (Wales) Act 1881 applies to Sunday only and not to Christmas-day and Good Friday. First, the preamble to the Act shows clearly that it was the intention of the Legislature that the Act should apply to Sunday only. The desire of the people of Wales is set out therein as the reason for the legislation, and it is a matter of notoriety that the people of Wales would not wish to have Christmas-day and Good Friday included within the operation of the Act. Secondly, there is nothing in the 2nd section, on which the magistrate based his decision, to lead the court to read in the 3rd section of the Licensing Act 1874 into this Act. The plain meaning of that section is to import into this Act the provisions of the Licensing Acts as to penalties. The premises must be "closed under this Act" before the section applies at all, and it cannot therefore operate to extend the provisions of the Act as to closing.

*Brynmôr Jones* for the respondent.—The appellant is the holder of a six-day licence under the 49th section of the Licensing Act 1872 (35 & 36 Vict. c. 94), and is bound by that section to keep his premises closed during the whole of Sunday. By the 1st section of the Act of 1874, that Act and the principal Act of 1872 are, so far as is consistent with the respective tenors of such Acts, to be construed as one Act. The provisions of the Act of 1872 (sect. 24) as to closing are repealed by the 33rd section of the Act of 1874. All the provisions therefore of the combined Acts as to closing are contained in the 3rd section of the Act of 1874, which enacts that all premises in which intoxicating liquors are sold shall be closed on Christmas-day and Good Friday, as if they were respectively Sunday, so that apart from the Act of 1881 the appellant was bound, as the holder of a six-day licence, to close his premises during the whole of Christmas-day. Next, the Act of 1881 does not repeal the 3rd section of the Act of 1874, and the effect of the Act is to alter that part of the section which prescribes during what hours the premises are to be opened on Sunday, and to enact that they shall be closed during the whole of Sunday, but the latter part of the 3rd section providing that the Sunday hours

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shall govern Christmas-day and Good Friday remains unaltered, and the appellant committed an offence against the Act in opening his premises on Christmas-day.

*Charles, Q.C.* in reply on the first point only.—This conviction cannot be sustained under the Act of 1872. Under the 24th and 49th sections of that Act every holder of a six-day licence could open his premises on Christmas-day and Good Friday. The 3rd section of the Act of 1874 only applies the hours of Sunday closing mentioned in that section to Christmas-day and Good Friday, and there is nothing in it to compel the holder of a six-day licence to close during the whole of Christmas-day and Good Friday. [He was stopped by the Court.]

*POLLOCK, B.*—It seems to me that this conviction must be quashed. The appellant was convicted under the Sunday Closing (Wales) Act 1881 (44 & 45 Vict. c. 51) for keeping his premises open during Christmas-day at Swansea, and the question is, whether the conviction is to be sustained. The history of the matter may be shortly stated in this way. Before the Sunday Closing (Wales) Act 1881 the law of England and Wales was based upon the Licensing Acts of 1872 and 1874 (35 & 36 Vict. c. 94; 37 & 38 Vict. c. 49), which clearly set out the hours during which licensed houses might be opened, and during which they were to be closed. The 49th section of the Act of 1872 dealt with six-day licences, and provided that in the case of six-day licences the premises were to be closed during the whole of Sunday, and the 24th section dealt with the periods of time during which premises with licences other than six day licences were to be closed on Sunday. By the 3rd section of the Act of 1874 these hours were varied, and this provision was added: "Such premises shall be closed on Christmas-day and Good Friday . . . as if Christmas-day and Good Friday were respectively Sunday." That meant to say that the same provision as was enacted to apply to Sunday should apply to Christmas-day and Good Friday. So the law stood until the people of Wales holding certain views stated in the preamble to the Act of 1881 got that Act passed. The preamble recites that "Whereas the provisions in force against the sale of fermented and distilled liquors during certain hours of Sunday have been found to be attended with great public benefits, and it is expedient, and the people of Wales are desirous that in the principality of Wales those provisions be extended to the other hours of Sunday;" and then the first section enacts that "In the principality of Wales all premises in which intoxicating liquors are sold or exposed for sale by retail shall be closed during the whole of Sunday." Now the question is, what is the meaning of the word "Sunday." There is no interpretation clause to show that Sunday means anything more than is generally expressed by that word. There is nothing to say that the Act is to be read with the Acts of 1872 and 1874. Therefore the word carries with it no unusual meaning. Nor does it appear that the people of Wales had any special views with regard to Christmas-day and Good Friday—in fact, as a matter of history, we know that they entertain different views from those entertained by the people of England. I think, therefore, that Sunday has in this Act the meaning

generally assigned to it, and that the object of the Act was to cause all licensed premises in Wales to be closed on Sunday and nothing further. Then it is said that the 2nd section of the Act makes a difference, but that section has no force in restricting the opening of licensed premises. It simply means that when premises are closed under this statute on Sunday the provisions of the Licensing Acts 1872-1874 shall apply to them. I think therefore that the conviction must be quashed.

*NORTH, J.*—I agree. As regards the Act of 1881, under which the information is laid, I think that the case is clear on the words of the statute without giving too much weight to the words of the preamble. Before the Act there were certain hours on Sunday during which houses might be opened. The 1st section says that, instead of being allowed to open as before, they shall be closed during the whole of Sunday. That is to say, the previous limited hours are taken away on Sunday, and on Sunday alone. Then the 2nd section says that the Licensing Acts 1872-1874 are to apply "in the case of premises closed under this Act." Now what are the "premises closed under this Act?" All that is done by it is to take away the limited hours previously allowed on Sunday. There is no reference to anything else, and I see nothing to lead me to suppose that the word "Sunday" means anything except the first day of the week. But it has been ingeniously argued with respect to the six-day licences granted under the 49th section of the Act of 1872, that the provisions of the 3rd section of the Act of 1874 (substituted for the repealed 24th section of the Act of 1872) apply as if the words "all premises in respect of which six-day licences are granted shall be closed during the whole of Sunday," were to be found there in addition to the general provisions for the closing of licensed premises which are found there, and then reliance is placed on the words at the end of the section providing that premises are to be closed on Christmas-day and Good Friday, as if Christmas-day and Good Friday were respectively Sunday. I read these words as simply having the effect of altering the hours of closing on Christmas-day and Good Friday, and not as meaning that the same law is always to be applied to Christmas-day and Good Friday as to Sunday, and, as I do not think that the Act of 1881 affects the hours of closing on Christmas-day and Good Friday. I agree, therefore, that this conviction must be quashed.

Solicitors for the appellant, *Smith and Lawrence.*

Solicitor for the respondent, *John Thomas, Swansea.*

*Friday, March 16, 1883.*

(Before *POLLOCK, B.* and *NORTH, J.*)

REG. on the prosecution of THE GUARDIANS OF THE GARSTANG UNION v. THE GUARDIANS OF THE PRESTON UNION. (a)

*Poor law—Pauper lunatic—Married woman—Removal to husband's settlement—Consent of husband—Wife certified to be a proper person to be kept in a workhouse—25 & 26 Vict. c. 111, s. 20.*

*J. B. resided with his wife in the Garstang Union,*

(a) Reported by H. D. BORSKY, Esq., Barrister-at-Law.

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but had not acquired a settlement there, and it was admitted that the last legal settlement of husband and wife was in the Preston Union. In 1881 the wife became of unsound mind and chargeable to the parish, and the medical officers of the union certified under 25 & 26 Vict. c. 111, s. 20, that she, being a pauper lunatic, was a proper person to be kept in a workhouse.

On the 4th Aug. 1881 an order was made by two justices for the removal of the woman to the Preston Union, and the husband consented to the order of removal.

The Court of Quarter Sessions quashed the order of removal on the ground that the wife could not be separated from her husband, and that she, as a married woman, was irremovable without her husband.

Held, that the decision of the Court of Quarter Sessions was wrong, and that the order of removal must be upheld.

RULE calling on the Guardians of the Preston Union to show cause why an order of sessions should not be quashed.

At the Court of Quarter Sessions in and for the county of Lancaster, holden at Preston, in the said county, on the 5th Jan. 1882 an order of removal directing that Margaret Billington, a pauper, the wife of James Billington, should be removed from the Garstang to the Preston Union was quashed subject to the opinion of the Court upon the following case:

## CASE.

1. From Aug. 1880 to July 7 1881, the said Margaret Billington resided with her husband, James Billington, in his house at Myerscough, in the Garstang Poor Law Union, and neither husband nor wife during such time were ever at anytime chargeable to, or received relief from, any parish or union.

2. The legal settlement of the said James Billington and of his said wife, the said Margaret, in his right, is admitted to have been, on the said 7th July 1881 and the 4th August 1881, in the Preston Poor Law Union.

3. A certificate bearing date the 11th July 1881, and in the following terms, was signed by the medical officer of health for the Garstang Union:

LUNATICS IN WORKHOUSES.—Certificate to be given to the medical officer of the workhouse under section 20 of the 25 & 26 Vict. c. 111.

I, William Chapman, the medical officer of the Garstang Union Workhouse, do hereby certify, pursuant to the provisions of the 25 & 26 Vict. c. 111, s. 20, that in my opinion, Margaret Billington, aged forty-six years, a pauper lunatic, is a proper person to be kept in a workhouse, and that the accommodation of the Garstang Union workhouse is sufficient for her reception.

4. (Not material).

5. On the 4th of Aug. 1881 two of Her Majesty's justices of the peace for the said county of Lancaster made an order for the removal of the said Margaret alone, from the said Garstang Union to the said Preston Union. The said order was, omitting formal parts, as follows:

Whereas, complaint hath been made unto us, two of Her Majesty's justices of the peace in and for the said county, by the guardians of the poor of the said Garstang Poor Law Union, that Margaret Billington (hereinafter called the pauper) has come to inhabit, and is now inhabiting, in the township of Barnacre-with-Bond, in the county of Lancaster (the same being one of the townships comprised in the said Garstang Union) not having

gained a legal settlement there, nor in any other township in the said union, nor having produced any certificate acknowledging her to be settled elsewhere, and that she is now actually chargeable to the common fund of the said union, in respect of relief made necessary by sickness and unsoundness of mind, being such as will produce permanent disability, and that the township of Woodplumpton, in the Union of Preston (being one of the townships comprised in the said Preston Poor Law Union) is the place of her last legal settlement.

We, the said justices, upon due proof thereof, do adjudge the same to be true, and that the place of the last legal settlement of the said pauper is in the said township of Woodplumpton, in the said union of Preston, and we, the said justices, do hereby further state, that we are satisfied, by the evidence aforesaid, that the said sickness and unsoundness of mind of the said Margaret Billington will produce permanent disability in the said pauper, Margaret Billington. These are, therefore, to order—(then followed the order that the pauper be removed to the Preston Union).

6. The said James Billington consented to such removal. The said pauper did not give, nor was she mentally competent to give, her consent.

7. The said James Billington at the time of such order, and thence hitherto, has continued to reside, and still resides, at his said house within the Garstang Union, and carries on his employment as theretofore, and maintains himself out of his own funds.

8. The guardians of the Preston Union duly prosecuted an appeal to the Quarter Sessions of Lancaster, holden at Preston on the 5th day of January 1882, and the said sessions, upon the hearing of such appeal, decided in favour of the appellants on the ground that the said wife could not be thus separated from her said husband, and that she as a married woman was, under the circumstances, irremovable alone without her husband. The grounds of appeal are attached to, and are to be taken as part of this special case.

The question for the opinion of the court, is whether upon the facts as above stated, and as in evidence before the quarter sessions, the order of removal appealed against is good in law.

Addison, Q.C. (*Leresche* with him) for the appellants.—The consent of the husband to the removal of the wife is not enough, and even if both husband and wife consent the justices have no power to make an order which will separate them. A long series of authorities support this proposition. In *Res v. The Inhabitants of Ironacton* (Burr. S. C. 153) an order removing the wife and children was upheld, but it was not shown that the husband was not residing at the place to which they were removed, and the Court assumed that he was. In *Res v. Inhabitants of Cuckfield* (Burr. S. C. 291) it was held that a wife could not be separated from her husband. These authorities are based upon the ground that it is against public policy to separate husband and wife. *Res v. The Inhabitants of Elltham* (5 East, 113) will be relied on as an authority that the consent of the husband is sufficient, but that case was doubted in *Res v. Inhabitants of Leeds* (4 B. & Ald. 503). Best, J. says: "If the point decided in *Res v. Elltham* were to occur again, I think it would, perhaps, be worth considering whether that decision could be supported." In the same case, Bayley, J. says: "It is against public policy and good morals to permit the separation of husband and wife, even with their consent." In another case of *Res v. The Inhabitants of Leeds* (13 L. J. 107, M. C.), it was held that where husband

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and wife are living together and become chargeable, and no settlement of the husband can be ascertained, the wife cannot be removed to the place of her maiden settlement, the husband alone consenting to the separation. No case can be cited to support the proposition that the husband and wife can be separated. He also cited

*Rez v. Carleton*, Burr. S. C. 813;

*Reg. v. The Inhabitants of Stogumber*, 9 Ad. & El. 623;

*Reg. v. The Inhabitants of St. Mary, Beverley*, 1 B. & Ad. 201;

*Reg. v. The Guardians of Bridgnorth*, 47 L. T. Rep. N.S. 301; 9 Q. B. Div. 766.

*Charles, Q.C.* (Leese with him) for the respondents.—The removal in this case was to the husband's settlement, but in the cases cited, except *Reg. v. The Inhabitants of Stogumber*, it was to a different settlement. If the husband had taken his wife to the Preston Union they could not have refused to take her in. *Rez v. The Inhabitants of Eltham* has never been overruled, and that is a distinct authority to show that a woman may be removed to her place of settlement with the consent of her husband and herself. *Reg. v. The Inhabitants of Stogumber* is also an authority to show that the consent of the husband is sufficient. In the report of that case in Perry and Davidson's Reports, vol. 1, p. 409, Lord Denman, C. J., says: "No consent on the part of the husband, nor anything equivalent to it, appears on the face of the case." It is found on the face of the order which is brought up to be quashed that this woman was permanently insane and disabled, and is therefore unable to give her consent to the removal. Under these circumstances the consent of the husband was sufficient.

POLLOCK, B.—This is an appeal from an order of sessions quashing an order of removal made by justices, whereby a married woman was removed to her husband's settlement, and the question is whether that order is good in law or not. It seems to me unnecessary to discuss the earlier cases brought to our attention by Mr. Addison, and reported in Burrow's Reports. Two principles have guided the courts in cases of this kind; one is the question of public policy in separating husband and wife, and the other raises the question whether, when they are separated, the wife should be sent to her home settlement, or to her husband's settlement. In the case of *Rez v. The Inhabitants of Eltham* (5 East, 113) it is quite clear that Lord Ellenborough thought that where both the husband and wife consented, the wife could be sent to her last legal settlement; but in this case it is not necessary to go so far as that, because the order was to send the wife to the husband's settlement with his consent. I agree with what was said by Field, J. in *Reg. v. The Guardians of Bridgnorth* (*ubi sup.*) It was said that in all the cases the policy seems to be that it is undesirable to separate husband and wife, and this seems to me the most important point in the case. The circumstances of this case are somewhat, but not entirely, novel. In *Reg. v. The Inhabitants of Stogumber* (*ubi sup.*) the question was raised whether a woman could be removed from the parish where she had resided with her husband to her husband's settlement, the husband being in a gaol in the parish where they had resided, and his wife being allowed to visit him. In the report of the case in Perry and

Davidson's Reports, vol. 1, p. 409, Lord Denman, C. J. appears to have said this: "It is clear in this case that the parties were residing in the same parish, and there might have been a *consortium* between them which it is the policy of the law not to interrupt. No consent on the part of the husband, nor anything equivalent to it, appears on the face of the case." How far that had any effect on the decision of the court it seems unnecessary to consider, for it appears from the argument that it was assumed that a *consortium* might exist between the husband and wife. Nowadays there could be no *consortium* where the husband was undergoing a sentence of penal servitude for life. In July 1881 the wife was taken to the Garstang workhouse, and on the 11th July the medical officer gave a certificate under 25 & 26 Vict. c. 111, s. 20, that the lunatic was a proper person to be kept in a workhouse. The words of that section are "No person shall be detained in any workhouse, being a lunatic, or alleged lunatic, beyond the period of fourteen days, unless in the opinion, given in writing, of the medical officer of the union or parish to which the workhouse belongs, such person is a proper person to be kept in a workhouse, nor unless the accommodation in the workhouse is sufficient for his reception; and any person detained in a workhouse in contravention of this section, shall be deemed to be a proper person to be sent to an asylum within the meaning of section sixty-seven of the Lunacy Act, chapter ninety-seven; and in the event of any person being detained in a workhouse in contravention of this section the medical officer shall for all the purposes of the Lunacy Act, chapter ninety-seven, be deemed to have knowledge that a pauper resident within his district is a lunatic, and a proper person to be sent to an asylum; and it shall be his duty to act accordingly, and further to sign such certificate as is contained in schedule F, with a view to more certainly securing the reception into an asylum of such pauper lunatic as aforesaid." Now, that was acted upon in the present case, and it was found that this woman was permanently disabled, and she was thereupon removed by the order of two justices. Whether that order was right is the question we have to decide. If it is said that the husband has not consented, the answer is that he has consented; and if it be said that the wife did not consent, the answer is that she could not. Therefore, the authorities on that point are not applicable to this case. Under sect. 20 of 25 & 26 Vict. c. 111, it is necessary that the wife should be removed, and upon all grounds I am of opinion that the judgment of the Court of Quarter Sessions is wrong, and that the order of the magistrates must be upheld.

NORTH, J.—I agree. Mr. Addison has cited several old cases, and we are much obliged to him for bringing them to our attention, but I do not think they give us much assistance in deciding the point raised in this case. The question is really reduced to this, namely, where the wife should be removed when it is necessary that she should live separate from her husband. I think she was rightly removed to her husband's place of settlement. Supposing the *consortium* were put an end to by the death of the husband, there can be no doubt that the wife could be sent to the husband's settlement, namely to the Preston Union. I am, therefore, of opinion that the order

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of Quarter Sessions was wrong, and the order of removal was right.

Solicitor for the prosecution, *Clarke, Preston*.  
Solicitors for the defendants, *Buck, Dicksons*,  
and *Cockshott*.

April 25 and 26, 1883.

(Before FIELD and MATHEW, JJ.)

REG. v. THE OVERSEERS OF THE PARISH OF  
TONBRIDGE. (a)

Burial board—Poor rate—18 & 19 Vict. c. 128,  
s. 12.

*By the 12th section of 18 & 19 Vict. c. 128, the vestry or meeting in the nature of a vestry of any parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a burial board, and from time to time supply vacancies therein, and may exercise the same powers of authorisation, approval, and sanction in relation to such burial board, and such other powers as are vested in the vestry of a parish separately maintaining its own poor.*

*Held, that this section does not apply to a district having a separate burial ground, but not separately maintaining its own poor, which is part of a district already having a legally constituted burial board.*

THIS was a special case, stated pursuant to an order of court dated the 24th June 1882, being, so far as material, as follows:—

1. The parish of Tonbridge is a parish maintaining its own poor, and is constituted and made up of the following six or more ecclesiastical districts, Tonbridge, Tonbridge Wells, Saint Peter's, Southborough; Saint Thomas's, Southborough; Saint Stephen's, and Hildenborough, none of which districts has ever separately maintained its own poor, all of the said districts contributing to a common rate levied for the relief of the poor by the parish overseers throughout the entire parish.

2. In the year 1881 a district was, under 1 & 2 Will. 4, c. 38, and other statutes, assigned to the new church of Saint Peter, then lately built upon land provided by the lord of the manor of Southborough by deed of gift, and the said church with a burial ground for the said district was duly consecrated, and in the year 1866 the said burial ground was enlarged by a further grant of land from the lord of the said manor, and the expense of laying out the said land as a burial ground was defrayed by a voluntary rate levied upon all the inhabitants of the said district.

3. In the year 1871 a district was assigned under 59 Geo. 3, c. 134 and other statutes to a new church of Saint Thomas within the limits of the aforesaid district of Saint Peter.

4. The burial ground aforesaid has always been the separate burial ground of the said original district of Saint Peter, and has been used exclusively by the inhabitants thereof, and since the said district of Saint Thomas has been formed out of the said district of Saint Peter the two districts have had the said burial ground exclusively for their joint use.

5. Since the formation of the said district of

Saint Thomas the inhabitants of the two districts of Saint Peter and Saint Thomas have been accustomed to meet in meetings in the nature of a vestry, for purposes common to them both, such meetings being summoned by the churchwardens of the district of Saint Peter.

6. In the year 1855, subsequently to the passing of 18 & 19 Vict. c. 128, sects. 11 and 12, herein-after set out, a meeting of the inhabitants of the parish of Tonbridge was held in pursuance of notice, copies of which had been affixed to the doors of all the churches in the parish, including those at Southborough, but excepting those within the ecclesiastical district of Tonbridge Wells, and at this meeting resolutions were duly passed for the formation of a burial board for such part of the parish of Tonbridge as was not included in the Tonbridge Wells ecclesiastical district. The inhabitants of the Southborough districts as a body were opposed to the said resolutions.

7. The burial board constituted in accordance with resolutions passed at the said meeting acquired a site about the centre of the parish of Tonbridge, but at the end of the town farthest from Southborough, and established a cemetery thereon, being about three and a quarter miles distant from the said church of Saint Peter, and the inhabitants of Southborough were rated for the expenses incidental to the establishment of the said cemetery, and have ever since been rated for the expenses incidental to the maintenance thereof, although in fact the inhabitants of Southborough have continued to use the Saint Peter's burial ground.

8. In the year 1858 the legality of the constitution of the said Tonbridge Burial Board was called in question, but it was decided by the Court of Queen's Bench in the case of *Viner v. The Tonbridge Overseers* (2 El. & El. 9; 28 L. J. M. C. 251, Q. B.) that the said burial board was legally constituted.

9. In the year 1878 the said burial board of Tonbridge found it necessary to enlarge the said cemetery, and for this purpose a meeting of the inhabitants of the parish of Tonbridge was held in pursuance of notice, copies of which had been affixed to the doors of all the churches in the parish including those in Southborough, but excepting those within the ecclesiastical district of Tonbridge Wells, and resolutions were duly passed at the said meeting, empowering the said burial board to enlarge the said cemetery, and to raise a sum of money sufficient for that purpose upon the security of the future poor rates of such portion of the parish as was not included in the ecclesiastical district of Tonbridge Wells. The inhabitants of the Southborough district as a body were opposed to the said resolutions.

10. Subsequently to this it was found necessary by the inhabitants of the districts of Saint Peter and Saint Thomas that the burial ground at Southborough aforesaid, jointly used by them, should be enlarged, and accordingly the churchwardens of Saint Peter's district summoned a meeting in the nature of a vestry for the 3rd Feb. 1879 by notices signed by them and affixed to the doors of all the churches and chapels in the districts of Saint Peter and Saint Thomas. The inhabitants of the other districts included in the jurisdiction of the Tonbridge Burial Board were

(a) Reported by J. SMITH, Esq., Barrister-at-Law



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not in any way consulted in the matter, nor was any notice of the said meeting or of the purposes thereof given to any of the parishioners residing outside the limits of Southborough.

11. The said meeting consisted exclusively of ratepayers from the two districts of Saint Peter and Saint Thomas, who thereupon appointed a burial board for the said two districts, and vacancies therein have since from time to time been filled up at similar meetings.

12. In Sept. 1881 the burial board thus appointed for Southborough having incurred expenses to the amount of 292*l.* 10*s.* in the enlargement of their said burial ground, and otherwise in reference thereto, issued their certificate to the overseers of the parish of Tonbridge for payment of the said sum.

13. The said overseers decline to act upon the said certificate, or to pay the said sum or any part thereof to the said burial board, on the ground that the said burial board has not been, and cannot be, legally constituted.

14. The said burial board contend that they have been legally constituted under 18 & 19 Vict. c. 128, ss. 11 and 12, which are in the following terms:

11. Where a parish or place has been united with any other parish or place, parishes or places, for all or any ecclesiastical purposes, or where two or more parishes or places have heretofore had a church or a burial ground for their joint use, or where the inhabitants of several parishes or places have been accustomed to meet in one vestry for purposes common to such several parishes or places, it shall be lawful for the vestry, or any meeting in the nature of a vestry of such several parishes or places in any of the cases aforesaid, and whether any one or more of such parishes or places do or do not separately maintain its own poor, to appoint a burial board, and from time to time to supply vacancies therein, and to exercise the same powers of authorisation, approval, and sanction in relation to such burial board, and such other powers as under the said Acts and this Act are vested in the vestry of a parish or place separately maintaining its own poor; and the burial board so appointed shall have all the powers for providing a burial ground for the common use of such several parishes or places, and for facilitating interments and otherwise as if such several parishes or places had been a parish separately maintaining its own poor, and the expenses of the burial board appointed under this provision shall be borne by the several parishes or places for which such board is appointed, and shall be apportioned among them by such burial board in proportion to the value of the property in such several parishes or places as rated to the relief of the poor, and the sums required by the burial board in respect of the portion of such expenses to be borne by any such parish or place shall be paid out of the rates for the relief of the poor in such parish or place in like manner as if such burial board had been appointed for such parish or place alone.

12. The vestry or meeting in the nature of a vestry of any parish, township, or other district not separately maintaining its own poor which has heretofore had a separate burial ground may appoint a burial board and from time to time supply vacancies therein, and may exercise the same powers of authorisation, approval, and sanction in relation to such burial board, and such other powers as under the said Acts and this Act are vested in the vestry of a parish separately maintaining its own poor, and the burial board so appointed shall have all the powers for providing a burial ground and otherwise as if such parish, township, or other district had been a parish separately maintaining its own poor.

15. On the 24th June 1882 the Queen's Bench Division of the High Court of Justice, upon the application of the Southborough Burial Board, made an order that a writ of *mandamus* should issue, directed to the overseers of the parish of Tonbridge, in the county of Kent, commanding

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them to put in force the powers of the Burials Acts (15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 18 & 19 Vict. c. 128; 20 & 21 Vict. c. 81, especially of sect. 13 of 18 & 19 Vict. c. 128), and to levy and pay to the said Samuel Warburton, clerk to the burial board of Southborough, in the said parish, the sum of 292*l.* 10*s.*, being expenses of the said board, according to the tenor of a certificate dated the 24th April 1882, under the common seal of the said board, and signed by two members and the secretary thereof, and further by consent of counsel on both sides that no objection should be taken to the form of the said writ, and that a special case should be stated without pleading, such case to be settled in case of difference by an arbitrator.

16. The question for the court is, whether upon the facts hereinbefore stated, the inhabitants of Southborough had or have any power under the sections hereinbefore set forth to constitute a separate burial board for the district of St. Thomas and St. Peter.

*Meadows White*, Q.C. (with him *Archibald*) for the applicants.

*Lumley Smith*, Q.C. (with him *Oandy*) for the defendants.

The arguments sufficiently appear in the judgment.

*Our. adv. vult.*

April 26.—FIELD, J.—This is a case in which it is the duty of the court to construe several statutes passed at different times, and as the subject-matter also is of a complicated character, dealing as it does with ecclesiastical districts and parishes, it is extremely difficult to arrive at the precise meaning of the Legislature. The facts, however, out of which this question arises are not very complicated. The old parish of Tonbridge, which maintained its own poor, had six divisions or districts which had not originally any ecclesiastical or any secular or parochial organisation. There was among these six districts first of all the commercial and industrial town of Tonbridge itself, and next in importance the town of Tonbridge Wells, and between them was the district of Southborough. The town of Tonbridge Wells very early became an ecclesiastical district, and acquired, as it had a perfect right to do under the Acts of Parliament I just now mentioned, a separate burial ground. In the year 1831 a new district came into existence, known as Southborough, and at that time it was made into one ecclesiastical district only, which was put into the same position as Tonbridge Wells, having its church St. Peter's, and its separate burial ground. This was the state of affairs in the parish of Tonbridge in 1853 when the first legislation upon this matter took place (16 & 17 Vict. c. 134), enabling certain parishes to appoint burial boards. This legislation arose in this way: In the metropolis a great many burial grounds were overcharged, and had become a scandal, and, power being given to the Secretary of State to close them, it became necessary to provide space for the interment of those who had formerly the right to be buried in these grounds, and for that purpose, in 1852, an Act was passed which applied solely to the metropolis (15 & 16 Vict. c. 85), and then in 1853 some of its provisions were, by 16 & 17 Vict. c. 134, applied to parishes outside the metropolis, the mode adopted by the later Act being to

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extend to parishes not in the metropolis all the sections of the earlier Act which were applicable. It is to be observed that the 23rd section of the earlier Act, being one of the sections adopted by the later Act, enables the vestries of several parishes to concur in providing a burial ground for their common use—a provision the importance of which will be seen shortly in regard to the subsequent legislation which provided for the circumstances under which these parishes might separate again from one another. The next Act (17 & 18 Vict. c. 87) went a little further by giving town councils power to provide burial grounds, and then in 1855 came the Act with which we have to deal (18 & 19 Vict. c. 128). Immediately after the passing of that Act the inhabitants of the parish of Tonbridge, other than Tonbridge Wells, determined to appoint a burial board. Southborough, having already got St. Peter's with its burial ground, objected to the mother parish having a burial ground upon the ground that, inasmuch as it had ceased to be an entire parish for ecclesiastical purposes, although that was not the case for secular purposes in the way of rating, it no longer formed an ecclesiastical unit with the capacity of having a burial board. That point was brought before the court in the case of *Viner v. The Overseers of Tonbridge* (2 El. & El. 9; 28 L. J. M. C. 251, Q. B.), and was decided in favour of the mother parish, which had appointed a burial board and formed a burial ground. For the purpose of making and forming that burial ground money was doubtless borrowed and charged upon the rates, and so far as I know the rates are still charged with the balance of the money so expended. The burial board also appointed the necessary officers and servants to attend to the burial ground, and from that time down to the year 1881 have acted as a burial board, including in their area the district of Southborough, divided into its two ecclesiastical districts of St. Peter's and St. Thomas's, two districts with one joint burial ground, the latter having become an ecclesiastical district in 1871, but never having had any separate burial ground. In 1879 the inhabitants of Southborough became desirous of appointing a burial board of their own, and upon the 3rd Feb. 1879 a meeting in the nature of a vestry was held for St. Peter's and St. Thomas's, and that meeting passed a resolution to appoint a burial board, and placed the burial ground of St. Peter's under its control, and added afterwards to it, and having incurred an expenditure of 292l. 10s., under the provisions as they believed of the Acts in question, certified that sum to the overseers of Tonbridge, and required the latter to make a rate upon the inhabitants of St. Peter's and St. Thomas's for the purpose of meeting those expenses. This the overseers of Tonbridge refused to do, on the ground that the alleged burial board for Southborough had no legal foundation. Upon that a rule was obtained for a *mandamus*, and a special case stated upon which we have now to decide. Mr. Meadows White, for the applicants, rests his case upon the 12th and 13th sections of the Amendment Act of 1855 (18 & 19 Vict. c. 128). The meeting of the inhabitants of Southborough—treating the districts of St. Peter's and St. Thomas's as one—in Feb. 1879 was, he contends, a meeting in the nature of a vestry—it was a meeting of a district not maintaining its own poor, which had theretofore

had a separate burial ground. It may very well be that Southborough was a district having a separate burial ground, for the inhabitants of St. Thomas's never lost their right of interment in the burial ground of St. Peter's, and it therefore seems to me that, although it has been ecclesiastically divided into two, it is nevertheless within the operation of the 12th section of 18 & 19 Vict. c. 128, so far as the language of the section goes. The argument put forward on the contrary on behalf of the defendants is, that although the district of Southborough may come within the words of that section, yet a case such as the present is not within the intention of the Act, to find out which it will be necessary for us to look at the whole course of legislation. Particular reference, however, I may say, was made on behalf of the inhabitants of Southborough to the words of the 13th section, providing that "where any district (whether a parish, or township, or other subdivision) not separately maintaining its own poor, but forming part of a parish maintaining its own poor, or of an incorporation or other union maintaining the poor of the places comprised therein, by means of a common rate, shall have a burial board, or shall form part of a place or union of places not co-extensive with the area rated for the relief of the poor, and having one burial board, it shall be lawful for such respective burial board to issue their certificate to the overseers of such parish, or the overseers or other persons authorised to make and collect, or cause to be collected such common rate (as the case may be), for payment of the sums required for the expenses of such burial board." From these words the deduction was drawn that, in allowing districts not separately maintaining their own poor to appoint burial boards, the Legislature was wholly indifferent as to the existence or non-existence of a burial board in the parishes or unions of which they formed parts, and that it was quite immaterial whether the mother parish had or had not a burial board. Various sections of 20 & 21 Vict. c. 81 were also cited on each side to show the intention of the Legislature on this point. I propose now to take the various sections in their order, in order to discover what the intention of the Legislature really was. The Act of 1853 (16 & 17 Vict. c. 134) enabled several parishes to concur in having one burial board; but it was seen that it might happen that, after such a union had taken place, the contracting parties might not like to continue united, and that provision should be made in that respect. This was done by the 2nd section of 20 & 21 Vict. c. 81, which provides that "Where the vestries of two or more parishes have agreed to provide one burial ground for the common use of such parishes such vestries may, at any time before such burial ground has been provided, determine the union between such parishes under such agreement." On the words, "before such burial ground has been provided," Mr. Lumley Smith, for the defendants, strongly relies, as showing that when once a union has been effected, and a burial board appointed, it requires express legislation to get rid of it; and the 12th section does not apply here, because, if it did, there would be two burial boards exercising jurisdiction over the same area of rateable property—a state of affairs obviously giving rise to so much inconvenience that it could never have been the intention of the Legislature to produce it. Mr. White,

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on the other hand, relies on the 5th section of 20 & 21 Vict. c. 81, as being very much in favour of his view of the intention of the Legislature. That section says that "the vestry or a meeting in the nature of a vestry of any parish, new parish, township, or other district not separately maintaining its own poor, and which has had no separate burial ground, may appoint a burial board, and such vestry or meeting and the burial board appointed by it shall exercise and have all the power which they might have exercised and had under the said Acts and this Act if such parish, new parish, township, or district had had a separate burial ground before the passing of the said Act of the 18th and 19th years of Her Majesty: Provided always, that all the powers of any other vestry or meeting and burial board, if any, shall then cease and determine, so far as relates to such parish, new parish, township, or district as aforesaid." That section again contains no provision as to what is to be done with existing liabilities, and, as was pointed out by the learned judges who decided the case of *Reg. v. The Overseers of Walcot St. Swithin* (6 L. T. Rep. N. S. 325; 2 B. & S. 571), it must probably be understood as if it contained words providing that all prior liabilities should remain of the same force and validity as at the time of the making of the burial board. On this section it was argued on the one side that the Legislature felt no difficulty in determining an existing burial board, and that the same provision as to the determination of the powers of other burial boards is to be read into the 12th section of 18 & 19 Vict. c. 128—a view which I think goes beyond the rules of fair construction; while on the other side it is said that, if the Legislature had intended such a provision, nothing could have been easier than to insert it in the earlier, as in the later statute. Then Mr. Lumley Smith relied also upon the 9th section of 20 & 21 Vict. c. 81, which says, "And whereas by the said Act 18 & 19 Vict. c. 128 it is enacted, that where a parish or place has been united with any other parish or place, parishes or places, for all or any ecclesiastical purposes, or where two or more parishes or places have heretofore had a church or a burial ground for their joint use, or where the inhabitants of several parishes or places have been accustomed to meet in one vestry for purposes common to such several parishes or places, it shall be lawful for the vestry, or any meeting in the nature of a vestry, of such several parishes or places, in any of the cases aforesaid, and whether any one or more of such parishes or places do or do not separately maintain its own poor, to appoint a burial board, and from time to time to supply vacancies therein, and to exercise the same powers of authorisation, approval, and sanction in relation to such burial board, and such other powers as under the Acts therein recited and that Act are vested in the vestry of a parish or place separately maintaining its own poor. Where any of the several parishes or places under the circumstances provided for in the said enactment separately maintains its own poor, or has a separate burial ground, it shall not be lawful for the vestry, or meeting in the nature of a vestry, of such several parishes or places to appoint a burial board under the said enactment without the approval of one of Her Majesty's principal Secretaries of State." In the case of *Reg. v. The Overseers of Walcot* (6 L. T. Rep. N. S.

320; 2 B. & S. 555) the 4th section of 23 & 24 Vict. c. 64 was also referred to—a section which contains the same principle, providing that "Where any parish or place has been divided into two or more parts or districts for all or any ecclesiastical purposes, and any one of such parts has a separate burial ground, it shall not be lawful for the vestry or meeting in the nature of a vestry for such entire parish or place to appoint a burial board without the approval of one of Her Majesty's principal Secretaries of State." This is the legislation bearing upon the subject, and the question is, are we to read these 12th and 13th sections literally, as Mr. White contends, or by the light of these different sections I have read. I do not say that it is at all clear, but upon the whole, giving my best attention to the matter, and giving the best sense I can to the Act of Parliament, I come to the conclusion that Mr. Lumley Smith's contention must prevail, and that the board so in existence is not a lawfully appointed board. Great light is thrown upon the discussion by the case of *Reg. v. The Overseers of Walcot St. Swithin* (*ubi sup.*), and the reasons given in the judgment in that case, especially in the judgment of Blackburn, J. The case is not exactly in point, but the reasoning of the learned judges would seem to show that it was upon the existence of the proviso in sect. 5 that their decision turned, and upon the extreme improbability that the Legislature could have intended to have brought into existence two separate jurisdictions on the same area. For these reasons, therefore, I think that the rule for a *mandamus* must be discharged, and that judgment must be for the defendants, with costs.

MATHEW, J. concurred.

*Judgment for the defendants.*

Solicitors for the applicants, *Tilleard, Godden, and Holme.*

Solicitors for the defendants, *White and Sons.*

Thursday, June 14, 1883.

(Before WATKIN WILLIAMS and A. L. SMITH, JJ.)

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*Highway district—Dissolution of, under sect. 39 of Highway Act 1862—Effect of, on highway board—Existence of highway board for certain purposes after dissolution—Highway board respondents in appeal to sessions after dissolution—Justices declining to hear respondents—Mandamus to justices to hear and determine appeal—Highway Act 1862 (25 & 26 Vict. c. 61), ss. 5, 9, 11, 39.*

On the 25th March 1883, the date of the dissolution of a highway district under sect. 39 of the Highway Act 1862 (25 & 26 Vict. c. 61), an appeal to the quarter sessions was pending against an order of justices in petty sessions, by which the appellant had been ordered to pay to the district highway board a sum of money for "extraordinary expenses," incurred by the board in repairing damage caused to the highways by "excessive weight and extraordinary traffic," in the constant passing over the same of a traction engine and carriages belonging to the appellant. When the appeal came on to be heard, on the 4th

(a) Reported by HENRY LEIGH, Esq., Barrister at-Law.

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*April, the Court of Quarter Sessions declined to hear counsel for the respondent board, on the ground that, the highway district being dissolved, the board had ceased to exist and could not therefore appear or be heard by counsel as respondents in the appeal; and, treating the appeal as unopposed, the magistrates quashed the order appealed against.*

*Upon a rule for a mandamus to the justices to enter continuances and hear and determine the appeal, it was*

*Held by the Queen's Bench Division (Watkin Williams and A. L. Smith, JJ.): First, that although, on the dissolution of the highway district, the highway board ceased to be the highway authority for all purposes connected with the control and management of the highways, they nevertheless continued to exist as a corporate body for other purposes, viz., preparing and stating their accounts, getting in debts and other moneys due, distributing the funds in hand to the proper recipients, and generally winding-up their affairs, and that they were therefore the proper respondents in the appeal, and entitled to be heard accordingly; secondly, that there had been no hearing and determination of the appeal on its merits, but merely an erroneous decision of the justices upon a preliminary objection, and therefore the rule for a mandamus must be made absolute.*

*Reg. v. Brown and others (7 E. & B. 767; 26 L. J. 182, M. C.) approved and acted on.*

In 1868 several parishes and places in the county of Essex, including the parishes of Brentwood and South Weald in the said county, were duly constituted a highway district under the provisions of the Highway Act 1862 (25 & 26 Vict. c. 61), under the name of the "Billericay Highway District;" and waywardens for the said several parishes and places within the said district have ever since been elected annually, and, with the justices acting for the county of Essex and residing within the said district, have constituted the "Highway Board" of the said Billericay highway district.

On the 17th Oct. 1882, at a Court of General Quarter Sessions, in and for the county of Essex, to which the consideration of a provisional order made by the justices at a previous Court of General Quarter Sessions in and for the said county, in pursuance of the powers contained in the 25 & 26 Vict. c. 61, and 27 & 28 Vict. c. 101, dissolving the said highway district, had been duly adjourned, the justices having then and there considered the said provisional order, made a final order confirming the same, and ordered that the said highway district should be dissolved on the 25th March 1883, and that all matters of account connected with the said highway district should be duly adjusted to that date.

In the month of Feb. 1883 proceedings were taken under sect. 23 of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), by the surveyor of the Billericay Highway Board, under the authority and on behalf of the board, against the Shorthorn Dairy Company Limited, carrying on business in London and also at Dytchleys in the parish of South Weald, in the county of Essex, and within the said highway district, to recover from the said company in a summary manner the sum of 279l. 5s., extra-

ordinary expenses incurred by the said board in the parishes of Brentwood and South Weald respectively between June 1881 and Sept. 1882, in repairing the highways between Dytchleys aforesaid and the Brentwood railway station, by reason of damage caused by "excessive weight" and "extraordinary traffic" passing along and over the same highway, by the passage of a traction engine and carriages attached thereto, constantly and daily run by the said company to and fro along and over the said highways between Dytchleys aforesaid and the said Brentwood railway station, for the conveyance of stores, materials, and agricultural produce of the company.

At the hearing of the information by three justices in petty sessions at Brentwood, on the 22nd Feb. last, the said justices made an order for payment by the dairy company to the highway board of the sum of 279l. 5s., the amount of the said damage, and 43l. 3s. for the costs of the board in that behalf, making together the sum of 322l. 8s.; and on the 1st March following the said company, by their solicitors, duly gave notice to the board and to their surveyor and the said justices of their intention to appeal against the said order, and gave security by deposit of money to abide the judgment of the court on the hearing of the appeal.

The appeal came on for hearing before the Court of General Quarter Sessions for the county of Essex at Chelmsford on the 4th April 1883, when counsel appeared on behalf of the appellants, the dairy company, and also on behalf of the respondents other than the said justices.

A preliminary objection was taken by the appellants' counsel that the highway board, having been dissolved on the 25th March 1883 by the before-mentioned final order of quarter sessions, had altogether ceased to exist, and had no *locus standi* at the hearing of the said appeal by themselves or by counsel, and that therefore the respondents' counsel could not be heard. The justices sitting for the hearing of the appeal, having heard counsel for the highway board in answer to that objection, held the objection to be valid, and refused to hear the highway board by themselves or their counsel; and thereupon, proof having been given by the appellants of due service of the notice of appeal, the justices quashed the order of justices appealed against, and ordered the money deposited by the dairy company (the appellants) as aforesaid to be paid to them by the clerk of the peace.

A rule *nisi* for a mandamus to the justices of the said county of Essex, commanding them to show cause why they should not hear and determine the said appeal, was, on the application of counsel for the said dissolved highway board, subsequently granted by the Queen's Bench Division of the High Court of Justice.

The following sections of the Highway Act 1862 (25 & 26 Vict. c. 61), under which the Billericay Highway Board was originally formed, are material:

Sect. 5 empowers any five or more justices of a county, by writing under their hands, to require the clerk of the peace to send, with the ordinary notice required to be given of the holding of courts of general quarter sessions, a notice in the form given in the schedule, that at the court therein mentioned a proposal will be made to divide the county, or some part thereof, into

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highway districts, or to constitute the whole or some part thereof a highway district; and also to require the clerk of the peace to give notice by post to the churchwardens and overseers of every parish mentioned in such notice; and, upon such requisition being complied with, the justices at the general or quarter sessions mentioned in such notice may entertain such proposal and make a provisional order dividing the county or some part thereof into highway districts for the more convenient management of highways; but such order shall not be of any validity unless it is confirmed by a final order of the justices at some subsequent court of general or quarter sessions.

Sect. 6 contains the regulations as to the making, confirming and approving of the order of justices for forming highway districts.

By sect. 9 the following (amongst other) provisions are enacted with respect to the constitution of the highway board in each highway district:

(1.) The highway board shall consist of the waywardens elected in the several places within the districts in manner herein mentioned, and of the justices acting for the county and residing within the district.

(2.) The board shall be a body corporate by the name of the highway board of the district to which it belongs, having a perpetual succession and a common seal, with a power to acquire and hold lands for the purposes of the Highway Acts without any licence in mortmain.

By sect. 10 are enacted provisions and regulations with respect to the election of waywardens in every parish forming part of a highway district.

By sect. 11:

After the first meeting in any highway district of the board of such district the following consequences shall ensue: all such property real and personal, including all interests, easements, and rights in, to, and out of property real and personal, and including things in action, as belong to or are vested in, or would but for this Act have belonged to or been vested in any surveyor or surveyors of any parish forming part of the district, shall pass to and vest in the highway board of that district, for all the estate and interest of such surveyor or surveyors thereof as aforesaid, but subject to all debts and liabilities affecting the same. All debts and liabilities incurred in respect of any property transferred to the highway board may be enforced against the board to the extent of the property aforesaid. All such powers, rights, duties, liabilities, capacities, and incapacities (except the power of making, assessing, and levying highway rates) as are vested in or attached to, or would but for this Act have become vested in or attached to, any surveyor or surveyors of any parish forming part of the district, shall vest in and attach to the highway board. All property by this Act transferred to the board shall be held by them upon trust for the several parishes or places now maintaining their own highways within their district to which such property belongs, or for the benefit of which it was held previously to the formation of the district.

By sect. 39:

Any highway district formed under this Act may from time to time be altered by the addition of any parishes in the same or in any adjoining county, or the subtraction therefrom of any parishes; and new highway districts may be formed by the union of any existing highway districts in the same or in any adjoining county, or any parishes forming part of any existing highway districts, or any highway district may be dissolved; but any such alteration of existing districts or formation of new districts, or dissolution of any district shall be made by provisional and final order of the justices; and all the provisions of this Act with respect to the formation of highway districts and provisional and final orders of justices, and the notices to be given of and previously to the making of such orders, and all other proceedings

relating to the formation of highway districts, shall, in so far as the same are applicable, extend to such alteration of existing or formation of new districts, or dissolution of districts, as is mentioned in this section. And in addition thereto provision shall be made, if necessary, in any orders of justices made under this section, for the adjustment of any matters of account arising between parishes or parts of districts in consequence of the exercise of the powers given by this section. Where any parish is added to or any district united with any district in another county, the final order of the justices of the county in which such parish or district is situate shall not be confirmed by them until they shall have received the approval of their provisional order for such addition or union from the justices of the county in which the district is situate to or with which such addition or union is to be made. Where any highway district is dissolved, or where any parish is excluded from any highway district, the highways in such district or parish shall be maintained, and the provisions of the principal Act in relation to the election of surveyors and to all other matters shall apply to the said highways in the same manner as if such highways had never been included within the limits of a highway district.

*Philbrick, Q.C. and H. Curtis Bennett*, for the appellant dairy company, now showed cause against the rule.—They contended that the board, which was originally constituted in 1868, upon the creation of the highway district under the Act of 1862 (25 & 26 Vict. c. 61), was, as a matter of course, and necessarily, dissolved, and ceased to exist, upon the dissolution of the highway district, in accordance with the provisions of sect. 39 of the Act, and from the moment of the coming into operation, on the 25th March 1883, of the final order of quarter sessions confirming their previous provisional order; consequently, therefore, they had no *locus standi*, and counsel could not appear or be heard on the appeal on the 4th April for a body which, having expired ten days before, had then no existence at all. Secondly, if anyone was entitled to be heard at all as respondent in the appeal, it was the surveyor of the parish under the Highway Act 1835 (5 & 6 Will. 4, c. 50), the statutory successors of the expired board. The property, interests, and powers of these old surveyors were by sect. 11 of the Act of 1862 expressly vested in the highway board, and therefore, upon the latter's dissolution, such property, interests, and powers re-vested in the surveyors under the last clause of sect. 39 of the same Act. If that were not so, then such property, interests, and powers were now *in nubibus*, and the matter was *casus omissus* from the Act. Thirdly, a *mandamus* cannot go, because the magistrates have in fact heard and determined the appeal by hearing evidence on the part of the dairy company of due service of the notice of appeal, and, upon no respondent appearing (the magistrate having held that the dissolved board could not appear as such) by then quashing the order appealed against. The decision of the Court of Quarter Sessions was right; but, even if it were erroneous, the court will not interfere to have it questioned. They cited

*Reg. v. The Justices of Monmouthshire*, 8 B. & C. 137; 6 L. J. 87, M. C.;

*Reg. v. The Justices of Carnarvon*, 4 B. & Ald. 86;

*Re v. The Justices of Gloucestershire*, 1 B. & Ad. 1;

*Reg. v. The Mayor, &c., of Monmouth*, 21 L. T. Rep. N. S. 748; 39 L. J. 77, Q. B.; L. Rep. 5 Q. B. 250.

[*WATKIN WILLIAMS, J.* referred to *Reg. v. Brown and others (Justices, &c.)*, 7 E. & B. 757; 26 L. J. 183, M. C.]

*Poland and F. C. Earle*, for the highway board, *contra*, supported the rule, and contended that,

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although the highway district had been duly dissolved by order of sessions, and though for many purposes the highway board had no longer any existence or any administrative powers, yet that it still and necessarily existed as a corporation for other purposes and duties, *e.g.*, for the purpose of settling their accounts, collecting and getting in moneys and debts due to the board, paying debts due from the board, paying and distributing the funds and moneys in their hands to the proper recipients, and finally winding-up their affairs. If not, what was to become of and to be done with the moneys in the hands of the board's treasurer? The point raised on behalf of the company, as to the appeal having been already heard and determined, is conclusively settled against that contention by the following cases:

*Reg. v. The Justices of Middlesex; Slade's case*, 36 L. T. Rep. N. S. 402; 2 Q. B. Div. 516; 46 L. J. 225, M. C.;

*Reg. v. The Justices of Worcestershire*, 3 E. & B. 477; 23 L. J. 113, M. C.;

*Reg. v. The Justices of Monmouthshire*, 4 B. & C. 844; 1 D. & R. 334.

WILLIAMS, J.—In this case I am clearly of opinion that the *mandamus* ought to go. The application is for a *mandamus* to the justices of the peace for the county of Essex, to enter continuances from session to session, in a certain appeal between the Shorthorn Dairy Company (the appellants) and the Billericay Highway Board (the respondents), and to hear and determine such appeal at the next general quarter sessions of the peace for the said county. Two objections have been raised to the issue of the *mandamus*. In the first place it is said that the justices in quarter sessions have already heard and determined this appeal. Now, however wrongly the justices might have decided the case, it is scarcely necessary to say that, if they had heard and determined it, this court would have no jurisdiction to issue an order to them to proceed to do what is now required. It is said, further, that the preliminary objection which was made before them was heard and determined by them. That is the converse way of putting it, that they have not heard and determined the appeal, but, in point of fact, have decided upon a preliminary objection, and would not further hear the case or enter upon its merits. The case is certainly one of some peculiarity, but it seems to me, looking carefully at the position of the corporation, the respondent highway board, and considering the real principles of law applicable to proceedings of this sort, that the case admits of no manner of doubt whatever. The appellants, the Shorthorn Dairy Company, had been ordered by the justices in petty sessions to pay a sum of money to the Billericay Highway Board, on account of expenses which the board had incurred in repairing certain highways in the parishes within their district, on account of the "extraordinary traffic" (that is the statutory expression) of the dairy company. That order having been made upon the company, the latter appealed therefrom to the general quarter sessions. The order of the justices in petty sessions was made on the 22nd Feb. 1883, and on the 1st March 1883 the company gave notice of appeal. On the 4th April the appeal came on for hearing at the quarter sessions, when the objection was taken that the highway board ceased to exist by having been dissolved as on and from the 25th

March 1883, and that therefore there was no respondent, nobody to oppose or to take part in the proceedings. The magistrates accepted and adopted that objection, and adjudged that there was no respondent at all before them, and then, on due service of the notice of appeal being proved, as a matter of form, in accordance with the practice of quarter sessions, the order appealed against was quashed. Under these circumstances, it seems to me to be impossible to say that the justices entered upon the merits of the case, or heard and adjudicated upon it in any shape or way. They determined merely the preliminary objection taken by the appellants that there was no respondent before the court to be heard. That is the same as if nobody had appeared at all; and, consequently, the same thing took place that happens when an action for the recovery of land is brought on, and the defendant does not appear, *viz.*, that upon the mere demand of the party proceeding, judgment goes in his favour, without discussion or evidence or entering into the question in any way. If the objection decided by the magistrates here had been a valid and a sound one, possibly the result might have been the right one, however monstrous it might have been. If it had really turned out that all the property, powers, and interest of every sort and kind of the highway board had ceased to be in them on the 25th March, and that another body had been substituted for them, and that there had been a direct transfer from the one body to the other at midnight on the 25th March, it might have been said that there was something in the objection, because there was an existing body in whom were now all the powers, interests, and property of the defendant body, and who ought therefore to be the persons to take up the quarrel, and stand in the place of their predecessors, and bear the brunt of the battle, and pay the costs if unsuccessful. All that would have had some good sense in it; but when one comes to look at the matter as it in fact is, there is really nothing in it. The point is one that has been made, and therefore it must be referred to shortly. Now what is the position of this board that is said to have been dissolved on the 25th March? It is a highway board constituted under the General Highway Act of 1862 (25 & 26 Vict. c. 61), consisting of waywardens elected by the ratepayers as representatives of the various parishes that are united together to form the highway district. There are two waywardens elected for each parish incorporated into the district, and those waywardens manage the whole business, as the business was, before the formation of the board, managed by the surveyors of the highways. By that Act of Parliament this new body was created a corporation, and all the property of the surveyors of highways, as it existed at the time this corporation was created, was transferred to and vested in the new corporation, in whom also were vested all rights, duties, and powers of every sort, they representing the entire district as a corporation having common interests and common rights. Then, it appears that this board determined on the 18th Dec. 1881 that they would take steps to dissolve themselves; and accordingly a resolution was passed in that month, under the provisions of the Act of Parliament, that they would dissolve, and accordingly, acting upon that, an application was made to the justices at quarter sessions, on the 3rd Jan. 1882, for a provisional order for dissolution, which was



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accordingly made. The matter then came before justices at the two subsequent quarter sessions in April and June, on each of which occasions it was adjourned, and ultimately, at the sessions on the 17th Oct. 1882, a final order was made, that "this board be dissolved as from the 25th March 1883;" and the effect of that is, that, from that moment, the 25th March last, they ceased to have the power of exercising any jurisdiction whatever over these roads. By virtue of the 39th section of the Act, all their duties and powers in relation to highways and the management of them were immediately transferred by the operation of that section to the old board; that is to say, to the surveyors of highways in the several parishes as they existed before the Act was passed; but this remained to them, namely, that, as from the 25th March 1883, they were to make up and state their accounts as between themselves and the parishes, to adjust all the various and respective interests of the several parishes, to prepare their accounts and distribute the money and property to each of the parishes in proportion to the rights of the several parishes respectively, and also to prepare and complete their accounts and to present them to be audited in the regular way. That was their duty. The effect of that, in my judgment, is, that this board, from the 25th March 1883, ceased to be the highway authority, and ceased to have the management and control of the highways, or any responsibility in themselves with respect to them, but that, for the purpose of winding-up their affairs, stating their accounts, and collecting the moneys due to them, as a corporation representing twenty-five parishes incorporated in their name, for all these purposes they still continue to exist; and it is not necessary to give any illustrations showing how that must be the case. It is, absolutely impracticable and improbable for any other result to follow. The consequence of that is that there is an order made by the justices against the appellants, the Shorthorn Dairy Company, that they should pay to the Billericay Highway Board a sum of money to recompense them for the expense which they, the board, had already incurred in making good injuries caused to the highways within their districts by the "extraordinary traffic," which the Shorthorn Dairy Company had brought upon the said highways. Now, when that order was made there is no doubt at all that there was a debt created by it from the Shorthorn Dairy Company to the Billericay Highway Board, which it was not merely the right but the absolute duty of the board to collect and bring in, as soon as they possibly could, and preparatory to bringing that debt in, to so prepare and state their accounts for the audit as to give credit to the several parishes interested in the matter for the moneys to be so received; and so to shape their accounts between parish and parish that each parish really interested in it should have the benefit of that sum of money. The company then having entered their appeal at the quarter sessions, it is suggested that, because this board was dissolved for the purpose of managing the highways, therefore not they but some other body, whom it is impossible to discover, ought to have come in and taken up the appeal; and it was said that the surveyors of the highways should have done it. I do not even understand how that can be expressed in intelligible language. What

surveyors? The surveyors of the two parishes particularly interested? Certainly not. In the first instance this money would have to go into the bank, and form part of the common fund, and be distributed by the board according to the interests of the several parties interested in it. If it could be said that the overseer of any particular parish could come in, this consequence would follow, that if that parish was actually in arrears with its rates, or there were rates still in the hands of the overseers of that parish not yet handed over to the board, and the overseers were to come in and intercept that money in the hands of the Shorthorn Dairy Company, they would leave the board in this position, that the board would have to prepare their account upon the footing of showing probably that the parish would be entitled to a contribution out of that money from them, whereas, in truth, by the interception of the money by the overseers the state of the account would be altogether altered. That is quite enough to show how such a contention would work out in practice. It cannot possibly, as it seems to me, be said that this board has ceased to exist for all purposes whatsoever; certainly for the purpose I have just referred to they have not so ceased, and therefore, in my opinion, the Court of Quarter Sessions were in error when they accepted and acted upon this objection. It seems to me that the decision of Lord Campbell, C.J. in the case of *Reg. v. Brown (ubi sup.)* is an authority for the proposition that where, as is the case here, the magistrates came to an erroneous decision upon a preliminary objection and, deciding so erroneously upon that preliminary objection, refuse to go into the merits of the case, that is not hearing and determining the case at all, but is simply refusing upon a wrong ground to exercise jurisdiction. On all these grounds, therefore, I am of opinion that this *mandamus* ought to issue to the justices that they should proceed to hear and determine the appeal.

SMITH, J.—I also am of opinion that this *mandamus* should go to the quarter sessions to hear this appeal. There are one or two facts, though it seems to me that there are very few which are pertinent, that I wish to notice in this case, and they are these: On the 22nd Feb. 1883 the petty sessions made an order upon the Shorthorn Dairy Company that they should pay to the board the sum of 322l. 8s. for damage done to certain highways by their "extraordinary traffic," by means of which certain roads in the Billericay highway district had been cut up and injured, and in repairing which damage that sum of money had been expended by the highway board under the 41 & 42 Vict. c. 77 for the common use and benefit of the district. The justices at petty sessions determined and adjudged that the dairy company were liable to pay to the highway board that sum of money. On the 1st March 1883 the company appealed against that order, making the highway board respondents in the first place, as they were bound to do. On the 25th March 1883 the district was dissolved pursuant to sect. 39 of the General Highway Act of 1862. On the 4th April 1883, upon the appeal coming on to be heard at the quarter sessions, the appellants the company took the point that, inasmuch as the district had been dissolved under sect. 39 of the 25 & 26 Vict. c. 61, there was no person in existence, body corporate or otherwise,



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to act as respondent in that appeal. The justices held the objection taken by the appellants to be a good one, and refused to entertain the appeal upon the merits, dismissed the order of the justices in petty sessions, and gave judgment for the appellant company. In that state of things the highway board came to this court and asked for a *mandamus* to the justices to enter continuances and hear the appeal, upon the grounds that the justices had not heard and determined it, and that they were wrong in point of law in holding that there was no person really respondent in the appeal. Now, I think that the highway board were right on both points, and I will take the last point first. It has been strenuously urged by Mr. Philbrick and Mr. Bennett, on behalf of the dairy company, that the effect of sect. 39 is to obliterate from the face of the earth this corporate body as a highway board. In my opinion that section has no such effect. When we look at the 25 & 26 Vict. c. 61, we find first that under sects. 5 and 6 the highway board is formed. I am not going into the details as to how the district is formed, but there are in sects. 5 and 6 a set of provisions indicating how and in what way that is accomplished; in other words, how parishes are to be grouped together and constituted a district. Then, turning to sect. 9, which provides who is to be the governing body of that district, as contradistinguished from the district itself, we find there a set of provisions as to who are to be such governing body, viz., the highway board, which board is to be a corporate body by the fact of its having perpetual succession and a common seal. We have, therefore, by sect. 5 a district, *quod* district, formed, and by sect. 9 we have a governing body, *quod* governing body, formed and made corporate with a common seal. Then sect. 11 provides how and in what way, after the formation of the district and the board, the property which was the property of the parishes before they were made a district becomes, upon the district being made, the property of and vested in the highway board, and if it never should become necessary to abolish a district these two sections would point out how and in what way, after the passing of the 25 & 26 Vict. c. 61, and the parishes having been united into a district, the affairs of the district are to be carried on as regards highways after that date. But it seems to have been thought by the Legislature that it might be desirable, in certain cases, that a district should be dissolved, and then we come to sect. 39. Now what does that say? As it seems to me, sect. 39 does nothing more than say that in certain cases a highway district may be dissolved, and then it goes on to say, "where any highway district is dissolved the provisions of the principal Act" (that is the Highway Act 5 & 6 Will. 4, c. 50) "in relation to the election of surveyors, and to all other matters, shall apply to the said highways in the same manner as if such highways had never been included within the limits of a highway district." I read that as meaning that, after a district has been duly dissolved, then the surveyors, *quod* surveyors, who are appointed by the individual parishes after the district has come to an end, are to take up the maintenance of the repairs and so on of the highways, exactly in the same way as before the passing of the Act of 1862, and before the twenty-five parishes as in this case were made into a district at all. Then comes this question, What

is to become of the corporation? It is said that sect. 39 dissolves the corporation which had been brought into existence by sect. 9. It has been pointed out very forcibly by Mr. Poland what a ridiculous result would be brought about if that was really the intention of the Legislature and the true construction of the statute. First of all, the corporation, *quod* corporation, may have a judgment for money owing to them; who then would get that? The surveyor could not sue upon such a judgment. The surveyor is the old surveyor, and the old surveyor could not sue upon such a judgment in any shape or way. Then it may be that debts are owing to the corporation on contracts. How is a stranger to sue on such a contract as that? He cannot sue a party owing money on contract, for a person owing money on contract is in no shape or way under any liability to a stranger. Then again, debts may be owing to the corporation, as there are in this case, and there may be debts to be called in by the corporation, as is the case at present, and there is in the present case also a sum of about 1400l. in hand, which has to be distributed to the different recipients of that fund. It is urged on the one side that the result of the dissolution is to put an end to the corporation *ipso facto*, and to let loose all the judgment debtors and the persons who owe money on contract, and to bring the corporation to an end as from that date. That certainly seems to me to be a monstrous and ridiculous result, and one that I should not consider the statute to mean unless it were expressed in perfectly clear and unmistakable words that such was its meaning. But does the Act mean it? On the contrary, on looking into this statute it seems to me that it never intended such a result at all. There are no words in the Act to dissolve the corporation as has been suggested; there are only words which allow the dissolution of the district; and it seems to me that, for the purpose of winding-up their affairs, for the purpose of getting in their debts, and for the purpose of distributing the moneys they may have in hand, the Billericay Highway Board as a corporation still exists, and as such are the proper respondents in this appeal, which was lodged on the 1st March 1883. The only other point raised, and which this court has now to determine, is, whether or not the justices have in fact heard and determined this appeal. Now, after hearing and referring to the cases which have been cited before us upon that point, and particularly the cases of *Reg. v. The Justices of Middlesex* (*ubi sup.*) and *Reg. v. The Justices of Gloucestershire* (*ubi sup.*). I am clearly of opinion that there has been no real hearing of the case at all. There has been nothing but a determination of the justices upon a preliminary matter, but no hearing upon the merits; and therefore, in my judgment, this *mandamus* should go directing the justices to enter continuances and hear the appeal.

*Rule absolute for a mandamus.*

Solicitor for the Billericay Highway Board,  
W. W. Brown, agent for O. C. Lewis, Brentwood.

Solicitors for the Shorthorn Dairy Company,  
Beaumont and Warren.

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REG. on the complaint of T. D. SIBLY v. WHITE AND OTHERS.

[Q.B. Div.]

June 13, 14, and 21, 1883.

(Before WATKIN WILLIAMS and A. L. SMITH, JJ.)

REG. on the complaint of T. D. SIBLY v. WHITE AND OTHERS. (a)

*Poor rate—Overseers of parish in a union—Bill in Parliament casting burden on poor rate—Overseers opposing Bill by authority of the vestry—Charging costs of opposition on the rates—Auditor's certificate allowing same in union accounts—Certiorari—Right and power of overseers to oppose Bill and charge costs on poor rate—Status and duties of overseers.*

1. The overseers of a parish in a union are not entitled and have no power to oppose the passing of a Bill in Parliament, and charge the costs of such opposition upon the poor rate, notwithstanding that the Bill proposed to charge, under certain circumstances, the poor rates of the parish with payment of interest on stock to be thereby created, and that they were authorised, by a vestry meeting of the ratepayers, to oppose the Bill, and to take such steps and incur such expense in opposing it as they might think necessary.
  2. Overseers are not trustees for the poor, but statutable officers whose duties are to keep the parish books, make up proper accounts, collect the required rates, and hand over the proceeds to the proper persons. They have not the ordinary governing or directing of relief to the poor, nor anything whatever to do with maintaining the ability of the parish to pay the required rate.
- So held by the Queen's Bench Division (Watkin Williams and A. L. Smith, JJ.), making absolute a rule for a certiorari to remove into that division the district auditor's certificate and allowance, in the union accounts, of the costs incurred by the overseers of a parish in a union, in opposing a Bill in Parliament which proposed to cast a pecuniary burden on the poor rates of the parish. *Bright v. North* (2 Phil. Oh. Rep. 216; 16 L. J. 255, Oh.) and *The Attorney-General v. The Mayor, &c., of Brecon* (40 L. T. Rep. N. S. 52; 10 Oh. Div. 204; 48 L. J. 153, Oh.) discussed and distinguished.

A RULE nisi was obtained on the 30th April last, at the instance of Thomas Dix Sibly, a ratepayer of the parish of St. George, in the Barton Regis Union, in the county of Gloucester, calling upon George Symonds White, auditor of the Gloucestershire Audit District, to show cause why a writ of certiorari should not issue, directed to him to remove into the Queen's Bench Division of the High Court of Justice the certificate of allowance made by him (together with his reasons or grounds for the same), bearing date on or about the 10th Dec. 1882, of the sum of 327l. 14s. 8d. in the accounts of the Barton Regis Union, for expenses incurred by the churchwardens and overseers of the parish of St. George, in the said union, in opposing in Parliament a Bill called "The Bristol Port and Docks Commission Bill."

The facts of the case are as follows:—In the session of 1882 a Bill entitled "The Bristol Port and Dock Commission Bill" was presented to Parliament, by which Bill power was sought to constitute a commission for the purpose of acquiring and working the docks at Bristol, and for the purpose of the Bill to raise, if necessary, moneys

out of the poor rates of the city and county of Bristol and certain parishes adjoining, of which the parish of St. George was one.

Upon its becoming known what powers the Bill sought to obtain, the overseers of the said parish of St. George called a meeting of the vestry of the parish, which meeting passed a resolution that the Bill should be opposed, and authorising the overseers to oppose the Bill in Parliament, and to take steps and incur such expenses in opposing it as they should think necessary.

The churchwardens and overseers of the said parish thereupon proceeded to oppose the Bill, and forthwith presented a petition against it, and upon the Bill coming before a committee of the House of Lords they were heard by counsel in opposition to the Bill, which was ultimately rejected by the Lords' committee. In opposing the Bill the said churchwardens and overseers incurred costs and expenses amounting, as allowed on taxation, to the sum of 327l. 14s. 8d., which sum was paid by them out of moneys in their hands arising out of the poor rates of the parish of St. George, and was charged by them in their parish accounts as follows:

September.—By cash for expenses incurred in opposing in Parliament the Bristol Port and Docks Commission Bill, the promoters of which sought for power to charge on the poor rate of this parish (with certain other parishes) any deficiency that might arise in carrying out their undertaking (the Bill was thrown out by the Lords Committee); amount as allowed on taxation, 327l. 14s. 8d.

On the audit of the accounts of the said union, on the 19th Dec. 1882, the said T. D. Sibly attended the audit meeting, and on his own behalf, as a ratepayer, and as solicitor on behalf of certain other large ratepayers of the parish, objected, under the provisions of the 7 & 8 Vict. c. 101, s. 35, to the allowance of the said sum as not being a lawful charge upon the poor rates, and as one that ought not to have been made by the overseers or to be allowed by the auditor.

The auditor, however, allowed the sum, and made his certificate for it, giving the following written reasons for so doing:

I have allowed the sum of 327l. 14s. 8d., being the amount of a duly taxed bill of Mr. J. W. S. Dix, the solicitor employed by the parish of St. George for opposing in Parliament a Bill entitled the Bristol Port and Docks Commission Bill; because, as it was proposed by the said Bill to take power to charge the poor rate of the parish, and to impose other or additional rates on property within the parish, which in the opinion of the parish officers would injuriously affect the value of property therein, it was their duty, as trustees, to oppose such Bill; and that they were justified, having acted on the opinion of solicitor and counsel, in applying the funds in their possession (raised by rates) in opposing such Bill, which was thrown out by the Lords' Committee. Witness my hand this 31st Jan. 1883.

(Signed) G. S. WHITE, District Auditor.

The auditor having, on the requirement of the said T. D. Sibly, so stated in writing his reasons for allowing the aforesaid sum, the rule nisi for a certiorari was moved for and obtained as above mentioned at the instance of the complainant, the said T. D. Sibly, and now came on to be argued, when the following counsel appeared, and showed cause against the rule on behalf of the several different parties as follows:

H. D. Greene for G. S. White, the district auditor.

Charles, Q.C. and Pitt Lewis for the churchwardens and overseers of the parish of St. George. They cited in support of their arguments

(a) Reported by HENRY HIGH, Esq., Barrister-at-Law.

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- *Reg. v. The Commissioners of Sewers for the Tower Hamlets*, 1 B. & Ad. 282; 9 L. J. 30, M. C.;
- Attorney-General v. Compton*, 1 Yo. & Col. C. C. 417;
- Attorney-General v. Mayor, &c., of Brecon*, 40 L. T. Rep. N. S. 52; 10 Ch. Div. 204; 48 L. J. 153, Ch.;
- Attorney-General v. The Corporation of Wigan, Kay*, 268; 23 L. J. 429, Ch.; De G. M. & G. 52;
- Bright v. North*, 2 Ph. 216; s. c. nom. *Brighton v. North*, 16 L. J. 255, Ch.;
- Reg. v. The Mayor, &c., of Sheffield*, L. Rep. 6 Q. B. 663; 40 L. J. 247, Q. B.;
- 43 Eliz. c. 2, sect. 1;
- 4 & 5 Will. 4, c. 76, sect. 54.

*Petheram*, Q.C. and *W. F. Barry* for the guardians of the Barton Regis Union.

*A. Wills*, Q.C. and *Glen*, for the complainant Sibly, supported the rule for a *certiorari*, and cited

- Reg. v. The Mayor of Sheffield (ubi sup.)*;
- Reg. v. Stewart and another*, 12 A. & E. 772;
- Gouldsworth v. Knight and others*, 11 M. & W. 337;
- 12 L. J. N. S. 282, Ex.

The scope and substance of the arguments urged on either side sufficiently appear in the judgment of the court.

*Cur. adv. vult.*

June 21.—The written judgment of the Court (Williams and A. L. Smith, JJ.) was now delivered as follows by

A. L. SMITH, J.—In this case a rule *nisi* for a writ of *certiorari* was obtained on behalf of Thomas Dix Sibly, a ratepayer of the parish of St. George in the Barton Regis Union, in the county of Gloucester, to remove into this court the certificate of allowance made on the 19th Dec. 1882 by Mr. George Symonds White, the auditor of the Gloucestershire Audit District, whereby he allowed the sum of 327l. 14s. 8d., being the amount of a duly taxed bill of costs of the solicitor employed by the overseers of the said parish of St. George for opposing in Parliament, in the session of 1882, a Bill entitled the Bristol Port and Docks Commission Bill. The material facts are as follows: On the 18th Dec. 1881 the Bill in question was deposited; on the 30th Dec. 1881 notice for convening a vestry meeting of the said parish of St. George was given by the churchwardens and overseers thereof, and pursuant thereto, on the 10th Jan. 1882, a vestry meeting was held, at which it was resolved that the Bill should be opposed, and that the overseers should take such steps and incur such expense as they might think necessary. The overseers thereupon did oppose the Bill in Parliament, and obtained its rejection, and incurred therein the costs amounting to 328l. 14s. 8d. The said Bill, amongst other provisions, contained the following clause: 76. (1.) If the commission (meaning thereby the companies incorporated by the said Bill) at any time find that they cannot have at their immediate disposal, under their borrowing powers or otherwise, funds sufficient to provide for the punctual payment of the whole of the interest on the consolidated stock on the day appointed for payment of the same, they shall, at such time before that day as will enable provision for such punctual payment to be made in manner after mentioned, issue precepts to the corporation and to the Barton Regis guardians and to the Bedminster guardians respectively, requiring each of such bodies to pay within a specified time, to be named in such precepts, the amount therein mentioned as payable by such body. (2.) It shall be the duty

of each of such bodies to comply with the requisition of such precept by paying the sums mentioned out of any moneys in their hands or by levying the amount required, in the case of the corporation as part of the borough rate, and in the case of the said guardians as part of the poor rate leviable on the portions of their respective premises comprised in the dock rate area exclusive of the city. (3.) If default is made in payment by any of the said ratepayers of the sums required to be paid by them in pursuance of this section, the amount in default shall be deemed to be a debt due to the commission from the defaulting authority, and to be enforceable at the instance of the commission by *mandamus*. (4.) The amount payable by each of the said bodies shall be calculated by the commission in proportion to the rateable value of the city and of the portions of the said moneys comprised in the dock rate area, exclusive of the city, according to the valuation list for the time being in force, or, if there is no valuation list, then according to the last rate for the relief of the poor. The reasons given by the auditor for the allowance which he made were as follows: "Because it was proposed by the said Bill to take power to charge the poor rate of the parish and to impose other or additional rates on property within the parish which in the opinion of the parish officers would injuriously affect the value of the property therein, it was their duty, as trustees, to oppose such Bill, and that they were justified, having acted on the opinion of solicitors and counsel, in applying the funds in their possession (raised by rates) in opposing such Bill, which was thrown out by the Lords' Committee." The question now raised before us is, whether this is an expenditure which the overseers were legally entitled to make; or, in other words, whether it is an allowance which could in point of law be made. It was insisted by Mr. Charles, on behalf of the overseers, that the provisions of the Bill cast upon the ratepayers an additional burden, inasmuch as it provided for the taking of more money out of the parish than otherwise would have been the case, and thereby might exhaust the ability of the parish to pay rates; that it affected the poor of the parish, inasmuch as it diminished the rateable capacity of the parish; that it cast an additional duty upon the overseers themselves, viz., that of making an additional levy for the purposes of the Bill, and that thereby "rights, privileges, and duties" of the overseers, within the meaning of the case hereinafter referred to, were directly attacked; that by the statute 43 Eliz. c. 2, s. 1, the overseers of the poor were to raise, weekly or otherwise, by the taxation of every inhabitant and of every occupier in such competent sum for and towards the necessary relief of the poor, to be gathered by the parish according to the ability of the same; that the overseers, as trustees for the poor, either by reason of the provisions of the statute itself, or if not by the direct authority thereof, at any rate as incident to the powers thereby conferred, were entitled to defend themselves from the proposals made by the Bristol Port and Docks Commission Bill, and to expend moneys derived from the poor rate in opposing the same. If it could be established that the overseers were trustees as suggested, and that "rights, privileges, and duties" similar to those dealt with by the Lord Chancellor

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in the case of *Bright v. North* (2 Phill., *ubi sup.*), and by the late Master of the Rolls in *The Attorney-General v. Brecon* (*ubi sup.*), were being attacked, we are of opinion that those cases are authorities for the proposition put forward on behalf of the overseers; and indeed this was not disputed at the bar. We are, however, of opinion that the overseers wholly fail in point of fact. In the first place, there is no trust imposed upon them to maintain the ability of the parish to pay rates, and even if there were, the duty to maintain the ability of the parish to pay rates is wholly dissimilar from the duty which existed in the case of *Bright v. North* (*ubi sup.*), viz., to maintain the stability of the banks. Overseers, though a quasi-corporation for some purposes not material to this case (*Goldsworthy v. Knight, ubi sup.*), are officers annually or, as in this case, triennially appointed; their duty is to keep the parish books, to make up proper accounts, to collect the required rates, and to hand over the proceeds to the proper persons. They have not even the ordering, governing, or directing of relief to the poor; that appertains to the guardians (4 & 5 Will. 4, c. 75, s. 54). They (the overseers) have nothing whatever to do with maintaining the ability of the parish to pay the required rate. An overseer is (as stated by Lord Denman, O.J. in the case of *Reg. v. Stewart, ubi sup.*), a statutable officer dealing with a statutable fund, and accountable for its application to statutable purposes. If the contention of the overseers in this case were well founded, they would be entitled to expend the moneys of the poor rate in opposing every local or other scheme which might tend to alter, lessen, or interfere with the rateable value of the parish. As to the suggestion that their own duties may be varied by the Bristol Port and Docks Commission Bill in their having to make an additional levy in that behalf, we are of opinion that such are not within either of the decisions cited. In our judgment, neither by the statute of Elizabeth nor by any powers incident thereto, were the overseers entitled to oppose the Bill in question, and to charge the costs thereof upon the poor rates; that they have no "rights, privileges, or duties," within the meaning of the cases cited; and, inasmuch as it was not contended that any right to property was sought to be attacked, we are of opinion that this rule must be made absolute, with costs against the overseers.

*Rule absolute for a certiorari, with costs against the overseers.*

Solicitors for the complainant, Sibly, *Merediths, Roberts, and Mills*, agents for *Sibly and Dickinson*, Bristol.

Solicitors for G. S. White, the district auditor, *Peacock and Goddard*, agents for *Mullings, Ellett, and Co.*, Cirencester.

Solicitors for the overseers of St. George's, *Warry, Robins, Burges, and Co.*, agents for *J. W. S. Dix*, Bristol.

Solicitors for the guardians of the Barton Regis Union, *Gregory, Bowcliffe, Rawle, and Johnstone*, agents for *Benson and Carpenter*, Bristol.

## HOUSE OF LORDS.

*Tuesday, April 24, 1883.*

(Before Lords BLACKBURN, BRAMWELL, and FITZGERALD.)

CHURCHWARDENS OF WEST HAM v. ILES. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Poor rate—Stat. 59 Geo. 3, c. 12, sect. 19—Owner rated instead of occupier—House let "at a greater rate than 20l."*

*Where a house is let at a rent "payable at any shorter period than three months," which in the aggregate amounts to more than 20l. a year, the owner cannot be assessed to the poor rate instead of the occupier under stat. 59 Geo. 3. c. 12, sect. 19.*

*Judgment of the Court of Appeal affirmed.*

THIS was an appeal from a judgment of the majority of the Court of Appeal (Lord Coleridge, O.J., and Brett, L.J., Baggallay L.J. dissenting), which had reversed an order of the Queen's Bench Division.

The case is reported below in 8 Q. B. Div. 69, and 46 L. T. Rep. N. S. 149.

The question raised by the appeal was whether the owner of houses let at weekly rents, the sum of which in the course of a year would amount to more than 20l., is liable to be assessed to the poor rate under sect. 19 of Sturges Bourne's Act (59 Geo. 3, c. 12.) instead of the actual occupiers.

The section applies to "houses, apartments, or dwellings, . . . let . . . at any rate or rent not exceeding 20l. nor less than 6l. by the year, for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months."

The respondent, who was the owner of house property let at weekly rents, had been assessed under a resolution passed by the vestry of West Ham under this section.

The Queen's Bench Division held that the assessment was properly made, but this decision was reversed by the Court of Appeal as above mentioned. The churchwardens and overseers then appealed to the House of Lords.

*F. M. White, Q.C.* and *Mugliston* appeared for the appellants. Their arguments appear sufficiently from the judgment of their Lordships.

No counsel appeared for the respondent. At the conclusion of the argument for the appellants their Lordships gave judgment as follows:

LORD BLACKBURN.—My Lords: In this case the whole question turns upon the construction of sect. 19 of 59 Geo. 3, c. 12. I quite agree with the argument which has been addressed to your Lordships, that in construing an Act of Parliament, where the intention of the Legislature is declared by the preamble, we are to give effect to that preamble to this extent, namely, that it shows us what the Legislature is intending; and if the words of enactment have a meaning which does not go beyond that preamble, or may come up to the preamble, in either case we prefer that meaning to one showing an intention of the Legislature which would not answer the purposes of the preamble or would go beyond them. To that extent only is the preamble material. The preamble of the section in question states that

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

the payment of rates is evaded by houses being "let out in lodgings," in which case I may observe that those who framed the preamble did not understand the law as it is perfectly settled now. A man who lets out houses in lodgings, and is the occupier, is himself liable, and the lodgers are not. The preamble proceeds to say, "or in separate apartments"—in which case the occupier of the separate apartments is rated—"or for short terms, or let to tenants who quit their residences or become insolvent before the rates charged on them can be collected." That is the evil which is pointed at, and then the section enacts a remedy for it: "That it shall be lawful for the inhabitants of any parish to resolve and direct that the owner or owners of all houses, apartments, or dwellings in such parishes, being the immediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof" (for the moment I will leave out the next line and a half) "for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months, shall be assessed to the rates for the relief of the poor instead of the actual occupiers." Now, stopping there (I have left out the limitations as to value altogether), there are two things. As it seems to my mind, where there has been a letting to the occupier of a tenement for any less term than one year, the lessor may be rated instead of the occupier, or where there has been a letting to the occupier, and by the terms of the agreement the rent has been made payable at any shorter period than three months, the lessor may be rated instead of the occupier. So far I think there can be no doubt about the matter. But it is very improbable that the Legislature would have passed any such enactment without some limit of value; and accordingly there are here the words "at any rent or rate not exceeding 20*l.* nor less than 6*l.* by the year." Those words are put in immediately after the words "let to the occupiers thereof," and the first question is upon the natural and grammatical construction of the words. Should they apply to a letting for any less term than one year or on an agreement by which the rent shall be reserved or made payable at any shorter period than three months? I think that the plain and natural meaning of the words is that they shall extend to both cases, the value must govern both classes. Now, it is said—and that is the only argument which to my mind seemed to amount to an argument in favour of the other side—that the effect of that construction would be to baffle the preamble, and that it would be necessary for the purposes of the preamble for us to say that whenever there are short terms of letting, not by taking in lodgers, but by the letting of an actual room, for a sum which exceeds 7*s.* 8*d.* a week (so says the argument), the Legislature are baffled in their object, which was to prevent the rates being evaded. But that I cannot see at all. I think that for that purpose it is possible enough that if their attention had been called to it they might have put some limitation; but to say that in order that they might not be baffled of their purpose, which was in respect to the letting of small lodgings at a small rent, the enactment shall apply, without stint or restriction of any sort, to a house which is let, as a house may well be let, to a person who is not inclined to take it for a long time, but is willing to pay at

the rate of thousands a year for it, provided always that the rent is reserved or made payable monthly—to say that that is necessary in order to carry out the preamble is not, I think, in accordance with the rules of construction, and is not such a construction as it would be prudent to adopt. Then the words which I have read are followed by what has been called a proviso. When the inhabitants have come to this resolution or declaration, they "may rescind, renew, vary, and amend every such resolution and direction." Then come the words, "so as no such resolution or direction shall extend to assess or charge the owners of any house, apartments, or dwelling which shall with the outhouses and curtilages thereof be let at a greater rent than 20*l.* or less than 6*l.* as aforesaid." If it were not for those two words "as aforesaid" there could not have been any possible doubt, I think, that this provision extends not merely, as was argued, to the rescinding, renewing, varying, and amending, but to the original resolution and direction, the first resolution and direction as well as those subsequently made. The houses, apartments, or dwellings, are not to be "at a greater rent than 20*l.*, nor less than 6*l.*" The words "as aforesaid," it is argued, show that this is intended to apply only to a letting for a period of less than a year. I must say that that is straining the words. I have come to the conclusion, therefore, that the decision of the majority of the Court of Appeal was the right one, and consequently I move that that judgment should be affirmed, and the appeal dismissed.

Lord BRANWELL.—My Lords: I am of the same opinion. The question is how these words are to be read. Mr. White proposes to read them as though the words beginning with "or on any agreement" were not connected with the immediately preceding words, which occupy about two lines, but were connected with the words ending at "occupiers thereof," so that he would read them as though after the words "one year or" there was the word "let." Now, if that were so, he would be in the right; if not, if what comes after the words "one year" is a part of the sentence which begins at "any rent or rate," then he is not right. I am of opinion that he is not right. I think that—I will not say the grammatical construction, because either construction is in my judgment grammatical, but—the ordinary and obvious construction is that which is unfavourable to him, and makes it necessary that, although the premises are let under an agreement by which the rent assessed is made payable at a shorter period than three months, still the rent shall not be more than 20*l.* to enable this Act to be acted upon. I think that is the ordinary construction of the sentence as it now stands; and it is confirmed, to my mind, by what has been called the proviso, which shows that those who were drawing the Act of Parliament thought that they were dealing with a case in which they had provided that the rent should not exceed 20*l.* Nor am I very much struck by the argument about the preamble. I dare say mischief may result from the law being as we state it to be; I do not, however, see but that the preamble is complied with upon either construction. There is this at least to be said, that if premises were let for three months at 7*l.*, clearly that case would not be within the Act; and that being so, I do not think that we ought to suppose

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that the Legislature intended that if they were let for two months, whatever the value was, this Act should apply. I am of opinion, therefore, that the judgment should be affirmed.

Lord FITZGERALD concurred.

Judgment appealed from affirmed, and appeal dismissed.

Solicitor for the appellants, G. A. Sedgwick.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Monday, July 16, 1883.

(Before BRETT, M.R., COTTON and BOWEN, L.JJ.)

REG. v. THE JUSTICES OF LANCASHIRE. (a)

*Public-house—Licence to sell excisable liquors—Occupier about to quit premises—Neglect to apply for licence—Expiration of licence—New tenant or occupier—Licence to—Jurisdiction of justices to grant—9 Geo. 4, c. 61, s. 14.*

By sect. 14 of 9 Geo. 4, c. 61, "if any person duly licensed under this Act shall (before the expiration of such licence) die, or if any person so licensed . . . shall remove or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors by retail . . . it shall be lawful for the justices . . . at a special session . . . to grant to the heirs," &c., "or to any new tenant or occupier of any house having so become unoccupied . . . a licence to sell excisable liquors by retail . . . provided always, that every such licence shall continue in force only from the day on which it shall be granted until the 5th day of April or the 10th day of October then next ensuing, as the case may be."

At the general annual licensing meeting in 1881, a public-house in Liverpool was, and had been for years, duly licensed for the sale of liquors, the licence terminating on the 10th Oct. 1881. S. became tenant and transferee of the licences in Jan. 1881. In June 1881 S. gave up possession to W., who relet to B., who then took possession. No licensed person was in possession from that time, S. having successfully opposed an application by B. for a transfer. Afterwards, in August, when the general licensing meeting was held, B. was still occupier; but about that time she left the premises in consequence of an epidemic. She never returned, and no one applied at the general meeting for a renewal of the licence, which consequently expired on the 10th Oct. 1881. On the 21st Sept. the mortgagees of the house discovered that the house was empty, and that the licence had expired, and took possession. On the 5th Jan. 1882 D. became possessed of the premises, and applied to the justices at special sessions for a licence.

Held (reversing the decision of the Queen's Bench Division), that the justices had jurisdiction to

grant the licence, notwithstanding the former licence had expired, B. being, at the time of the annual licensing meeting, a person who could have applied for a renewal of the licence, and "an occupier . . . about to quit" who had "neglected to apply" at such meeting "for a licence to continue to sell excisable liquors."

*Ex parte Todd* (47 L. J. 89, M. O.; 3 Q. B. Div. 407) and *White v. Justices of Coquetdale* (44 L. T. Rep. N. S. 716; 7 Q. B. Div. 238) overruled.

THIS was an appeal from a decision of a divisional court of the Queen's Bench Division, on a case stated by the justices at the quarter sessions held by adjournment at Liverpool on the 18th April 1882, on an appeal by Alexander Hill Davies from a refusal of Edward Lawrence and others, justices of the peace of the City of Liverpool, to grant him a licence to sell excisable liquors at the Prince of Wales Hotel, Highfield-street, Liverpool. The justices at quarter sessions granted the licence subject to the opinion of the Queen's Bench Division on the case stated.

#### CASE.

1. The premises, 39, Highfield-street, Liverpool, known as the Prince of Wales Hotel, had been for many years before, and were at the time of the general annual licensing meeting in 1881, licensed premises.

2. No notice of any objection to the renewal of the licences attached to the said premises was given before or at any time during the said annual licensing meeting.

3. One Atkin Smith Street became tenant of the said licensed premises to one Robertson in Jan. 1881, and the licences were transferred from Robert Williams, the licensed person in occupation of the said premises, to the said Atkin Smith Street, at a special session held on the 6th Jan. 1881.

4. While Street was tenant, Robertson's mortgagees gave notice to Street to pay the rent to them; and in the month of June 1881 the said Atkin Smith Street gave up possession of and removed from the said premises under some arrangement with a person named Wood, who subsequently relet the premises to a Mrs. Barker, a widow, who thereupon entered into possession.

5. The said house was not open for the sale of excisable liquors, nor were such liquors sold in the same, nor was any licensed person in the occupation thereof, after the month of June 1881.

6. Mrs. Barker applied at a special sessions held some time before the general annual licensing meeting in 1881, for a transfer of the licences from Street to herself; but, by reason of an opposition to her application made by Street on the ground that the arrangement under which he had given up possession had not been carried out, the transfer was not granted.

7. At the time of the general annual licensing meeting, Mrs. Barker was the occupier of the said house and premises, but at or about the time of the general annual licensing meeting, scarlet fever broke out in the house among Mrs. Barker's children, and they were removed from the premises by the officers of the health committee of the city, and Mrs. Barker left the premises at the same time, and never returned. After Mrs. Barker quitted them the premises were disinfected by the health officers and closed, and they remained closed and unoccupied until the mortgagees took possession.

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8. Mrs. Barker did not apply at the general annual licensing meeting, or at any adjournment thereof, for a renewal of the licence to the said premises, and no application for a renewal of the said licences was then made by anyone, and the said licences expired on the 10th Oct. 1881 by effluxion of time.

9. The mortgagees had no notice until the 21st Sept., after the termination of the general annual licensing meeting in 1881, that Mrs. Barker had left the premises, that the premises were closed, or that there had been an omission to apply at the general annual licensing meeting for a renewal of the licences to the said premises. Upon the mortgagees becoming aware of these facts they at once took possession.

10. A special session for the transfer of licences was held on the 13th Oct. 1881, but no application was then made for a grant of a licence to the said premises under 9 Geo. 4, c. 61, s. 14. but on the 24th Nov. 1881, at a special sessions then holden, an application was made by Robert Wren, under the said section of the said Act, for a grant of a licence to himself in respect of the said premises. The justices refused the said application.

11. The appellant, on the 5th Jan. 1882, became possessed of the premises under an arrangement with the mortgagees for the purchase of the freeholds thereof, and on the said 5th Jan. 1882 applied at the transfer sessions to the respondent justices to grant to him a licence in respect of the said premises in pursuance of the provisions of the 9 Geo. 4, c. 61, s. 14.

12. The respondent justices refused the application on the ground that they had no jurisdiction to grant it.

The question for the opinion of the Queen's Bench Division was whether, upon the above facts, the respondent justices, or the quarter sessions on appeal from their refusal, had jurisdiction to grant the appellant the licence applied for.

On the 3rd April 1883 Denman, Field, and Hawkins, JJ. quashed the order of the quarter sessions with costs.

Davies appealed.

The *Solicitor-General* (Sir F. Herschell, Q.C.) and *H. Bremner* for the appellant.—The question arises on the construction of sect. 14 of 9 Geo. 4, c. 61. (a) The justices at special sessions, and the

(a) And be it further enacted, that if any person duly licensed under this Act shall (before the expiration of such licence) die, or shall be, by sickness or other infirmity, rendered incapable of keeping an inn, or shall become bankrupt, or shall take the benefit of any Act for the relief of insolvent debtors, or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected to apply, at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors by retail, to be drunk and consumed in such house; or if any house, being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways, or for any other public purpose; or shall be, by fire, tempest, or other unforeseen and unavoidable calamity, rendered unfit for the reception of travellers, and for the other legal purposes of an inn; it shall be lawful for the justices assembled as aforesaid at a special session, holden under the authority of this Act, for the division or place in which the house so kept or having

Divisional Court decided that there was no jurisdiction; but it is submitted that there is. Mrs. Barker was the occupier of the house, she was about to quit the same, and she neglected to apply for a licence. The court below, however, held that there was no power to grant a licence where the previous licence granted had actually expired at the date of the application. That decision was based on certain cases which are all distinguishable, though certain dicta in them, which we say cannot be supported, are in favour of the view taken by the court below. The effect of the decision, if it stands, will be to entirely destroy the benefit intended to be conferred by the section. The licence expires on the 10th Oct., and it is not till after the adjourned licensing meeting in September that a person can be said to have neglected to apply for a licence. Between the date of the adjourned meeting and the 10th Oct. no special sessions was held at which an application for a licence could have been entertained. There is nothing in the section to limit the jurisdiction to cases where application is made before the 10th Oct.; and such a limited construction involves an absurdity, for a licence can only be granted, in respect of a house elsewhere than in London or Middlesex, till the 10th Oct. next, and if it were granted after the adjourned meeting it would expire in a few days. Moreover, such a licence would be altogether unnecessary, for the old licence would still be running till the 10th Oct. The present appellant comes within the word "new tenant or occupier," and is therefore the right person to apply for a licence. When a duly licensed occupier who had applied unsuccessfully for a licence at the adjourned meeting in Sept., and whose licence consequently expired on the 10th Oct., remained in occupation till the 13th Oct. and then gave up possession to another person, it was held that there was no jurisdiction to grant the new occupier a licence:

*Simpkin v. Justices of Birmingham*, 26 L. T. Rep. N. S. 620; L. Rep. 7 Q. B. 482.

That case was decided, however, on the ground that the outgoing tenant, not having quitted till after the expiration of his licence, did not come within that part of sect. 14 which enables a new licence to be granted, "If any person so licensed shall remove from or yield up possession of the

been kept shall be situate, in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt or insolvent, or to any new tenant or occupier of any house having so become unoccupied, or to any person to whom such heirs, executors, administrators, or assigns shall by sale or otherwise have *bond fide* conveyed or otherwise made over his or their interest in the occupation and keeping of such house, a licence to sell excisable liquors by retail, to be drunk or consumed in such house, or the premises thereunto belonging; or to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways, or for any other public purpose, or have become unfit for the reception of travellers, or for the other legal purposes of an inn, and who shall open and keep as an inn some other fit and convenient house, a licence to sell excisable liquors by retail, to be drunk or consumed therein: provided always, that every such licence shall continue in force only from the day on which it shall be granted until the fifth day of April, or the tenth day of October then next ensuing, as the case may be: (9 Geo. 4, c. 61, s. 14.)



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house." In a subsequent case the person duly licensed gave up possession to B. in August, but in the same month a transfer of the licence to B. was refused on the ground of his previous misconduct. In September B. was succeeded in his tenancy by G., who was succeeded in November (after the expiration of the licence) by T.; and it was held that, as the previous licence had expired, there was no jurisdiction to grant a new one to T.:

*Ex parte Todd*, 47 L. J. 89, M. C.; 3 Q. B. Div. 407.

In that case Mellor and Manisty, JJ. differed as to whether any new tenant could apply, or whether it must be the tenant immediately succeeding the licensee, the "new tenant" within the section. The case really only decides that there was no "duly licensed" tenant removing from the house. [BRETT, M.R.—Rightly or wrongly the court gave an interpretation to the section. BOWEN, L.J.—Is there any difference in principle as to the construction to be put on that part of the section which commences with the words, "if any person duly licensed," and the part which begins "or if any person so licensed?"] Yes, for the second part applies to persons removing, or wilfully omitting or neglecting to apply for a licence, and if the view of the court below were right, a licensed person might spite his landlord by omitting to apply for a new licence in August or at the adjourned meeting in September. The licence now asked for can only be granted at a special sessions, and we are told that it is the invariable practice not to appoint such special sessions between the date of the adjourned meeting and the 10th Oct. The licence would thus be lost till August in the next year. It must also be remembered that a tenant who is about to quit has no motive in applying for a new licence. [BRETT, M.R.—Suppose a person were about to quit after the date of the adjourned meeting.] In that, case as no one but the occupier can apply, if he neglected to do so, no new licence could be granted till the following August, if the decision below is correct. Where the licensed person died on the 27th Sept. and an application at the adjourned meeting on the 2nd Oct by the lessees for a fresh licence was refused on the ground that they were not in occupation of or about to occupy the premises, and in November (after the licence had expired) the assignee of the licensee's heir gave notice that he would apply for a new licence at a special sessions in December, it was held that there was no jurisdiction to entertain the application:

*White v. Justices of Coquetdale*, 44 L. T. Rep. N. S. 715; 7 Q. B. Div. 288.

That case also turned on the words of the first part of the section. It has been suggested that Mrs. Barker could not have applied for a licence; but she was the occupier, though no transfer of licence was made to her, and no one else could have applied at the annual licensing meeting in August. Street had ceased to occupy, and could not therefore apply. The justices at sessions found as a fact that Mrs. Barker was an occupier.

*Aspinall*, Q.C. and *Pickford* for the respondents.—The justices only followed the authorities cited, which were binding on them. The point raised by the appellant's counsel is, however, not

the only point. The section says the licence may be granted "if the occupier of any such house, being about to quit the same," shall have neglected to apply for a licence "to continue to sell." No person as occupier neglected to apply. Street had gone before either of the licensing meetings, and Mrs. Barker, although she occupied, was not an occupier who could omit to do the act which it is suggested she omitted to do—i.e., to apply for a licence to continue to sell—because she never had been entitled to sell, but had only been in bare occupation of the premises. All she could have done would have been to apply for a new or original licence. This part of the section only applies where there is an omission by a previously licensed tenant, which Mrs. Barker never was. In other words, a licence to continue to sell means a renewed licence—not a new licence to a person who has never before sold in that house. If a new licence could be applied for after the previous licence had expired, some limit of time within which application could be made would probably be found in the Act. Five cases are dealt with by the section, viz., death, sickness, bankruptcy, removal, and neglect or omission to apply for a licence; and the words "so licensed" apply both to renewal and neglect.

The *Solicitor-General* in reply.—Mrs. Barker could have obtained a licence to continue to sell if she had obtained a licence for a year from the 10th Oct.; that would have been, not a new licence, but a renewal of a licence. By sect. 74 of 35 & 36 Vict. c. 94, a new licence is defined to be "a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors;" and "the renewal of a licence," means a licence granted at a general annual licensing meeting by way of renewal." A licence to continue to sell means a renewal of a licence.

BRETT, M.R.—In this case it seems to me that Mrs. Barker, on the facts stated, was a person who could have made a claim for a renewal of the licence. According to the definition which has been read to us by the *Solicitor-General*, if she had obtained a licence at all, it would not have been a new licence, but a renewal of a licence for the premises. Then, that being so, at the time of the general annual licensing meeting, Mrs. Barker was the occupier of the house and premises, and Mrs. Barker, from unhappy circumstances in her family, it is obvious at that time was a person who was about to quit the premises. Mrs. Barker, at the time of the general annual licensing meeting being a person in the occupation of the premises, was, it seems to me, entitled to ask at that time for what is called in the case, "a renewal of the licence of the said premises." If so, she did not apply in fact for the renewal. Then, after the 10th Oct., and after, therefore, the licence which had been granted for these premises had expired, the applicant (the appellant here) applies to the magistrates to exercise the jurisdiction given to them under the 15 section of the statute 9 Geo. 4, c. 61, and the question is, whether they had jurisdiction. The question is not whether they were obliged to do it; because by the case it is stated that, if they had jurisdiction, they saw no objection to do it, and were prepared to do it, and it is taken that, if they had jurisdiction, they were prepared to grant to this applicant a new licence for

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the premises. Now, if Mrs. Barker was a person who, if she had obtained a licence at all, would have obtained a renewed licence, then it seems to me she is a person, in so far as she was an occupier, who was an "occupier about to quit the same," who did neglect to apply, that is, in other words, did not apply, "at the general annual licensing meeting . . . for a licence to continue to sell excisable liquors to be drunk or consumed in such house;" that is, I construe the words "licence to continue to sell excisable liquors" to be equivalent to "renewal of a licence." It does not mean that the person who is to ask for a licence shall continue, but that a licence shall be granted which shall allow liquors to continue to be sold and drunk on the same premises. If that be so, Mrs. Barker was a person who might have applied for a renewal, who was in occupation at the time when she might have so applied, and who did not do so. Then, had the magistrates jurisdiction under these circumstances when the appellant applied to them? The case having been brought within the preliminary part of sect. 14, the whole question is whether an efflux of time has happened which prevented the magistrates from having jurisdiction. In *Ex parte Todd* it was certainly held, and the meaning of the judgment was, that there does come a time when, by efflux of time, the magistrates have no jurisdiction, and that is at any time after the licence which has been in existence has become exhausted. The case of *White v. The Justices of Ooquetdale* obviously was decided in obedience to the case of *Ex parte Todd*, and the question is clearly raised before us, therefore, whether we agree with *Ex parte Todd*. This case seems to me to be exactly governed by the principles there laid down, and by the construction of the Act there enunciated, and, unless we can say that we do not agree with the construction of the section put upon it in *Ex parte Todd*, we are bound to decide this case against the appellant. But I confess that I do not agree with the construction of this section put upon it in *Ex parte Todd*. It is admitted there are no words which specifically put this limitation of time on the power of the justices; therefore, we ought not to say that there is this limitation, unless there is a necessary implication that the words of restriction are satisfied in the section. So far from that, it seems to me that, by putting a restriction upon the section which was put upon it in *Ex parte Todd*, you immediately raise the most formidable case of difficulty that can be, which has been pointed out during the discussion, namely, that where persons in possession of licences, and in the occupation of premises, who can apply for a renewal, or persons not in possession of the premises, but who can apply for a renewal, omit or neglect to apply for the renewal in August and September, and where the occupation of the premises is to continue over October, no other person can apply for the renewal if that person does not. The person who is called a new tenant, who is coming in in November or at any time after the 10th Oct. cannot apply, and the licence is exhausted on the 10th Oct.; and, if the construction put upon the section in *Ex parte Todd* be true, there is no one who can remedy the matter, and the premises must remain without a licence until the following 10th Oct. That would be a *casus omissus* of such a formidable kind in the section that one would have to say, instead of saying there

is a necessary implication in the restriction of time, that it was almost a necessary implication that the restriction of time was not there. I think that that view of the section was overlooked in *Ex parte Todd*. I do not think that the case of *Ex parte Todd* is strengthened by the case of *White v. The Justices of Ooquetdale*, because the judges in that case did not exercise their minds upon the section, but only followed the former decision, as they were bound to do. I think that the magistrates, in this case, were bound also to act upon *Ex parte Todd*, but that, the case having now been discussed before us, we are at liberty to say that we disagree with that case. It seems to me that case was within the section, and that there is no limitation of time which deprived the justices of their jurisdiction, and that they therefore have jurisdiction to grant this appellant a licence, and, if that be so, and by the case we are to take it they intended to do so, we hold that they are entitled to do so, and that Mrs. Barker was a person entitled to have the licence renewed. With regard to the case of *Simpkin v. The Justices of Birmingham*, I do not think we need interfere in the least with that case, because the real decision there was not upon anything as to the limitation of time, but that the circumstances were not any of the circumstances mentioned in the section, and therefore the application of the section in that case did not arise.

COTTON, L.J.—There are two points which have to be considered; first, whether the event has occurred which enables the magistrates to act under the 14th section, and then, whether in the latter part of the section there is any limit as to time after which the magistrates cannot exercise the jurisdiction in the events which have occurred. Brett, M.R. has said almost all I intended to say upon *Simpkin v. The Justices of Birmingham*. That was a case upon facts—the question being whether the facts or circumstances had occurred giving the magistrates jurisdiction. That was under the first part of the section, and it certainly is no authority in any way in the present case, for all it decided was that, in the event which had there occurred, where the tenant had removed who had the licence, but did not remove until after his licence had expired, he was not a person so licensed removing, because it was held, as a question of construction, that a person removing within the subdivision of that part of the section, must be licensed at the time that he removed. The question simply was whether the event had occurred which gave the magistrates jurisdiction. In one construction that would be right, and probably it was; but what we have to consider is, whether there is any limit as to time as to when the magistrates are to exercise their discretion. I will refer to the event which has here happened. I do not for a moment say that the removal of the licensed tenant, Street, during the existence of the licence would not be an event which might be relied upon here; but the event which has been relied upon is the neglect of Mrs. Barker to apply for a renewal, and I think that neglect is an event which has occurred which could justify the present applicant in applying to the justices. Of course it is another question whether the time allowed within which they could exercise the jurisdiction has expired. I agree that Mrs. Barker was in a position to apply for a licence to sell excisable liquors that is, really to continue

to use the house as a house where liquors might be sold; and, when one looks at the notice given with reference to the transfer of the licence, it is, with reference to a transfer to so-and-so, and is intended to apply to the licence to sell at the old house. The house is not considered as being removed; that continues, and there is a new licence granted to the person who is to sell, but it is not itself a new licence, but only continuing the old house—the new person continues in the old house. I think here the words may probably be referred, not to the person licensed going on, but to the person not licensed applying for, and getting a licence to go on in the old house. Therefore I think Mrs. Barker was entitled to apply to continue the sale of excisable liquors in the old house, and, as she neglected to do that, an event occurred which justified an application to the magistrates. Then, as regards the limit, have the justices jurisdiction at a special sessions held after the previous licence has expired? In my opinion there is nothing to limit their powers. All that is said is this, that, if the event happens, "it shall be lawful for the justices, assembled as aforesaid at a special session, to grant a licence." There is no limit whatever there, and, as pointed out by Brett, M.B., it is very difficult to say, if the occupant does neglect to apply for a renewal in August, or at the adjournment which must be in September, how there can be an application under the section before the expiration of the licence, which must expire in October. I say "must" expire in October. I mean it must in that particular part of the country. In some places it must expire in April, and in others in October. This is in October, and the general annual licensing and the adjourned meeting must be one in August, and the other in September. Therefore it seems to me that it would be impossible practically to work the section, as regards the neglecting of the occupier to apply for the licence to continue, if the application under this section must of necessity be made at a special sessions existing, called, and held during the continuance of the licence. Under the Act of Parliament there need not be more than four special sessions in the year, and it is obvious that it might very well be that there could be no special sessions to which the application could be made, after the neglect of the occupier to apply in September. That being so, I think the construction we ought to give to these words, which is really the natural construction, is not to limit the time in which the jurisdiction ought to be exercised. Undoubtedly that is at variance with *Ex parte Todd*, but we are in a position to say whether that case was rightly decided. In my opinion, it was wrong to put it on the ground that the jurisdiction of the magistrate could not be exercised after the licence had expired.

BOWEN, L.J.—I am of the same opinion. There are two questions which we have to decide. First, whether Mrs. Barker is a person who falls within the description given in the 14th section, of a person who wilfully omits or neglects to apply for a licence to continue to sell. With regard to that point, my opinion is certainly the same as that of Brett, M.B. and Cotton, L.J., although I do not feel so clear as they do about it. But I should like to add a few words about the second point, which is, Assuming she is a person who falls within the description, is this application made too late? That depends upon whether

*Ex parte Todd* is good law or not. Distinguish *Ex parte Todd* as we may, and justify it as we may endeavour to do, as a decision upon the special facts of that case, it still remains clear that the court in *Ex parte Todd* laid it down in distinct language, and with their minds clearly brought to the discussion of the question, that the application under section 14 must be during the pendency and currency of the period during which the old licence is in force. Now, is that good law? With the greatest respect for the court which decided it, I confess I cannot think that it is good law, and there is an almost conclusive point which arises against it, which is this: It is reading into the section words which limit the *prima facie* operation of the section, and make it do something different and smaller than it does in terms. Now, if any such limitation is to be put upon the Act, one certainly would not expect to find, and one would not readily acquiesce in, any limitation which made the remedy given by the Act otherwise than commensurate with the blot or mischief which the Act was intended to cure. In this case we have to deal with the licensing system. It hangs upon two kinds of licensing sessions. First, there is the general licensing sessions to which applications are made to renew for one year, to begin on the 10th Oct. then next; and besides that, as changes must occur in the tenure of these houses, special sessions are wanted to provide during the year for special changes which occur in the occupation of the tenancy. It is obvious that provision must be made for contingencies such as death, changes of occupancy, bankruptcy, and other similar contingencies; and sect. 14 is intended to deal with these, and the branch of that section under which the case falls, is the branch which provides that, "If the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected to apply at the general annual licensing meeting," then the beneficial portion of the section is to take effect. Now, what would be the protection which the landlord would gain, or the benefit which the occupier would obtain, if he did apply at the general annual licensing meeting? The landlord would gain the protection, and the occupant would gain the benefit, of the licence then to run from the 10th Oct. then next for a year. If we were to construe the section as the court in *Ex parte Todd* construed it, the provision which the section made for an accidental omission to apply for the licence at the general annual licensing meeting would not be commensurate with the protection and benefit which would have been obtained if the application had been duly made. That is to say, you would not be really curing the slip or blunder completely, but only curing it to a very limited, and almost perhaps imperceptible, degree; because, as has been pointed out, it must be rare indeed that an occupier of a house has omitted to apply to the general annual licensing meeting; it must be rare indeed, if the next occupier has no opportunity of applying, during the pendency or currency of the licence, for a fresh grant, and therefore the remedy would not be co-extensive with the mischief if those words were to be read into the Act of Parliament. It seems to me upon the general principle of construction to be a very good reason for not construing the Act in that way. You may perhaps do violence to an Act of Parliament in

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order to cure a mischief; but you certainly ought not to do violence to the language, or to read it in an unnatural sense, when the effect of so reading it would be to leave the mischief uncured, or to a certain extent uncured.

*Appeal allowed.*

Solicitors for the appellant, *Gregory, Rowcliffes, and Co.*, for *Bremner, Son, and Pennington*, Liverpool.

Solicitor for the respondents, *Atkinson*, Town Clerk of Liverpool.

*Wednesday, April 25, 1883.*

(Before BRETT, M.R., and BOWEN, L.J.)

HUNNINGS v. WILLIAMSON. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Metropolis Management Act 1855 (18 & 19 Vict. c. 120), ss. 54, 60—Vestry—Person interested in contract—Ceasing to be member—Action for penalties—Evidence of acting as member.*

*By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 54, if a member of a vestry is concerned or interested in any contract made with the vestry, he ceases to be a member, and is liable to penalties.*

*Defendant lent money to a person who had made a contract with a vestry, and the benefit of the contract was assigned to defendant as security for the loan. Afterwards defendant was elected a member of the vestry.*

*In an action for penalties for acting after having ceased to be a member, the attendance-book, signed by defendant, and the minute-book containing his name, were produced at the trial, and the jury found for the plaintiff.*

*Held (refusing a rule for a new trial), that sect. 54 applied to a contract made before defendant became a member of the vestry, that defendant was interested in the contract within the meaning of the section; and that there was evidence of his having acted as a member of the vestry.*

THIS was an action brought by one March Hunnings against William Thomas Williamson, to recover certain penalties which the plaintiff alleged the defendant had incurred under the 54th section of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), by reason of having acted as a member of the vestry of the parish of St. Mary, Islington, after having ceased to be such member by being interested in a certain contract made with the vestry.

By 18 & 19 Vict. c. 120, s. 54 :

In case any member . . . . . of any vestry for any parish mentioned in schedule (A) or (B) to this Act . . . . . in any manner be concerned or interested in any contract or work made with or executed for such . . . . . vestry, in every case such person shall cease to be such member . . . . . as aforesaid; . . . . . and any person who acts as a member of such . . . . . vestry . . . . . after ceasing to be such member . . . . . as aforesaid . . . . . shall for every such offence be liable to a penalty of fifty pounds, which may be recovered by any person who may sue for the same in any of the superior courts of law, with full costs of suit.

By sect. 60 :

Entries of all proceedings . . . . . of any such vestry, with the names of the members who attend each meeting, shall be made in the books to be provided and

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

kept for that purpose under the direction of the . . . . . vestry, and shall be signed by the members present or any two of them; and all entries purporting to be so signed shall be received as evidence, without proof of any meeting of the . . . . . vestry having been duly convened or held, or of the presence at any such meeting of the persons named in any such entry as being present thereat, or of such persons being members of the . . . . . vestry, or of the signature of any person by whom any such entry purports to be signed, all which matters shall be presumed until the contrary be proved.

The case is reported on the questions of discovery and interrogatories, 48 L. T. Rep. N. S. 392 and 581.

At the trial before Pollock, B., it was proved that in March 1882 the defendant's brother entered into a contract to do certain work for the vestry, and, being in want of money to enable him to carry out the contract, borrowed from the defendant, and assigned the benefit of the contract to the defendant by way of security for the loan. It was further proved that in May 1882 the defendant was elected a member of the vestry. The attendance-book of the members, and the minute-book of the vestry were produced. The attendance-book was signed on five occasions by the defendant as a member attending the meetings of the vestry. The minute-book contained the names of those members who had signed the attendance-book, and was duly signed as required by sect. 60, but was not signed by the defendant. The jury found a verdict for the plaintiff for five penalties, amounting to 250l.

The Queen's Bench Division refused a rule for a new trial.

*Talfourd Salter*, Q.C. now moved by way of appeal from such refusal.—There was no evidence of liability on the part of the defendant, and the case ought not to have been left to the jury. In the first place, the defendant never ceased to be a member of the vestry within the meaning of sect. 54; that section can only have been intended to apply to cases of contracts entered into after the member has been elected. Secondly, there was no evidence to go to the jury that the defendant acted as a member of the vestry. Thirdly, the defendant was not "concerned or interested in" the contract within the meaning of the statute. He referred to

*Fletcher v. Hudson*, 46 L. T. Rep. N. S. 125; 7 Q. B. Div. 611.

BRETT, M.R.—In this case an action was brought under sect. 54 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) on the ground that the defendant, being interested in a contract with a vestry, acted as a member of the vestry, and thereby became liable to penalties. The first objection put forward on behalf of the defendant is, that sect. 54 has no application to the case. It is contended that the section only applies to cases where the member is interested in a contract made after his election, and not where, as here, the contract was made before he became a member of the vestry. But if we look at the words of the section, they are, "such person shall cease to be such member." There is no limitation, nor any provision that the section shall apply only to future contracts, nor are there any express terms prohibiting the electors from electing a person who is interested in a contract with the vestry. There is nothing to show that the votes given for such a person are thrown away. It follows that if any person is elected a member of a

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vestry, and at or after the time of his election he is interested in a contract made with that vestry, he ceases to be a member, and there must be another election. Where a person already interested in a contract is elected, he ceases to be a member the moment after his election. I think, therefore, that the present case comes within the statute, and the objection which has been taken cannot prevail. The defendant, being interested in a contract with the vestry, ceased to be a member of the vestry within the meaning of sect. 54; but, after he had so ceased to be a member, he nevertheless acted as a member, and by so acting became liable to penalties. The next objection taken was that there was no evidence that the defendant acted as a member of the vestry. The attendance-book, which was kept by the vestry for the purpose of showing what members attended the meetings, was produced at the trial, when it appeared that this book was signed by the defendant. This was evidence that the defendant attended the meetings, and I am inclined to think that the attendance-book was in itself evidence that he acted as a member of the vestry. But the minute-book of the vestry was also produced; this was not signed by the defendant, but it was properly admitted for the purpose of showing that the transactions mentioned in it actually took place; for by sect. 60 of the same Act the entries purporting to be signed by any two of the members present "shall be received as evidence, without proof . . . of the presence at any such meeting of the persons named in any such entry as being present thereat, or of such persons being members of the board or vestry, . . . all which matters shall be presumed until the contrary be proved." I think the two books taken together are evidence of what was done at the meetings, and are also evidence that the defendant acted as a member of the vestry. Then it was further objected that there was no evidence that the defendant was "concerned or interested in any contract" made with the vestry, within the meaning of sect. 54. It was urged that, as he only lent the money to his brother to enable him to carry on the contract, and took an assignment of the benefit of the contract as security for the repayment of the loan, but was not himself a party to the contract, he could not be said to be "concerned or interested in" it; but surely he was interested in the contract, for it was his interest to promote its fulfilment in order that he might obtain payment of the money he had lent. For these reasons I think the defendant is liable, and a rule ought not to be granted.

BOWEN, L.J. concurred.

*Rule refused.*Solicitors for the defendant, *Olapham and Fitch.*

Wednesday, July 4, 1883.

(Before BRETT, M.R. and FRY, L.J.)

REG. v. THE JUSTICES OF ESSEX. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Highway district—Highway board—Dissolution of district—Continuance of board—Order obtained by board—Appeal against such order—Hearing of appeal after dissolution of district—25 & 26 Vict. c. 61, ss. 9, 39—41 & 42 Vict. c. 77, s. 23.*

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

*A highway district was dissolved under 25 & 26 Vict. c. 61, s. 39, by an order of justices, which was to take effect on the 25th March 1883.*

*The highway board took proceedings under 41 & 42 Vict. c. 77, s. 23, to recover certain expenses caused by extraordinary traffic, and in Feb. 1883 an order for payment of such expenses was made.*

*On the 1st March notice of appeal against this order was given, but the appeal came on for hearing on the 4th April, when, objection being taken that the highway board had ceased to exist, and therefore could not be heard as respondents, the justices at quarter sessions refused to hear them, and quashed the order.*

*Held, making absolute an order for a mandamus to the justices to hear and determine the appeal, that, notwithstanding the dissolution of the highway district, the highway board still existed, and were the proper respondents.*

*Order of Williams and Smith, JJ. affirmed.*

THIS was an appeal of the Shorthorn Dairy Company Limited from an order of Williams and Smith, JJ. making absolute a rule for a *mandamus* to the justices of the county of Essex, directing them to hear and determine an appeal against an order which had been made under the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), s. 3, for payment by the Shorthorn Dairy Company to the Billericay Highway Board of a sum of money for extraordinary expenses incurred in repairing highways.

The facts of the case, and the provisions of the statutes on which the decision turned, are fully stated in the report of the case in the court below, 49 L. T. Rep. N. S. 177.

The appeal was argued by *Philbrick, Q.C.* and *H. Curtis Bennett* for the appellants, the Shorthorn Dairy Company; and by *Poland (Earle with him)*, for the respondents, the Billericay Highway Board.

The arguments were similar to those used in the Divisional Court.

BRETT, M.R.—In this case an order for payment of extraordinary expenses incurred in repairing a highway was obtained by the Billericay Highway Board, who are declared by the Act of Parliament (25 & 26 Vict. c. 61), s. 9, to be a corporation, against the Shorthorn Dairy Company, the present appellants. There was an appeal to quarter sessions against that order, and it is not denied that when the appeal was entered the highway board were the proper respondents; but before the hearing of the appeal something happened which altered the state of affairs—an order for dissolving the highway district came into operation. On behalf of the appellants the effect of this is alleged to be that the highway board is dissolved, and, as the highway board were respondents in the appeal to quarter sessions, therefore, at the time when that appeal came on for hearing there were no respondents in existence, and the appellants were entitled to judgment. On the other side it is said that the highway board is not dissolved but still exists, and was the right respondent when the appeal to quarter sessions came on for hearing. If the respondent board was dissolved and gone they could not be heard as between the appellants and respondents. Whether in that case the appellants would be entitled to judgment I doubt; for if the highway

board is dissolved, there must be some successor to them somewhere in existence, and I should say that the Court of Quarter Sessions should adjourn the hearing of the appeal until such successor could come in, and, therefore, that there ought not to be judgment for the appellants in such a case. But if they are not dissolved, the highway board were the right respondents, and the decision of the magistrates cannot be supported. The real question is, whether the highway board was dissolved on the 25th March, and that must depend on the proper interpretation of the Act of Parliament (25 & 26 Vict. c. 61). The board is constituted by sect. 9, which makes them a body corporate. Then was there anything in the order which came into force on the 25th March to take away their corporate life? It is said that sect. 39 shows that the board was dissolved; but that section speaks of highway district, not highway board, and does not say in terms that the board is to be dissolved. Sect. 39 goes on to show the consequence of dissolving the highway district, for in the last clause of the section it is provided that in such cases "the highways in such district . . . shall be maintained, and the provisions of the principal Act (5 & 6 Will. 4, c. 50), in relation to the election of surveyors and to all other matters, shall apply to the said highways in the same manner as if such highways had never been included within the limits of a highway district." Therefore, the consequence of the dissolution of the district is to throw back matters into the same state as if the district had never existed. If, therefore, the board, as a body corporate, existed only for the purpose of managing the highways, it is dissolved; but it has other powers; amongst others, there is power to make contracts, which may result in debts, to sue and to defend actions, and to make rates in order to pay the costs of actions and for other purposes. This cannot be called the management of highways, and therefore it is not true to say that the highway board is only brought into existence as a body corporate for the purpose of managing the highways. Therefore it seems to me that only one set of powers and duties is transferred from the highway board. How, then, is it necessary to imply that the board is dissolved? I cannot see that it is. I come to the conclusion, to which I understand Mr. Philbrick assents, that, unless there is a necessary implication that the board is dissolved, the appellants must fail, and I think that there is no such necessary implication, and therefore that the board exists for the purpose of being respondents in this appeal. How far they may still exist for any other purposes I do not say. The result is that the appeal will be dismissed.

Fry, L.J.—I am entirely of the same opinion. The Act of 1862 (25 & 26 Vict. c. 61) incorporates the highway board, and gives it power to hold property and to enter into contracts and incur debts and other powers. Then sect. 39 provides for the dissolution of highway districts, but that section does not expressly deal with highway boards, and is silent as to their successors if they are dissolved as corporations. Therefore, it is plain that the only way in which we can come to the conclusion that the board is dissolved is if we are bound to hold that there is a reasonable implication that this is the case. The balance of convenience is in favour of the view that the

board should continue to exist, for if not in whom is the property of the board vested? It is said that the property is vested in the surveyors of the several parishes which were comprised in the dissolved highway district in proportion to the amount of the payments made by the several parishes to the common fund. But there is this difficulty, that the payments to the common fund vary from time to time, and, moreover, difficult questions might arise before it would be possible to know what were the amounts of the several undivided shares. Take the case of a chattel that was in the possession of the highway board at the time of its dissolution; it is said that it would belong to the surveyors of the parishes in undivided shares; but how inconvenient that would be. Take the case of the horses, carts, spades, &c. belonging to the board, and supposing they were stolen or misappropriated in any other way, what a difficulty would arise as to prosecuting or suing. If the board is still in existence this difficulty does not arise; so also in the case of debts owing by or to the board. It is suggested that there is an absurdity in the board continuing to exist for ever when there is no duty for them to perform, but it seems to me there is no difficulty as to this, for by the latter part of sect. 39 they have no duty as to the management of the roads, and that being so, they must eventually come to an end from having nothing to do. That is the view I take of the construction of the statute, and it is enough to say that Mr. Philbrick has not convinced me that the result is so unreasonable that there is a necessary implication that the board is dissolved.

*Judgment affirmed.*

Solicitor for the Billericoy Highway Board,  
W. W. Brown, for O. O. Lewis, Brentwood.

Solicitors for the Shcrtthorn Dairy Company,  
Beaumont and Warren.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Thursday, July 26, 1883.

(Before KAY, J.)

GARD v. COMMISSIONERS OF SEWERS. (a)

*Metropolis Improvement Acts—Powers of Commissioners of Sewers to take land for improvements—Owner's right of pre-emption—Clause of particular statute conferring right of pre-emption not impliedly repealed by subsequent general statute—57 Geo. 3, c. xxix. ss. 80, 96—14 & 15 Vict. c. xci. s. 54.*

*The Commissioners of Sewers are not entitled, under 57 Geo. 3, c. xxix. s. 80, to adjudge the whole of a house to be "necessary" to be taken for the widening of a street, and to take it in pursuance of such adjudication—when in fact only a portion of the house physically obstructs such widening—with the object of reselling the remainder of the house at an increased price, and so enabling a scheme for widening the street to be carried out, the "necessity" contemplated by the Act being a purely physical necessity. The right of pre-emption given by sect. 96 of the same Act to the persons from whom lands have been*

(a) Reported by J. G. ALEXANDER, Esq., Barrister-at-Law.

*purchased under the powers of the Act is not taken away by 14 & 15 Vict. c. xci. s. 54.*

*Thomas v. Daw* (15 L. T. Rep. N. S. 200; L. Rep. 2 Ch. App. 1) and *Galloway v. Mayor and Commonalty of London* (14 L. T. Rep. N. S. 865; L. Rep. 1 E. & I. App. 34) distinguished.

THIS was a motion for an interim injunction to restrain the Commissioners of Sewers of the City of London from proceeding under a notice to treat, dated the 9th Feb. 1883, served by them upon the plaintiffs for the purchase of certain premises, Nos. 44 and 45, Wood-street, in the City of London, and from taking any proceedings to assess the amount of compensation to be paid in respect of such premises; or, in the alternative, that the defendants might be restrained from selling or disposing of any part of the premises to any person or persons until the same should have been first offered for sale to the plaintiffs. By consent, the motion was treated as the trial of the action.

It appeared that the houses referred to in the motion formed part of the block of buildings burnt down by the Wood-street fire towards the end of 1882, and only the carcass was now standing. After the fire the Commissioners of Sewers determined to take the opportunity, before the re-erection of the buildings, of widening and improving Wood-street and Addle-street, the former by 5ft. 6in., and the latter (at the corner of which one of the houses stood) by 3ft. Negotiations for the amicable purchase of the property having fallen through, a notice was served on the plaintiffs to have the value assessed by a jury. The Commissioners of Sewers had made an adjudication in the form required by the Act 57 Geo. 3, c. xxix. s. 80, that the whole of the premises in question were required for the purpose of widening the street; but only a width of 5ft. 6in. was required for the physical widening of Wood-street, and the commissioners proposed to resell the remainder without giving the first offer of it to the plaintiffs.

The following are the material sections of the two Acts which were referred to in the course of the argument:

It is enacted by 57 Geo. 3, c. xxix. s. 80, that for the improvement of the streets and public places of that part of the metropolis which is situated within the weekly bills of mortality, it shall "be lawful for the Commissioners of Sewers or trustees or other persons having the control of the pavement of any parochial or other district . . . to widen . . . any of the streets or other public places within any such parochial or other district . . . and that if any houses, walls, buildings, lands, tenements, and hereditaments, or any part thereof, shall be adjudged by the said commissioners or trustees or other persons as aforesaid to project into, obstruct, or prevent them from so . . . widening . . . the said street or other public places within the said parochial or other district, and that the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements, or hereditaments will be necessary for that purpose," the commissioners, &c., may contract with the owners of such houses, &c., and pay them such sums as may be agreed upon.

By sect. 82 of the same Act, it is provided that when the owners of such houses, &c., refuse

or are unable to treat, a precept may be issued for impanelling a jury to assess the value of the premises; and by sect. 86 the premises are to vest in the commissioners, &c., on payment of the sums awarded.

By sect. 96 it is enacted that the commissioners, &c., may absolutely sell and dispose of all or any of the lands, &c. conveyed to them in pursuance of the Act, and a right of pre-emption is given to the persons from whom they were purchased.

By 14 & 15 Vict. c. xci. s. 54 it is made lawful for the Commissioners of Sewers "to sell and dispose of, in such manner as they may think fit, to any persons; and by indenture under the hands and seals of seven of the commissioners to grant and convey by way of absolute sale in fee simple for a consideration of money, any lands which have been or may be purchased by the commissioners for the purpose of altering, widening . . . or opening any of the streets or public places within the City, and which, by the commissioners, may be deemed unnecessary for the purposes aforesaid," no right of pre-emption being reserved to previous or adjoining owners.

By sect. 55 the commissioners are "authorised, by writing under the hands and seals of seven of the commissioners, to demise or lease such lands as shall be deemed unnecessary for the purposes aforesaid for the purpose of building upon or for any other purpose," as the commissioners may think fit, subject to a proviso that within five years from the date of such lease the commissioners shall sell and absolutely dispose of the lands comprised in it in manner thereinbefore directed.

*Rigby, Q.C.* and *Theobald* for the plaintiffs.—Under sect. 92 of the Lands Clauses Act the party called on to sell part of a house to the commissioners would have the right of compelling them to take the whole, but they would have no right to demand to take the whole; and although this is a proceeding under an earlier Act to which the Lands Clauses Act does not apply, there is a strong presumption that the intention of the Legislature would be the same. It would be an unreasonable construction to put upon sect. 80 to hold that it allows the commissioners to take the whole of the houses, when all that they really require is a strip of land 5ft. 6in. in width. [*KAR, J.*—Is it not the true construction of the section that the adjudication made by the commissioners is conclusive, so that the court cannot go behind it, if it has been made *bonâ fide*? Sect. 95 provides for their disposing of lands which turn out to be superfluous.] We submit that that is not the fair meaning of the section; the section is not grammatically correct, and need not be read in that way. [*Hastings, Q.C.* for the defendants, referred to *Thomas v. Daw* (15 L. T. Rep. N. S. 200; L. Rep. 2 Ch. App. 1.) *KAR, J.*—That case entirely confirms the reading of the section which I had already adopted, and shows that I cannot inquire into the correctness of the adjudication. *Hastings, Q.C.* said that the commissioners were desirous of having the opinion of the court as to whether they were right in making the adjudication, and he was therefore instructed to admit that only 5ft. 6in. in width was necessary for the physical widening of the street.] We say that it is a misuse of the powers conferred by the Act to take the whole of a house, when only a small part



of it is required. [KAY, J.—May not the words “any part thereof” be read distributively, so as to apply only to “houses” to which they are appropriate, and not to the general words which follow?] That can hardly be so, as those words come after the general words. Substantially, the defendants do not say that they want the whole; they only say that they want to obtain control over the whole in order to carry out their scheme. [KAY, J.—Does “necessary” mean “necessary to widen the street,” or “necessary to cover their own expenses?”] We say “necessary for widening the street,” all the provisions of the Act point to a physical necessity; otherwise “convenient,” or “expedient,” or some such word would be used. [Hastings referred to the word “convenient,” used in the following section. KAY, J.—That is “necessary and convenient,” not “necessary or convenient.”] This case differs materially from *Quinton v. Corporation of Bristol* (30 L. T. Rep. N. S. 112; L. Rep. 17 Eq. 524) and *Galloway's case* (14 L. T. Rep. N. S. 865; L. Rep. 1 E. & I. App. 34.) The Act in those cases contained schedules defining the limits within which the lands were to be taken, and liberal powers of management; these are general provisions applicable throughout the metropolitan area, and there are no powers for raising capital to pay the expenses such as were there given. [KAY, J.—Still the Commissioners of Sewers come within the equity of those decisions in so far as they are not a trading body, and merely represent the public interest.]

*Hastings, Q.C. and J. Henderson* for the Commissioners of Sewers.—We contend that as the Commissioners of Sewers are authorised by the 80th section to take a house or any part thereof, if they require part of the house they can take the whole. It is a preliminary condition to the exercise of the power that some part should be wanted, but if that condition is fulfilled the whole can be taken. If the argument on the other side is valid, the section conferring the power of sale of superfluous lands would be superfluous, as no more land could be taken than was physically necessary. The purpose here is just as much a beneficial public purpose as in *Galloway's case*, and the same considerations apply to it. [KAY, J.—How does your argument apply to a case of land without buildings? If you wanted a corner of a piece of vacant land belonging to one proprietor in order to widen a street, do you say that you could take the whole? There might be an acre or more.] We only contend that in the case of houses we can take the whole. *Thomas v. Daw* (*ubi sup.*) is in our favour. The reason why there is no schedule in this Act is that the commissioners are empowered to adjudicate: the Legislature has placed confidence in their judgment, and if they honestly adjudicate these houses to be necessary, the court cannot go behind that adjudication. This adjudication is perfectly honest, because it is necessary to take the whole of the houses in order to raise money by their sale, and so to obtain means for the improvement of the street. Secondly, as to the claim of pre-emption under sect. 96. We rely, as an answer to that claim, on sect. 54 of the City of London Sewers Act 1854 (14 & 15 Vict. c. 91), which was an Act continuing and amending the previous Act of 1848 (10 & 11 Vict. c. 112), and is substituted for and must therefore be taken to have repealed sect. 96 of the Act of Geo. 3. The

later section gives no further power to the commissioners than they had before under sect. 96 of the earlier Act; it must, therefore, have been meant to be substituted for it, and it does not contain any provision as to a right of pre-emption. [KAY, J.—It is now well settled, that a general enactment of a later Act cannot repeal a specific enactment in an earlier Act merely by implication. His Lordship referred to *Thorpe v. Adams*, 23 L. T. Rep. N. S. 810; L. Rep. 6 C. P. 125; *Hill v. Hill*, 35 L. T. Rep. N. S. 860; 1 Ex Div. 411.]

*Rigby* in reply.—The commissioners are not acting as a judicial body in making the adjudication. Similar powers are given to other trustees and bodies by the Act. On the second point, the later general enactment cannot repeal the earlier special enactment.

KAY, J.—The question which I have to determine in this case is by no means free from difficulty. The defendants, the Commissioners of Sewers, admit that at the time when they made their adjudication they did not intend to use more than 5ft. 6in. in width of the site of these houses next to the street for the actual widening, but they intended to sell the rest for the purpose of raising money. That being their intention, they adjudged that certain houses, Nos. 44 and 45, Wood-street, and the land whereon they stood projected into, obstructed, and prevented them from altering, widening, and extending the street in question, and they adjudged in form that the possession, occupation, and purchase of such houses and of the land whereon they stood was necessary for that purpose—that purpose being the widening of the street. It has been decided in the case of *Thomas v. Daw* (*ubi sup.*) that the section under which the notice was given enables the commissioners to take either the whole or part of a house, and with that construction I entirely agree; and Lord Ohelmsford, after stating his opinion to that effect, says as follows: “But although I have arrived at this conclusion, I think that in every case of an intended widening or altering of a street, it is competent to the commissioners to adjudge that the whole of a house or building obstructs or prevents this object. If this is honestly done, although erroneously, I think it cannot be questioned. The only consequence of the commissioners taking more than they require for the street would be that, under the 96th section, they would have to sell it subject to a right of pre-emption in the person from whom the house or building was purchased. But whether they intend to take the whole, or only a part, it is essential as a preliminary step that the commissioners should adjudge that the house, or the part required, prevents them from altering or widening the street.” I take Lord Ohelmsford's meaning to be this: the commissioners must adjudge, first, that the whole of the house projects into, obstructs, or prevents them from altering, widening, or extending the street, or that part of it projects, &c.; and, secondly, that the possession, occupation, and purchase of the whole house will be necessary for that purpose, or that the possession, &c., of part of it will be necessary. The form of the adjudication here clearly refers to the whole of the house. The commissioners do not use the word “whole,” but they say that the house projects, &c., and that the house is necessary to

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be taken, so that the form of the adjudication fulfils the obligation thrown upon them, according to the words of Lord Chelmsford. The 80th section of the Act provides as follows: [His Lordship read them, and proceeded:] The word "that" in the beginning of the last clause seems to me to refer—though it is certainly ill-expressed—to the word "adjudge," and that seems to be the view of Lord Chelmsford. And I read the word "part" all through the sentence, so that in this case there are two things to be adjudged, viz., first, that the whole or part of the house projects, &c., and, secondly, that the purchase of the whole or part of the house will be necessary for that purpose. Does then the section mean that the commissioners are to make a mere formal adjudication following the exact words of the Act, although they may, as is admitted to be the case here, have in fact come to the conclusion that only a part of the house is required for the physical widening of the street, or is the meaning this: that if in fact only part of the house obstructs the street, or if in fact only part of the house is necessary to be taken for the purpose of widening the street, they must *bonâ fide* come to a conclusion upon and determine that question? Can they, as it has been argued they may do, say this: "We come most clearly to the conclusion that we only want 5ft. 6in. for the physical widening of the street, and that only 5ft. 6in. obstruct such physical widening; but, although we have that plainly in our minds, we arbitrarily, under this section, adjudicate that the whole obstructs our widening the street, and we take the whole in order to widen it." I confess I should have great hesitation in coming to the conclusion that that was the construction of the Act. But the argument, which is deserving of the greatest possible consideration, has been put in this way: It is said that these commissioners are not a trading body, armed with these powers for the purpose of making profit, but they are a body who are, like the Corporation of London in the well-known case of *Galloway v. The Mayor and Commonalty of London* (*ubi sup.*), armed with their powers for the purpose of making public improvements in a great city; and part of the scheme of the Act is that, in carrying out its provisions, they will sometimes take more land than they want for actually carrying out the physical purpose of widening streets. It is argued that therefore the court will give a wide interpretation to their powers, and not interfere with them, although it may appear they are taking more land than they want for the actual widening, intending to sell the portion which they do not want in order to raise money to carry out the scheme of the Act; and in the argument reference was made to sect. 96, and the subsequent sections which give to the original owners a right of pre-emption in the event of the commissioners selling any land which they may have taken, and may ultimately not want, and providing that the money obtained by such sales may be used for the purposes of the Act. In that way it is said that the case comes within the decision in *Galloway v. Corporation of London*. First of all, I observe that there is a very wide distinction between that case and the present one, because in that case the lands which were to be taken are all put in a schedule to the Act, and actually defined by boundaries and quantities, and the words of the Act were that

they might take all the lands, which not only showed the extent to which they might go, but placed a limit, within the four corners of the Act, on the land which they were to take. There is nothing of that kind in the present case. There is no schedule here, nor any limitation whatever as to the lands to be taken, save such as is comprised in the words I have read, and that makes an enormous distinction between the two cases. Suppose the commissioners were to take it into their heads to widen one of the widest thoroughfares in London, such as Oxford-street or the Strand, and say that they would take the lands on both sides of the street. If the argument which I am now considering be right, they might adjudge that every house and every vacant piece of land on both sides of the street obstructed their widening of the street, and proceed to take the whole of such house or piece of land, however great its extent. Or, to put an extravagant case, suppose the street which they were about to widen passed a large building like the Bank of England, they might take the whole of the Bank of England. Or again, suppose there was a wide vacant piece of land, a quarter of an acre in extent, then, although they only wanted a yard of that, according to the argument they might take the whole. That gives an enormously greater power to these "commissioners, or trustees, or other persons" than was given in *Galloway's* case to the Corporation of London. Then there is another distinction between the two cases, which to my mind is of still greater importance. In *Galloway's* case there were very large powers of raising money for the purposes of the Acts, and upon the whole consideration of the words of the Acts, their Lordships came to the conclusion that it was not intended to limit the power of the corporation. Lord Cranworth, after referring to the sections containing those powers, says "The object of all this is plain. It was anticipated that the projected improvements would be likely so to add to the value of property in the neighbourhood that, by enabling those at whose cost the improvement had been made to appropriate to themselves, at their old value, the houses and lands adjoining the improvements, and then to sell them at their increased value, they might be able wholly or partially to reimburse themselves the outlay they had made." The argument there was, that the powers of the corporation ought to be limited to so much of the land on both sides of the widened street as might be wanted for the purpose of building new houses. But Lord Cranworth said that he did not find in the Act of Parliament any limit of that kind; the only limit he found was in the map and book of reference, which described by boundaries the land which the corporation were to take. The Act said that they might take all, and it was impossible to impose that arbitrary limit. That brings that Act into sharp contrast with this. Here the land which the commissioners may take is the land which they may adjudge necessary, and it seems to me that they were bound to adjudge, not merely by a formal judgment, but by coming really, upon consideration, to a decided opinion and conclusion. Then, were they justified in coming to the conclusion which they came to by their adjudication? I do not treat the question as one of honesty or dishonesty, but I think they were not justified. The argument, which I have listened to with the greatest possible attention, is that the section

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does not mean only the physical widening, and that it is sufficient if the house obstructs the widening, or is required for the purpose of the widening in this sense, viz., that by selling the larger portion of it the commissioners may make a profit, and apply the money for the purpose of the widening. But I think the meaning of the Act is that the commissioners are not to take more of a house than they *bond fide* adjudge is necessary for the physical purpose of widening the street, and I think the phrase "for that purpose" does not include the taking of other and extra land beyond what is actually wanted, with the object and intention of selling such extra lands for the purpose of raising money. Therefore for that reason I must say that I am against the defendants in this case, and I think the best way to put my decision is that the admission which the defendants have made shows that the formal adjudication they have made was in the wrong form, that it ought to have been an adjudication that only 5ft. 6in. projected, and that only 5ft. 6in. was necessary to be purchased. I must not omit to say that the section I have been considering, and the decision of Lord Chelmsford in *Thomas v. Daw*, are both open to this observation, that there may very often be cases in which, at the moment of the adjudication, the commissioners do not know exactly how much they will want, and therefore are *bond fide* unable to say whether they want the whole or any part, or whether they want five feet or five yards or any other quantity, and, within the meaning of the Act of Parliament, may say that a specified quantity is wanted, when a less quantity would suffice. But the contention that they can do that when they have, in fact, come to a conclusion as to exactly how much they do want is, I think, wrong, and in my opinion the Act does not give them any power, when they know exactly what they want, to take extra land for the purpose of selling. As to the other point which has been raised, I should have felt very great difficulty in agreeing with the defendants. [His Lordship read sect. 96 of the Act 57 Geo. 3, c. xxix., and continued:] It is confessed that when the commissioners gave notice to the owners of these particular houses to treat for the purchase of them, they had come to an agreement with third parties to sell to them. Most certainly, if sect. 96 is still in force, that was contrary to the Act. But it is said that sect. 96 is not now in force, and for that reference is made to the City of London Sewers Act 1851 [his Lordship read sect. 54 of this Act]. It is said that the power there given to the commissioners to sell to any person is totally inconsistent with the provision that the persons from whom they bought should have a right of pre-emption. I should be slow to consider that a section in a general Act, worded as this is, repealed by implication a previous section of a particular Act giving a right of pre-emption, without referring to that previous section or to the Act which contains it, and without showing on the face of it the smallest indication of an intention to take away from individuals a right such as this. But that the section had not that effect is pretty plain if the next section is looked at [his Lordship read sect. 55]. It is sufficiently plain that the object of that section, at any rate, was to give a power of leasing to seven, instead of the whole of the commissioners. Under the former Acts the concurrence of the whole was

necessary to a conveyance of superfluous lands, and it seems to me that the meaning and purpose of the two sections was to enable seven of the commissioners to exercise the powers necessary to carry out the formalities, and, though the sections are badly expressed, that is a possible and not unreasonable construction, and one which the court ought to adopt, rather than the conclusion that an important right of pre-emption given by the earlier statute is by implication taken away. Therefore I come to the conclusion, although it is not necessary to decide the point—but I desire to express my opinion upon it, after hearing the able argument which has been addressed to me—that the later Act does not operate so as to take away by implication the right of pre-emption conferred by the earlier Act; and on that ground also the plaintiff is entitled to succeed. But, being in his favour on the former ground, I think it right to grant an injunction in the fullest terms to prevent the defendants from taking any further proceedings for taking compulsorily the whole of these two houses; and, the defendants admitting that at the time when they made the adjudication they only required 5ft. 6in. for the purposes of the Act, and intended to sell the rest of the two houses, there must be a declaration that the adjudication of the 30th Jan. 1883 was *ultra vires* and wrong.

Solicitors: Walls, Abbot, and Martin; E. A. Baylis.

#### QUEEN'S BENCH DIVISION.

Monday, July 23, 1883.

(Before GROVE and MANISTY, JJ.)

REG. on the prosecution of THE ASSESSMENT COMMITTEE OF THE POPLAR UNION (resps.) v. THE EAST AND WEST INDIA DOCK COMPANY (apps.) (a)

*Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), ss. 46, 47—Supplemental valuation list—Alterations—Dock company—Diminution of profits—Sufficiency of evidence of alteration.*

*Upon an appeal against a supplemental valuation list, under the Valuation (Metropolis) Act 1869, evidence showing an alteration extending over a period beyond the preceding twelve months is inadmissible.*

*A diminution in the profits of a dock company within the preceding twelve months is admissible as evidence of an alteration in value, but is not in itself sufficient to establish an alteration within the meaning of the Act.*

*The dock company are not entitled to have their premises valued at their present actual value, and to have that value entered in the supplemental valuation list, but all that can be entered is any alteration in value that may have taken place during the preceding twelve months.*

APPEAL from an order of the Court of General Assessment Sessions under the Valuation (Metropolis) Act 1869 upon a case stated for the opinion of the Queen's Bench Division of the High Court of Justice. The material part of the case is as follows:—

1. The East and West India Dock Company are and have been for many years possessed of extensive docks, premises, and hereditaments lying partly in the parish of All Saints, Poplar, in the Poplar Union, in the county of Middlesex.

(a) Reported by H. D. BONSEY, Esq., Barrister-at-Law.

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2. At the quinquennial valuation made in 1875 the court of assessment sessions fixed the gross and rateable values of the aforesaid hereditaments at 127,776*l.* gross and 61,896*l.* rateable.

3. At the next quinquennial valuation in 1880 the company were assessed at the same values as before, and did not appeal.

4. In 1881 a supplemental valuation list within the meaning of sect. 46 of the Valuation (Metropolis) Act 1869 was made by the overseers of the parish, but they did not include therein the hereditaments of the company. No objection was made by the company to the supplemental list, nor any application to be inserted therein.

5. On the 27th May 1882 the company gave notice to the overseers, requiring them to make a supplemental valuation list within the meaning of sect. 46 of the Valuation (Metropolis) Act 1869 showing the alterations which had taken place within the preceding twelve months in the gross and rateable value of the said hereditaments.

6. On the 1st June 1882 a supplemental valuation list within the meaning of sect. 46 of the Valuation (Metropolis) Act 1869 was, subject to the question of the omission of the company's hereditaments hereinafter mentioned, duly made and deposited by the overseers of the parish, but they did not include in the said supplemental list the hereditaments of the company.

7. On the 24th June 1882 the company gave notice to the clerk of the assessment committee of the Poplar Union and the overseers that they desired that the supplemental list should be corrected by the insertion therein of the said hereditaments with an assessment at gross, 70,067*l.*, rateable 50,391*l.*

8. On the 29th Sept. 1882 the assessment committee heard counsel for the company on their objection, who, for the purpose of proving that there had been an alteration within the meaning of sect. 46, tendered in evidence the books and balance-sheets of the company for the years 1874 to 1881 inclusive, and offered to verify by the testimony of witnesses the facts and figures therein contained; and he contended that the books and balance-sheets showed that there had been a continuous and considerable decline in the profits of the company, extending over several years down to and including 1881, and that an important portion of such decline had occurred during the preceding twelve months.

9, 10, and 11. No evidence other than as above-mentioned was tendered; the assessment committee declined to insert the property of the East and West India Dock Company in the supplemental valuation lists, on the ground that no alterations had been made in the value within the meaning of the Act, and thereupon the company appealed to the court of assessment sessions.

12. On the hearing by agreement between the parties no further evidence was tendered by either side, but the opinion of the assessment sessions was asked upon the following questions: (1) Whether the evidence tendered to the assessment committee on the 29th Sept. 1882, or any and what part thereof was relevant and admissible. If any, then (2) whether such relevant and admissible evidence tendered, if proved, was sufficient to establish an alteration within the meaning of sect. 46; (3) whether, assuming an alteration within the twelve months established, the company was therefore entitled to have the

present actual value ascertained and inserted (as was contended by the company), or only to have the values standing in the valuation list reduced by the amount of the alteration in value, if any, occurring within the preceding twelve months, and to have such altered values inserted in the supplemental list (as was contended by the assessment committee); and the company duly applied to the justices in assessment sessions to direct a valuation of the said hereditaments under sect. 36 of the said Act. It was agreed that the balance-sheet for the year 1881 should be taken as though made for the twelve months preceding the said supplemental list objected to, saving all other (if any) just exceptions thereto.

13. It was contended for the company that the evidence tendered was relevant and admissible and, if proved, was sufficient to establish that an alteration had taken place within the preceding twelve months within the meaning of the 46th section of the said Act, and that the company were entitled to have the hereditaments valued at the present actual value, and such value entered in the supplemental list.

14. It was contended for the assessment committee that the company were concluded by the quinquennial valuation made in 1880, and also by the supplemental list of 1881, and that the company could not go behind either of the said lists, and that the evidence as to a falling off in the years 1875 to 1881 was consequently irrelevant and inadmissible, and that none of the evidence tendered was relevant and admissible, or, if any, only such, if any, as showed a falling off within the preceding twelve months between April 1881 and April 1882, and that such last-mentioned evidence was not, nor was the whole of the evidence tendered, even if relevant and admissible, sufficient to establish an alteration within the said preceding twelve months, April 1881 to April 1882, within the meaning of sect. 46 of the said Act, and that, even if the said evidence did establish an alteration within the said twelve months, the company were not therefore entitled to have the said hereditaments valued, and their present actual value entered in the supplemental list, but only to have the values reduced by the amount of the alteration in value, if any, occurring within the preceding twelve months.

15. The court of assessment sessions was of opinion that the whole of the evidence tendered to the assessment committee was relevant and admissible and sufficient to establish an alteration within the meaning of sect. 46 of the Act; and that the appellants were entitled to have the hereditaments valued at their present actual value, and such value entered on the supplemental list, and not merely any alteration in value which might have taken place during the preceding twelve months.

16. The question for the opinion of the Queen's Bench Division is, whether the decision of the court of assessment sessions was right.

By the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), s. 43:

The valuation list as approved by the assessment committee, and, if altered on any appeal under this Act to any sessions or a superior court, as so altered, shall come into force at the beginning of the year, commencing on the sixth of April succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned.

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By sect. 46 :

Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years (the first of such periods beginning with the sixth of April, one thousand eight hundred and seventy one) shall be conducted as follows :—

(1.) In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations. If no alteration has taken place which makes a supplemental list necessary, the overseers shall send a certificate to that effect to the assessment committee in place of such list, which certificate may be in the form contained in the second schedule of this Act.

(2.) In the fifth year of every such period the overseers shall make a new valuation list.

(3.) The same regulations shall be observed, and the same proceedings shall be had in the case of a supplemental list and a new valuation list as are directed by this Act, and the Acts incorporated herewith in the case of the valuation list made in the first year after the passing of this Act.

(4.) A supplemental list and a new valuation list shall come into force at the beginning of the year succeeding that in which they are respectively made, in the same manner and subject to the same conditions as the valuation list made in the first year after the passing of this Act.

(5.) In each of the last four years of such period the valuation list which was in force on the day before the commencement of each such year, together with and as altered by the supplemental list, if any, which comes into force at the commencement of such year, shall be the valuation list which is in force during that year.

(6.) A new valuation list when it comes into force shall supersede the valuation list which was in force during the fifth year of such period.

By sect. 47 :

If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect :

(1.) The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee, or of any ratepayer of the union, or of the surveyor of taxes for the district, shall send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament, &c.

Sir *Farrer Herschell* (S.G.) and *Holl*, Q.C. (*Fullarton* with them) for the respondents.—The scheme of the Act, as I submit, is that, instead of there being constantly changing valuations continuing to be made from time to time, there shall be a quinquennial valuation which shall stand for five years subject to the provision for certain cases. The effect of the order of quarter sessions is practically to destroy altogether the value and effect of a quinquennial valuation. There is a quinquennial valuation made in 1875, and then again in 1880, at which no objection is taken, and of course the quinquennial valuation in 1880 must be taken as the starting-point. In 1881 there is a supplemental list, but no supplemental list as regards them. They made no application to be inserted in it, and no objection was taken by them, and therefore my contention is that down to the year 1881 they are concluded, and that, when they come to 1882, all that they are entitled to show, if they can, is that within the meaning of this Act there has taken place an alteration within that preceding twelve months, and that by reason of the alteration they ought to be inserted in that supplemental list as reduced in value. In the supplemental list you have no

business with anything except alterations which have taken place during the preceding twelve months. The sessions have held this, that there was an alteration during the preceding twelve months, and that once you show an alteration during that twelve months you need not look at the quinquennial valuation or anything at all; you are at large, and you are to be assessed on the value without reference to the quinquennial valuation. You must take the quinquennial valuation as the basis. They must assume 127,000*l.* was the proper value, and show how much it has diminished. [*GROVE, J.*—How can they show that without going into the whole question of valuation? If they cannot, then the Legislature says they are not to. All they are entitled to go into is the alteration during the preceding twelve months. [*MANISTY, J.*—The sessions have found that the appellants are entitled to have the hereditaments valued at their present actual value, and such valuation in the supplemental list is not merely an alteration in value which may have taken place.] That is the issue between us. Another question is the mode of valuation. My contention is that the increase or reduction must be an increase or reduction arising from some definite cause, either affecting the structure or its relation to other structures, or some change in the condition of things which has caused it to be increased or reduced in value. The illustration given in the 47th section is the erection of any building, and of course the removal of a building would be the same. I do not say it is exhaustive, but it is illustrative of the alteration which is to cause a change in the valuation. [*GROVE, J.*—Suppose the building to be a shop of a particular class, which has a very large business, and in consequence of the predominance of a particular trade it is entirely superseded, so that it loses its value as a shop though it is structurally the same, should you say that was not an alteration in value within the meaning of the statute? I should say it was because there would be a change in the condition of things which could be attributed to a specific cause. It is said that the rates from shipping in the docks were less in the twelve months in question than they had been previously, but that is no evidence that the value of the hereditaments has diminished. Falling off of receipts in a particular year is no evidence of an alteration in value. You must first prove the cause, and then you must prove the amount of alteration due to the cause; but all that is proved here is the diminution in receipts. The case of *Reg. v. The New River Company* (L. Rep. 4 Q. B. 309) was relied on before the court of quarter sessions, but there was a structural alteration; pipes had been laid on to a new district. In the present case there is no suggestion that there has been any structural alteration.

Sir *Hardinge Giffard*, Q.C., *Marriott*, Q.C., and *Digby* for the appellants.—The assessment committee have no right to reject the evidence; the question of diminution of value is a question of fact, and the amount of the receipts is an element which they ought to take into consideration—of course it would not be conclusive, but it ought not to be rejected. [*GROVE, J.*—I think I may say, both for my brother *Manisty* and myself, that the evidence was admissible and relevant, but the difficulty in my mind begins after that; the question is whether it was enough.]

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Quite enough. The evidence tendered shows a diminution of the shipping, not in any particular year, but going on progressively for a great number of years. In order to bring ourselves within the Act we are not obliged to assign a cause except for the one reason I mentioned, namely, that it must be a cause, or rather a thing which affects the rateable value. By the last statute the Legislature intended to alter the state of the law as it then stood, and to substitute provisions which were no longer open to the same construction. Under the Union Assessment Act there is no particular period for a valuation. The leading principle of the Act which your Lordships have now to construe is to secure a uniform basis of value for the metropolitan district, and a valuation must be made every five years. A ratepayer could formerly appeal against the rate; he can now appeal against the valuation list, subject to this, that he must show a change of circumstances. By the 46th section the supplemental list is to be in the same form as the valuation list; the same regulations are to be observed and the same proceedings as in the case of the list in the first year. The list in the first year is to show the gross and rateable value, not with reference to any antecedent valuation. It is very difficult to see what ground there is for suggesting that which *prima facie*, I suppose, would strike everyone as unjust and improper, namely, that you are to have an artificial estoppel. Unless an alteration can be shown within the preceding twelve months, there can be no interference with the quinquennial value; but, when once the condition arises—that is, an alteration within the preceding twelve months—then there is nothing to prevent the ratepayer showing the truth, and he is not bound by the previous valuation. There is nothing in the statute to lead to the suggestion that the Legislature intended to impose on the parties an artificial calculation on which the values may be entirely unreal, and that they are not really to ascertain the truth. In the case of *Reg. v. The New River Company*, cited by the Solicitor-General, the judgment is entirely inconsistent with the notion that the alteration must of necessity be something physical and structural. My contention is, that in order to be allowed to enter into the calculation at all, I must show that there has been an alteration of circumstances which has taken place within the preceding twelve months, and the moment I show such an alteration, the problem which the statute calls upon the proper authority to solve is this: what is in truth the rateable value for the year in the supplemental list? [Grove, J.—If you have to show an alteration in circumstances, that is just what is contended against you. You must not simply show an alteration in receipts.] The evidence tendered, is that a very much smaller number of ships came into the dock, and that, I submit, is a change of circumstances.

Grove, J.—I am of opinion that the assessment committee are right, and that the East and West India Dock Company are not entitled by the statute to have their assessment reduced in the way which they contend, and, further than that, the evidence which was tendered and given, though to a certain extent admissible and possibly relevant evidence in a limited degree, was not sufficient evidence to entitle the assessment com-

mittee to adopt the mode of valuation which the appellants contend is the right mode within the meaning of this Act. Now, the question really depends upon two sections of the Act. Possibly one section only really applies to this particular case, namely, the 47th; because, as was thrown out by my brother Manisty in the course of the argument, this is more a case within the 47th section than within the 46th section, the 46th section being applied to a supplemental list, which, as far as I can gather from the Act, is not made obligatory upon the application of any ratepayer of the union; whereas, in the 47th section, the words are "The overseers of the parish may, and on the written requisition of the assessment committee, or of any ratepayer of the union, or of the surveyor of taxes for the district, shall send to the assessment committee a provisional list." The 47th section, therefore, seems to apply to an obligatory list being made out on the application of the party affected; but, as far as regards the question argued before us, that point does not appear to me to be material. At all events, it has not been argued by the counsel on either side, because the question which has been raised before us is really this, as far as I can express it, whether, when the quinquennial valuation has been made, and when a new valuation in any subsequent year has to be made—I call it a new valuation although perhaps I am using a term which is not quite what the Act means by "new valuation," because the Act by new valuation means a supplemental and additional valuation which may either add to or reduce the value given to hereditaments in the previous valuation—whether you can first of all go behind the particular year and reopen and go into the valuation for the years intervening between the quinquennial valuation and that time, or whether you can go back altogether and show the actual value of the property within the meaning of the Act. Now the argument of Sir Hardinge Giffard—I need not say an able one—seems to me to ignore the two important provisions of this Act. I directed his attention to both of them; but I think he treated them rather lightly, and, in my judgment, he did not answer the difficulties which arose on the words of sects. 46 and 47. His argument was this: The previous Act of the 25 & 26 Vict. c. 103, had an annual valuation, and its provisions were directed to what was requisite for an annual valuation, and, among other sections, the 25th section, which may be called the same section, with reference to the then state of things, as the 47th section under the present Act; and Sir Hardinge Giffard contended that from the alteration in the wording of the 47th section of this Act from the wording of the 25th section of that Act, a very different construction was to apply to the 47th section of the present Act. The words of the 25th section of the previous Act are these: "Where, by reason of any alteration in the occupation of any property included in such list, such property becomes liable to be rated in parts not mentioned in such list as rateable hereditaments and separately valued therein, and when and so often as it shall appear to the overseers that any rateable property included in such list has been increased or reduced in value since the valuation thereof, whether by building, destruction of building, or other alteration in the condition thereof or otherwise, the overseers of the parish in each of the



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cases aforesaid shall, as soon as conveniently may be, make a supplemental valuation list, showing the annual rateable value according to the judgment of the overseers," &c. The 47th section of the present Act says this—in place, I may call it, of what I have read of the Act of the 26th & 27th Vict. : "If in the course of any year the value of any hereditament is increased by the addition thereto, or erection thereon, of any building, or is from any cause increased or reduced in value, the following provisions shall have effect." Now there the words, "increased or reduced from any cause" no doubt are larger than any words in sect. 25 of the preceding Act; but it appears to me that they are not so large as Sir Hardinge Giffard contended, because he reads them thus: "If from any cause they are increased or reduced in value." That is, never mind the cause; you need not go into the cause, if they are increased or reduced in value, that is enough. Now I do not read the section in that way, and for this reason, among others, that if the Act had intended to say that, it would have said, "If in the course of any year the value of any hereditament is increased or reduced, the following provisions are to have effect." But, when we come to the 46th section, that, to my mind, seems still more clear, because it reads thus: "Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years (the first of such periods beginning with the 6th April) shall be conducted as follows: In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list." It appears to me that the argument for the dock company in this case really ignores those words. What meaning are we to give to "alterations which have taken place during the preceding twelve months"? According to the argument for the dock company, any alterations during the preceding four years, provided it was within the last year, could be inquired into; and not only that, but I do not see how you could avoid going even beyond the last quinquennial valuation if you are to take the actual value of the premises and the real value of them altogether. I cannot ignore the words "during the preceding twelve months" in sect. 46, or "if in the course of any year the value of any hereditament is increased or reduced" in sect. 47. The object of the statute is that there should be a five years' valuation. It was to prevent the old valuations remaining when great changes have taken place in the value of premises, and it was to keep them always alive and keep them, if I may say so, fairly up to the existing period, and it was thought that five years was a fair time for revaluing. It would have been costly and troublesome to have valued them every year. If we are to be able to reopen the valuation in each of those four years, the quinquennial valuation is really no more than the valuation in any of the other years. I do not say that the mode of computation may not be a difficult one. It is a matter on which we are not asked, and which must be left to a jury, how you are to frame the reduction. There will be a great deal more difficulty in considering the Act in the opposite way, but still I do not say it is

free from difficulty in the mode of application. In the present case, the assessment committee heard counsel for the company on their objection and requirements with a view to proving that there had been an alteration within the meaning of sect. 46 entitling the company to a revision of the valuation list, and he tendered in evidence the books and balance-sheets of the company for the years 1874 to 1881, and offered to verify by the testimony of witnesses the facts and figures therein contained; and he contended that the said books and balance-sheets showed that there had been a continuous and a considerable decline in the profits of the company extending over the several years down to and including 1881, and that an important portion of such diminution had occurred during the preceding twelve months, and that, under the circumstances stated, an alteration within the meaning of sect. 46 had taken place. No evidence other than as above-mentioned was tendered. It is stated in another part of the case that that was done by an agreement. Therefore it was not as if they could have tendered other evidence, and did not, but that it was agreed that that evidence should be taken as a test of the contention on each side. One question left to us is, Is that evidence admissible and relevant? I think it was admissible as to those twelve months only. It was relevant, but I think it was not enough. It is necessary to show diminution in the value within the meaning of the Act, and it is also necessary to show an alteration in circumstances. A mere alteration showing that they had received less money within the last twelve months than they had received in the preceding year would not be enough. It may be an accidental fluctuation in the business from some adventitious cause having nothing to do with the valuation of the premises. Therefore, on that question, I am of opinion that the evidence, although partly admissible and relevant, was not sufficient to establish an alteration within the meaning of the 46th and 47th sections. Then, secondly, with regard to the opinion of the sessions that "the appellants are entitled to have the hereditaments valued at their present actual value, and such value entered in the supplemental list, and not merely any alteration in value which may have taken place during the preceding twelve months," that I answer in the negative—that the appellants are not entitled to have them valued at their present actual value, and have that value entered in the supplemental list, but all that can be entered is any alteration in value which may have taken place during the preceding twelve months. My judgment, therefore, is in favour of the respondents.

MANISTY, J.—I am of the same opinion in the result, and, as this is a question of some little difficulty and some general importance, I propose to go somewhat more at length into the reasons upon which I have arrived at the same conclusion. Now, no doubt the Act of 1862 has some bearing upon the Act of 1869, but there is no real serious difference so as to put a different construction upon the Act of 1869 from that which, if there were no Act of 1862, I would put upon it. The scheme of the Act of 1862, of course, was somewhat difficult and the language was somewhat difficult to deal with. For instance, in sect. 15 of the Act of 1862, the gross estimated rental was to be "the rent at which the bare-



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ditament might reasonably be expected to let from year to year." It was necessary to put a very large construction upon those words, and that has been rectified in the Act of 1869, which does assist one somewhat in dealing with the subsequent sections, because the gross value in the Act of 1869 means, not the rent at which it may be let from year to year, but the rent which a tenant might be reasonably expected to pay, taking one year with another, for these docks, and that is the fundamental principle. Now, the next thing is, there is to be a quinquennial valuation, and the provisions with respect to it certainly are exceedingly careful, and, to my mind, very clear. The overseers are to make a valuation list, and you will find throughout this Act there are three things clearly and very distinctly mentioned, and they are, in form, at all events, and somewhat also in substance, different things. There is the valuation list, that is the quinquennial valuation list, and that is to last subject to the provisions afterwards found in the Act. The valuation list is to come into force at the beginning of every year—I think the 6th April ensuing that in which it is made—and it is to last from April to April, and it is to be conclusive evidence, by sect. 45, of the gross value and of the rateable value of the hereditaments, subject always to the provisions afterwards mentioned. Now, what are these provisions? The first is a supplemental list in sect. 46, and I must say I think what I threw out at the commencement of the argument in this case is a quite correct view, the more I have thought about it, that this proceeding is quite misconceived in form; the whole appeal is misconceived altogether in form, and it is, in substance, a proceeding under sect. 47, although it is quite impossible in considering sect. 47 to exclude the language of sect. 46. Sect. 46 clearly contemplated the overseers preparing a supplemental list. There is nothing in that to make it compulsory, but in this case they did prepare a supplemental list, which, of course, was subject to a revision by the assessment committee and to an appeal to the quarter sessions, and, strange to say, the form in which the present appeal came before the sessions was as an objection to the omission from the supplemental list. There is no appeal given for such a thing. In sect. 46 provision is made for the overseers if necessary making a supplemental list, and then the principle on which it is to be made out is in these terms, that it is to be in the same form as the valuation list. It is to be in the same form as far as it goes, and it shall show all the alterations that have taken place during the preceding twelve months. That would not be in the valuation list originally, and, therefore, the form is for a valuation list; but you shall take the form so far as it goes, and show the alteration, and then the parties affected by that may appeal. The list shall show all the alterations that having taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alteration. Now, you have three lists—the valuation list, the supplemental list, and the provisional list, and provisions are made here for all three, and they are clear and very distinct, if people would only follow them. That being so, what takes place? Evidence is given with regard to the income of this company for a number of years, but, as for confining them-

selves to an alteration in the value in the preceding year, whether it is to be taken out of sect. 46 or out of sect. 47, seems to me to be immaterial—they are in substance the same; one is more explicit, namely, "which shall have taken place during the preceding twelve months," and the other is "an alteration in the course of any year." The evidence laid before the sessions, and I suppose, before the assessment committee also, was to the effect that, if you look to the income of this company during several years, going back to the year 1874, you will find that there is a great difference in the income of that company. Apply the Act to that. You are to assert and to prove an alteration within the preceding twelve months, or in any one year. Now, it seems to me that they were quite wrong in taking the evidence applicable to all these years, and that evidence was admissible with a view, if they could, as a step in the case, to show that there was an alteration of some sort in the year preceding—that would be in the year 1881—which did reduce the value. Now, just take 1880 or 1881, or any year you like, and say, Well, there has been a drop this year of 10,000*l.* or 20,000*l.* To my mind it would be utterly wrong to say that it is to be deducted either from the quinquennial 90,000*l.* or deducted at all from anything. You would have to see how that alteration, if it be an alteration, would affect the letting, not of that year, but the letting to a tenant, taking one year with another, taking the good and the bad all through. That is what they had to do. The greatest mistake would be made if they said, "We go into the annual value of this year, and will prove it by showing the income has been so much less this year than last year, and so much less than it was the year before." I do not deny that it is evidence which shows that there has been a very large reduction in the income, unless it is accounted for; and it may be, if they have laid out a great deal more money on the property that year, it would not affect the letting value a bit, but would rather increase it. So the very reduction in the net profits increases the rateable value of property very often; but, then, has there been a substantial alteration which has caused the letting value to be altered, and, if so, to what extent? I do not myself think it necessary to say whether, if there be a falling off of 10,000*l.*, that is to be deducted from the 90,000*l.* I think that would be an utter mistake. You have to look to see what the cause is, and if that cause goes actually to increase the value, though it may not increase the income, that is the thing which the assessment committee have to look at. Whether, therefore, you take it upon sect. 46 or sect. 47 of the Act of 1869, it seems to me the result is the same. I am very clear upon this, that the sessions were wrong in admitting evidence of preceding years. The principle on which they have gone seems to me to have been the wrong one, and therefore the question should be answered against them.

Solicitors for the appellants, *Freshfields and Williams.*

Solicitor for the respondents, *J. W. Marsh.*

ERRATUM.—In *Reg. on the complaint of T. D. Sibby v. White and others* (ante, p. 241), line 5 of paragraph 2 of head-note, for "ordinary" read "ordering."

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JUSTICES OF LANCASHIRE v. MAYOR, &amp;C., OF ROCHDALE.

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## HOUSE OF LORDS.

April 23 and 24, 1883.

(Before Lords BLACKBURN, BRAMWELL, and FITZGERALD.)

JUSTICES OF LANCASHIRE v. MAYOR, &amp;C., OF ROCHDALE. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Highways—Turnpike roads—Liability to repair—41 & 42 Vict. c. 77, s. 13.*

*Where by the operation of a local Act enlarging the boundaries of a municipal borough, and passed between 31st Dec. 1870 and the date of the passing of the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), portions of turnpike roads entering the borough were brought within the area of the borough, and so taken out of the turnpike trusts:*

*Held (reversing the judgment of the court below), that such portions of the turnpike roads had not become "main roads" within sect. 13 of the 41 & 42 Vict. c. 77, so as to make the county rates liable for half the expenses of repairing them.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Coleridge, C.J., Brett and Cotton, L.JJ.), reported in 8 Q. B. Div. 12, and 45 L. T. Rep. N. S. 425, reversing a judgment of the Queen's Bench Division (Watkin Williams and Mathew, JJ.), reported in 6 Q. B. Div. 525 and 44 L. T. Rep. N. S. 316, upon a special case. The special case, and the sections of the Acts of Parliament are set out in the report of the case before the Divisional Court, and the facts appear sufficiently from the head-note, and from the judgments of their Lordships.

*Gorst, Q.C. and H. F. Blair* appeared for the appellants.

*Sir H. Giffard, Q.C. and F. O. Crump* for the respondents.

*Gorst, Q.C.* was heard in reply.

At the conclusion of the arguments their Lordships gave judgment as follows:—

LORD BLACKBURN.—My Lords: This case depends upon the construction of a few words in an Act of Parliament, and the words of that Act of Parliament are such as to make it no easy matter to say what the Legislature intended. The general rule of construction of Acts of Parliament is of course, as everyone knows, that we are to give effect to what we understand to be the intention of the Legislature, and we are to derive the intention of the Legislature from the words which they have used, construing them in the sense which such words ought to bear with reference to the subject-matter to which they are applied. That is a very good rule to lay down, but the difficulty always is as to the application of it to the particular case. Now, as to this particular case, what appears to me is this. I think that the fact that Rochdale has a municipal corporation is purely an accident, and that it has nothing to do with the case which we have to consider. But the fact that Rochdale has now an urban sanitary authority within the Public Health Act of 1875 has a great deal to do with the matter, although the fact that it is a municipal borough is not, in my opinion, important. Now the first thing which we find is this. Looking at the history of the legislation in 1853 before Rochdale

was ever made into a borough, but when it was only a country town, a Rochdale Improvement Act was passed, which incorporated some clauses of the Towns Improvement Act 1847, and particularly sect. 50: "The trustees of any turnpike road shall not collect any toll on any road within the limits of the special Act or lay out any money thereon." The limits of that special Act are three-quarters of a mile round the market-place of Rochdale, which, as I said before, was not at that time a borough. Then in 1856 Rochdale was incorporated and became a borough, and in consequence of that the powers which had previously been exercised by the commissioners under the Rochdale Improvement Act all came into the hands of the town council of the borough, who were then acting as trustees. Then followed the Rochdale Improvement Act 1872; it is important to notice the date 1872. That Act extended the territorial limits of the municipal borough, and made them co-extensive with the boundaries of the parliamentary borough of Rochdale, which were a different thing, and all the provisions of the Acts theretofore in force relating to the "town" were extended to and rendered applicable in respect of the enlarged borough. Now this portion of the enlarged borough comprises a portion of a district which was not within the jurisdiction of the improvement commissioners, or the jurisdiction of the municipal corporation when they were acting as trustees, until that Act had obtained the Royal assent, and the Act obtained the Royal assent in 1872, not quite seven years before the Act of 1878 which we have to consider. There were several portions of turnpike roads which were within that extended district, as I may call it, the trusts of some of which had expired and some had not expired at the time when this action was brought. That being the state of things in 1872, in 1875 there came the Public Health Act of that year. That Public Health Act regulated what should be done in urban sanitary districts, and amongst others these are the clauses which are material. Within an urban sanitary district (which would include Rochdale, for Rochdale would be a borough whose corporation was exercising the powers of an urban sanitary authority) it is enacted that the municipal authority shall be the sole surveyor of the highways, and there is a clause (sect. 148) which clearly shows that the Legislature, in passing that Act of 1875, were quite aware that within an urban sanitary district, or through an urban sanitary district, there might be turnpike trusts, and they made provision as to what should be done with them. The turnpike trusts were to continue, but arrangements and agreements might be made as to that portion of road which was subject to a turnpike trust wholly within the district of the urban authority, and that it might be managed by them. Of course, when such an Improvement Act as the present had passed, including sect. 50 of the Towns Improvement Act, the portion of the turnpike road which lay within the district that had been created under such Act was no longer to be managed by the turnpike trustees, but by the general law of the land the portion of the highway which lay within the parish was repairable by that parish. The section which has been referred to of the Public Health Act shows that as a general matter the Legislature were quite aware that there might be turnpike roads running in urban sanitary districts. That

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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being the state of things, there came the legislation of 1878, which has to be considered. The legislation of 1878 as regards all this matter seems to have one general idea in it. The portion of road wholly within the parish was by the general law of the land repairable by that parish. It was a great hardship, or might be a great hardship, for that particular parish, which was perhaps a poor rural one, that the parish should have to keep up a road which was cut up by the traffic of distant parts of the country that came across it. That was a practical inconvenience which had been felt long before, and I believe it was mainly upon that ground that Acts for turnpike trusts were first introduced. Now turnpike Acts were almost always passed for a certain time, but in practice they were continued for a longer time; they varied in their terms, but that was the common thing. The Legislature, seeing that what I have just stated was the case, seem to have thought that where there was a road which ran through a parish, or where there was a highway authority which had to maintain the road, that highway authority being substituted for the parish, it might be very hard upon it that a comparatively small district should maintain the road entirely for the benefit of the great traffic which passed through it, and which came from distant parts, and I think that that was a sensible and intelligible reason for legislation. The mode in which the Legislature sought to remedy that hardship was to say that when there was such a road it should be a main road, and that the main road should still be maintained by the district in which it was, but that half of the expense was to be paid out of the county rate of the county in which it lay. They seem to have thought that, when such a road had been put under a turnpike trust, *prima facie* that road was in its nature such as ought to be maintained in this manner, and it was certainly a reasonable enough thing so to think. Accordingly they passed the enactment which we have now to construe (sect. 13 of the Highways and Locomotives (Amendment) Act 1878), and as to which it is no doubt very difficult to see what it means: "For the purposes of this Act, and subject to its provisions, any road which has within the period between the 31st Dec. 1870 and the date of the passing of this Act ceased to be a turnpike road, and any road which being at the time of the passing of this Act a turnpike road may afterwards cease to be such, shall be deemed to be a main road." I pass by the rest of it. What do these words mean? If they mean any road which was subject to a turnpike trust (meaning the whole road which was subject to a turnpike trust) and has ceased to be a turnpike road (meaning that the turnpike Act has either been repealed, or by efflux of time has expired), then the present case is not within them, for these portions of the turnpike roads which lie within the extended borough of Rochdale are not within these words, and consequently the action was wrongly brought, and the judgment in the action ought to be for the defendants. That was the view which the Queen's Bench Division took; they thought that that was the meaning of these words. The Court of Appeal thought that any road has ceased to be a turnpike road when by legislation, though the rest of the road has continued to be a turnpike road, a portion of the road which has been subject to a turnpike trust has been taken from it, and

the turnpike trustees have been forbidden either to spend money upon it or to interfere with it, or to levy tolls upon it. When that had been done, the Court of Appeal thought that it had ceased to be a turnpike road, and as by the operation of the Act of 1872 these had, in that sense of the word, ceased to be turnpike roads within the seven years, the time limited, they thought that the plaintiffs were entitled to recover. The question now is, which of the two constructions of the Act is the right one? I do not myself attribute any weight whatever to the interpretation clause. My own impression is, looking at these words, that if the case had been now beginning I should have hesitated long before saying what the words of the Legislature did mean. I do not think that it is at all a good specimen of draftsmanship; the words are by no means clear. I, however, rather think (but on this I wish to speak with some doubt) that if it had been absolutely *res integra* I should have inclined to the same opinion as the Queen's Bench Division did; I should have thought that the effect of the enactment was that it meant when the whole turnpike trust ceased. But the Court of Appeal having decided the other way, I rather think that, if I were left deciding by myself alone, I should say that, although I was inclined to agree with the Queen's Bench Division, yet I did not feel that so strongly as to make me reverse the decision of the Court of Appeal. But I find that the other noble and learned Lords who have heard the case have a much stronger opinion in favour of the view of the Queen's Bench Division than I have, and I certainly should not differ from them in the state of mind which I have described. I think that the strongest reason why the words which have been used in this legislation may bear the meaning which the Court of Appeal has put upon them, is found in what Sir Hardinge Giffard brought forward, namely, that in the Towns Improvement Clauses Act, which is a general Act, sect. 50 certainly does use the words "any road" in such a sense as shows that they clearly mean a part of a road, for it says that the turnpike trustees shall not spend money on any road, or levy tolls on any road, which lies within the district of the special Act; which clearly means any portion of a road that lies within that district. Now the Legislature, in passing sect. 13 of the Act of 1878, knew, or ought to have known (perhaps they forgot it), that there were a great many districts in England in which Acts had been passed including sect. 50 of the Towns Improvement Act as part of them, and knowing that when they used the words at the beginning of sect. 13, "any road" (the very words of sect. 50), there is a *prima facie* reason for saying that they used them in the sense in which the words had been used in the legislation which they were dealing with, or ought to have been dealing with. They used those words no doubt, but then it may very well be said that it does not at all follow that words which are used in one Act by the Legislature shall have the same sense as when they are used in another Act. It is only when the two subject matters are so closely connected that you can fairly say that the Legislature must have used the words in the same sense as they had done before that the argument comes into play at all. What I have said makes me pause before I venture to assert that the Court of Appeal were wrong. But when I look at the matter in the other way, and see what

good ground there is for saying that having regard to the object of the Legislature it would perhaps be reasonable to consider that the whole turnpike road trust was then before the Legislature, I will not venture to differ from the other noble and learned Lords who have heard the arguments in the present case, and to say that the Court of Appeal were right. Taking that view of the matter the result will be, and I beg to move, that the appeal be allowed with costs.

LORD BRAMWELL.—My Lords: I concur in the advice which has been given to your Lordships by my noble and learned friend, and I confess that my opinion upon the matter is so strong that, when I consider who have decided the other way in the Court of Appeal, and the hesitation of my noble and learned friend, I have some misgiving as to whether I can properly have appreciated the considerations upon which the court below have acted, and my noble and learned friend has doubted. I do not know historically how this Act came into existence. It may have been, as Mr. Gorat says it was—I have very little doubt that it was so—from some notion of relieving agricultural districts in the way he supposes. However, I doubt very much whether, if one did know, one would have a right to apply that knowledge to the construction of this Act of Parliament. I think not. I think you must construe the Act of Parliament, not according to what possibly may have been the motives, if you can ascertain them, of those who passed it, but according to its language. I think upon the language of the Act of Parliament you can see what the intention was, namely, that whereas certain turnpike roads were maintained by the tolls which the turnpike trustees could levy, it was contemplated, as we know (and this we have a right to refer to, because it is general knowledge) that this power of levying tolls would cease by the expiration of the time for which the power to levy them had been given, and that, as a consequence of that, parishes which had no particular benefit from the road, any more than they had from other roads in the parish, would be liable to expenses for repairs occasioned by the use of those roads by persons out of the parish—by the general public in fact. I say, taking those things into account, it seems to me that one can see that the Legislature intended to give a relief to parishes which would find themselves in the position of having to repair such roads as those; that is to say, roads which had ceased to be turnpike roads by reason of the expiration of the time within which the power of levying tolls could be exercised. It seems to me that the intention of the Legislature was to give relief to parishes in such cases as that—possibly to sanitary authorities, but I think not, for I do not see that it would apply to sanitary authorities—at all events we may say generally to give relief to the parishes through which the road passed. I think one can see that that was the general intention. Now let us see how that intention has been carried into effect by sect. 13 of that Act. I own to my mind the language of that section is plain. “For the purposes of this Act and subject to its provisions any road which has” (I will leave out the next words) “ceased to be a turnpike road, and any road which being at the time of the passing of this Act a turnpike road may afterwards cease to be such.” To my mind those words plainly mean this, that when any turnpike road, or any road

which was a turnpike road, has ceased to be such, or if any road which being a turnpike road (as indeed it says in so many words) shall cease to be such after the passing of this Act, then upon the turnpike road spoken of there ceasing to be a turnpike road, the provisions of this section shall apply. I see no difficulty in understanding that to mean not a road from the Land's End to John o' Groats, but a road which was under a turnpike trust, and which may be five miles in length, or fifty for all I know, and which may go through one parish, or parts of one parish, or one county, or may go into two or three. The expression to my mind is one which one ordinarily uses when one says, “This is a turnpike road;” that is to say, the particular place we are standing upon is a part of a road which road is under a turnpike trust, or has the powers, and duties, and rights, and circumstances which attend a road under a turnpike trust. It seems to me manifest that that is so, not only from the reason of the thing, but when you come to the words, “and any road which being at the time of the passing of this Act a turnpike road may afterwards cease to be such.” That says in words “any road which being at the time of the passing of this Act a turnpike road.” But part of a turnpike road is not “a turnpike road,” it is part of a turnpike road. And if after the passing of this Act the turnpike powers expired as to any road, it would not be true that a part of the road in particular had ceased to be a turnpike road; it would be true of the whole road. If after the passing of the Act a particular part of the road were taken out of the operation of the turnpike trusts, it would not be true that the turnpike road had ceased to be a turnpike road; it would only be true that a part of it had. I confess this appears to me to be plain. In addition to that I think the expression “ceased to be a turnpike road” (I do not want to repeat the arguments that have been used) is an inaccurate expression to apply to a case where a portion of a road has been taken away from the operation of a turnpike Act. It really is like the case that Mr. Blair put, of a man's hat being knocked off his head, and of a person saying, “You have ceased to wear your hat.” In one sense it would be true; you could not say it was a falsity, but it would be a very inaccurate way of describing what had happened. The word “ceased” is a strictly proper word to apply to the case where the entire road has “ceased to be” a turnpike road, because the powers applicable to the entire road have ceased, but it is an inaccurate expression to describe what has happened to a part of a road which has been taken out of the road generally, and which has in one sense ceased to be a turnpike road, because it has ceased to be a part of a road which is a turnpike road. Therefore, if we look at the general intention of the statute, which I think can very well be collected from it, and look also at the language used, it is manifest to my mind that this 13th section must be read thus: “For the purposes of this Act and subject to its provisions to any road which has been a turnpike road” (that is to say, the entirety of the road which has been a turnpike road), “and at the date of the passing of this Act has ceased to be such, and to any turnpike road which is a turnpike road at the time of the passing of this Act, and afterwards ceases to be such,” the provisions of the section shall apply. I say that is a matter

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JUSTICES OF LANCASHIRE v. MAYOR, &amp;C., OF ROCHDALE.

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of mere construction. But further than that, really when one considers what the condition of things is here, as was most forcibly put by my noble and learned friend on my left (Lord Fitzgerald), how is it conceivable that the Legislature could have intended that at the expiration of six years this burden which the Corporation of Rochdale had voluntarily taken upon themselves (advisedly no doubt, and for good consideration, because they found it worth their while to do so) should be taken from them and shifted in part upon the county? Sir Hardinge Giffard very ingeniously suggested that possibly they had not taken it upon themselves, and he gave an illustration which was perhaps somewhat difficult to answer, but everybody knows perfectly well that towns do take this upon themselves, and that it is not legislation that has forced it upon them. They do it voluntarily, and no reason can be given, as I say, why it should be taken from them and put upon the county. In addition to that there is this consideration: I have been endeavouring to find a power in the local Acts, which I cannot find altogether there, though I think there is some indication of it—probably it is derived from the provisions of the general Acts incorporated with these local Acts—a power enabling this corporation of Rochdale to deal with this road in an entirely different way from that in which rural parishes, or indeed urban parishes, can deal with the roads within their boundaries which cease to be turnpike roads, but which do not come under any of these Improvement Acts. I have not the slightest doubt in the world that it can be found out that the Corporation of Rochdale may divert the road, and may widen the road, and may deal with it in a way altogether different from the way in which a road is commonly dealt with by a parish which has to repair it after it ceases to be a turnpike road. I confess I cannot feel any difficulty about this case. It may be from my inability to appreciate the point which has created a doubt in the mind of my noble and learned friend who has addressed your Lordships, and which has caused the Court of Appeal to decide otherwise, but speaking for myself I really cannot entertain any doubt about it. I think that the judgment of the Court of Appeal must be reversed.

LORD FITZGERALD.—My Lords: I agree with the opinion of the noble and learned Lord who has preceded me, and I should say that from the beginning I thought on reading the two judgments, the judgment of the Queen's Bench Division and the judgment of the Court of Appeal, that on the whole it would be better to follow the judgment of the Queen's Bench Division. In that judgment, as delivered by Williams J., I think a construction is put upon sect. 13 of the Act of 1878 which follows its grammatical and ordinary meaning, which adds nothing to it, and takes nothing from it, and, above all, it will be observed does violence to no existing right, and does not affect existing liabilities. When you find a grammatical construction of which that can be said it is preferable in most cases to follow it. I should not say that I have a very confident opinion, because, as I have confessed in the course of the argument, questions arising upon the Turnpike Road Acts or Highway Acts as applicable to England are entirely new to me, and I am especially glad that in this particular case I am relieved from the task of following out

that labyrinth of Acts which we should have to deal with, if we had to take them as bearing one upon the other for the purpose of interpreting sect. 13. I deal with sect. 13 of the Act of 1878 alone. No doubt it is capable of two meanings. One meaning, that which I am prepared to adopt, was given to it by the Queen's Bench Division. Now let us see how the contrary meaning would operate. Certainly the section is capable of being construed as applicable to part of a road as well as to the whole of the road which is subject to some particular turnpike trust; but, in dealing with it as the Court of Appeal have done, you involve yourself at once in difficulties. You interfere with existing liabilities, and you create rights which did not exist before the Act passed. I have already pointed this out in the course of the argument; it has become of importance as affecting not the borough of Rochdale alone, but also many boroughs throughout the country. There must be, and I assume there are, a great many boroughs in different counties in exactly similar circumstances; that is, boroughs which have taken upon themselves the maintenance of the roads within the territorial ambit of the borough, getting in return complete control over them, a property in them, and a right to do with them as they please, save that they are under an obligation to keep them in repair, and they may raise special rates within the limits of the borough for that purpose. In addition to the full dominion, they get an ample equivalent for the expenses of maintenance in being protected by the provisions of the Act from contribution to other county rates in reference to roads situate in the district of the county to which the borough belongs. It has been observed that before the passing of the Act of 1878 the position of the borough of Rochdale since 1872 was unaltered. I dare say that observation would apply to other boroughs in the country. They had certain liabilities, and they had no right to reduce those liabilities by going to the county at large. We all know that, as was pointed out by the noble and learned Lord who has last delivered judgment, when a road becomes a portion of a borough such as Rochdale, the whole state of things is altered, and the repairs of the road become quite a different thing. Probably, in place of being an ordinary country road, it becomes one paved and with footpaths. The expense of keeping it in repair may be double what it was before, and, if we are to adopt the construction put upon sect. 13 by the Court of Appeal, the result would be that one half the cost of repair of such of these roads as had formerly belonged to turnpike trustees would be thrown upon the county at large. I asked if there was anything in the language of the Act of Parliament which would warrant us in coming to that conclusion, or if there was any reason that could be adduced from the special nature of the matters dealt with by the Legislature to lead us to that conclusion, and I got no answer to the question. It appears to me to be a question between two interpretations, one of which is according to the literal grammatical common-sense construction of sect. 13, applying the language of the section to that state of facts where a road which had been the subject of a turnpike trust has ceased to be a turnpike road, either by effluxion of time or otherwise, and not applying it to a portion of the road. That is according to the grammatical

and fair construction of it, and it involves you in no difficulty. But you at once get into difficulty, and expose yourself to the danger of doing injustice, when you adopt the contrary construction. For that reason, from the beginning I have thought that the Queen's Bench Division was right, and I agree now with the judgment of my noble and learned friends.

*Order appealed from reversed; respondents to pay the costs in the Court of Appeal and of this appeal; judgment of the Queen's Bench Division restored; cause remitted to the Queen's Bench Division.*

Solicitors for the appellants, *Ridsdale and Son*, for *Wilson and Hulton*, Preston.

Solicitors for the respondents, *J. J. and C. J. Allen*, for *Z. Mellor*, Rochdale.

May 10 and June 11, 1883.

(Before Lords BLACKBURN, WATSON, and FITZGERALD.)

THE GREAT EASTERN RAILWAY COMPANY v. THE HACKNEY DISTRICT BOARD OF WORKS. (a)  
ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Metropolis Management Acts 1855 and 1862—New street—Land bounding or abutting on—Paving expenses—Street carried over railway on a bridge.*

*The appellant company, in pursuance of the powers conferred on them by the Railways Clauses Act 1845 (8 & 9 Vict. c. 20), made a railway in a cutting across a public road, and carried the road over the line on a bridge. The bridge was supported on piers erected on the slopes of the cutting, and there was a parapet wall on each side of it. These walls were the property of the company. The respondent board paved the road, and called upon the company to contribute to the expenses as being owners of land bounding or abutting on "a new street" within sect. 77 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102). It was admitted that the road was a "new street" within sect. 105 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120).*

*Held (reversing the judgment of the court below), that the company was not liable to contribute to the paving expenses either as owners of the parapet walls or of the line and slopes.*

THIS was an appeal from a judgment of the Court of Appeal (Baggallay, Brett, and Holker, L.JJ.), reported in 46 L. T. Rep. N. S. 679, and 9 Q. B. Div. 412, which had reversed a judgment of the Queen's Bench Division (Lord Coleridge, C.J. and Manisty, J.) upon a case stated by a metropolitan magistrate.

A summons had been taken out by the respondent board to recover from the company a sum of 74l. 2s. 6d. in respect of the cost of paving a new street under circumstances which appear in the head-note above and in the judgment of Lord Watson.

The magistrate dismissed the summons, subject to a case stated, and his decision was affirmed by the Queen's Bench Division, but was reversed in the Court of Appeal as above mentioned.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

*Charles, Q.C.* and *French* appeared for the appellants.

*Sir H. Giffard, Q.C., Poland*, and *Avory* for the respondents.

The arguments appear sufficiently from the judgments of their Lordships.

The following authorities were cited or referred to:

*Angell v. Paddington Vestry*, L. Rep. 3 Q. B. 714; *Plumstead Board of Works v. British Land Company*, L. Rep. 10 Q. B. 203; 32 L. T. Rep. N. S. 94; *London and Brighton Railway Company v. St. Giles, Camberwell*, 4 Ex. Div. 239; 41 L. T. Rep. N. S. 162; *North Staffordshire Railway Company v. Dale*, 8 E. & B. 886; *Coverdale v. Charlton*, 4 Q. B. Div. 104; 40 L. T. Rep. N. S. 88; *London and North-Western Railway Company v. St. Pancras*, 17 L. T. Rep. N. S. 654; *Lord Northbrook and Pound v. Plumstead Board of Works*, L. Rep. 7 Q. B. 183.

*Charles, Q.C.* was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 11.—Their Lordships gave judgment as follows:

LORD WATSON.—My Lords: The facts of this case are simple enough, but the questions of law to which they give rise are attended with considerable difficulty. A street in the Hackney District, known as Cazenove-road, runs nearly at right angles to the appellants' line of railway, which at that point is in a deep cutting, and is carried over the railway by means of a bridge. The roadway of the bridge, measuring from parapet to parapet, is of the same uniform width as the remainder of the street. The parapets of the bridge consist of two brick walls bounding the roadway, which rest upon arches of brickwork, having their foundations outside the lines of the roadway in the land of the appellant company. The respondents have paved part of Cazenove-road, which is admitted to be a "new street" in the sense of sect. 105 of the Metropolis Management Act 1855, and they now maintain that the appellants are liable to contribute to the expenses of that operation, inasmuch as they are owners of lands bounding or abutting on both sides of the roadway of the bridge, within the meaning of sect. 77 of the Metropolis Management Act 1862. On each side of the bridge there is a narrow way or passage, the private property of the appellants, leading directly from Cazenove-road to their railway, and it is not disputed that the appellants are liable to contribute in respect of these two passages as bounding or abutting on the street. The controversy between the parties is confined to those portions of the street which are lined by the parapet walls of the bridge. A divisional court of the Queen's Bench, consisting of Lord Coleridge, C.J. and Manisty, J., decided in favour of the appellants, holding that the present case was ruled by that of the *London and Brighton Railway Company v. St. Giles* (*ubi sup.*). The Court of Appeal unanimously set aside that decision, on the ground that the parapet walls of the bridge are lands owned by the appellants within the meaning of sect. 77 of the Act of 1862. I agree with the observations made in the Court of Appeal that the *London and Brighton Railway Company v. St. Giles* (*ubi sup.*) is not an authority which the judges of the Queen's Bench were bound to follow,



seeing that judgment went in favour of the railway company on the express ground that the roadway of the bridge was not a "new street." That being so, it became quite unnecessary to determine whether the railway company would have been liable if the bridge had been part of a new street. Still the deliberate opinion of the court is entitled to its due weight, because, although unnecessary to the ultimate disposal of the case, it was formed and expressed after hearing full argument on the point. In the case stated by the magistrate there was no mention made of parapets or bounding walls, and though presumably there must have been some sort of fence for the protection of wayfarers, Hawkins, J., who delivered the opinion of the court, deals with the question as if the whole upper portion of the bridge had consisted of a roadway or street. It was maintained on behalf of the appellants that the bridge in Cazenove-road, including the carriage-way, footpaths, and parapet walls, is now vested in the respondents by virtue of certain enactments contained in sect. 96 of the Metropolis Management Act 1855. That clause (*inter alia*) provides that all streets being highways, and the pavements, stones, and other materials thereof, shall vest in and be under the management and control of the vestry or district board. And as the interpretation clause of the Act (sect. 250) declares that the word "street" shall "apply to and include" any bridge not being a county bridge, it was argued that the fabric of the bridge in question, at least to the extent above indicated, must be held to have passed to and become vested in the respondents in the terms of sect. 96. I am unable to assent to the appellants' argument upon this part of the case. It was assumed, no doubt rightly, by the counsel on both sides that the rights and liabilities of the appellants, with reference to this bridge, were regulated by the Railways Clauses Act 1845. The object of the enactments of that statute, so far as these bear upon the present case, was to compel railway companies to provide and maintain convenient roads, in substitution for such portions of turnpike-roads, or public highways, as might be intersected by their line of railway. In the case of the company electing to keep their line below the level of the substitute road, the language of the Act appears to me to distinguish the road itself from the bridge by which it is to be carried over the line. Sect. 46 in that case provides that the "road" shall be carried over the railway "by means of a bridge." Again sect. 50 enacts, with regard to "every bridge erected for carrying any road over a railway," that there shall be a good and sufficient fence "on each side of the bridge," and also that "the road over the bridge" shall have a clear space of a certain width between the fences thereof. The real import of these enactments is, that the substitute road shall be supported by means of a bridge provided by the railway company, the land upon which the old highway rested having been taken and used for railway purposes. In my opinion the right of the public, or of the highway authority, is not thereby enlarged. Their right is, in the first place, in and to the road, and may extend to the materials of which it is composed; and in the second place, to have subjacent support to the road from a properly constructed bridge. They are also entitled, in terms of the statute, to have the road maintained, and to have the bridge kept properly fenced by

the railway company; but these provisions do not appear to me to imply that they are to have any greater interest in the bridge and its fences, as distinguished from the road proper, than they had in the strata upon which the original road rested. These remained the property of the landowner, although burdened with a public right of way in perpetuity. The Metropolis Management Acts do not, in my opinion, confer any larger right upon district boards in the streets and highways placed under their charge than had previously belonged to the public. The statutory functions of the district board are limited exclusively to the surface of the road or street proper. In the case of new streets, what sect. 105 of the Act of 1855 authorises the board to do is to "pave the same, either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time to keep such pavement in good and sufficient repair." Keeping in view, then, that the sole object of vesting streets, and the materials of which they are composed, in district boards is to enable them effectually to perform their statutory duties in relation to the streets, I cannot suppose that the Legislature, in enacting that the word "street" shall "apply to and include" any bridge, intended to vest in the board anything more than the street which is carried or supported by the bridge. Accordingly, I understand the position of matters to be this: the whole bridge, from its foundation upwards, is part and parcel of the appellants' land, with the exception of those portions of it, consisting of the carriage-way and footpaths, and the materials of which they are made, which have become vested in the respondents by force of statute. The bridge, with that exception, appears to me to be as much the appellants' property as an embankment would be, constructed upon land acquired for that purpose in order to carry the approaches to the bridge. Although the parapet walls of the bridge in question are, in my opinion, part of the appellants' land, that does not appear to me to be of itself necessarily conclusive of their liability to contribute to the expense of paving Cazenove-road. If these walls had been erected by the appellants at their own hand and for their own purposes, the present case would have been within the principle of *London and North-Western Railway Company v. St. Pancras* (*ubi sup.*). As I understand the facts of that case, the line of the railway company ran parallel to, but at a depth of 18 feet below, the level of the street. On the side of the railway next to the street the company built a retaining wall, which was carried up to the edge of the street and for several feet above its level. I think the court were right in holding that the wall was land of the railway company abutting on the street, because to my mind it is obvious that the wall was necessary for the construction of the line and the protection of the traffic upon it, and, in short, formed part of the works from which the company were deriving profit. I do not think that case differs in principle from *Higgins v. Harding* (L. Rep. 8 Q. B. 7; 27 L. T. Rep. N. S. 483). It seems to me that no substantial distinction can be made between the retaining wall of a railway cutting and the retaining wall of a railway embankment. The authorities cited in the course of the argument appear to me to establish this proposition that the person vested



with the property of heritable subjects which have been placed *extra commercium*, or are subject in perpetuity to the burden of a public right which deprives him of their beneficial use, is not an owner of land within the meaning of sect. 77 of the Act of 1862. In *Angell v. Paddington (ubi sup.)* it was decided by the Court of Queen's Bench that a church abutting upon a new street, the site of which had been conveyed to the Commissioners for Building New Churches, is neither a house nor land within the meaning of the Metropolis Management Acts. Then in *Plumstead v. British Land Company (ubi sup.)* it was held by the Exchequer Chamber (reversing the judgment of the Court of Queen's Bench) that the owners of the *solum* of roads which had been dedicated to the public were not, although these roads abutted on a new street, owners of "land" within the meaning of these Acts. The Court of Queen's Bench had previously decided in *Lord Northbrook v. Plumstead* (L. Rep. 7 Q. B. 183) that the owner of the soil of certain private roads leading out of a new street was liable to contribute in the terms of sect. 77; and the view taken by the court in *Plumstead v. British Land Company (ubi sup.)* seems to have been that there was really no difference in principle, but only an immaterial difference in degree, between a case of a public highway and that of a road, the use of which had been granted to private proprietors. In the Exchequer Chamber a somewhat broader view was taken of the policy and import of the enactments of sect. 77. Lord Coleridge, C.J., in whose opinion the other members of the court concurred, there lays it down that the property to which the Legislature intended to attach liability was, in popular language, either house property or land property in the street; that the public roads belonging to the company were not such land property in any reasonable sense, and consequently that the company were not owners of land within the meaning of the statutes. The circumstances of the present case are, in my estimation, materially different from those with which the Court of Queen's Bench had to deal in *London and North-Western Railway Company v. St. Pancras (ubi sup.)*. The parapet walls and their support were not erected by the appellants at their own hand and for their own railway purposes, but under the compulsion of a statutory enactment made in the interest and for the benefit of such members of the public as might have occasion to use that part of Cazenove-road which crosses the line of railway. Nor does the present case appear to me to come within the principle of *Lord Northbrook v. Plumstead (ubi sup.)*, because, as was pointed out by the judges who decided that case, the use of the private roads was part of the consideration in respect of which the tenants agreed to pay rent, so that the landlord was actually getting a return from them in the shape of rent. But should these parapets, and the bridge itself, which are a source of expense and not of profit to the appellants, be taken down, the earnings of the appellants' railway would not be thereby affected. On the other hand, it must be conceded that these parapet walls are not in all respects in the same position as soil irrevocably dedicated to the public as a highway. If they were, I should have little difficulty in holding that the present case is ruled by *Plumstead v. British Land Company (ubi sup.)*.

The surface of land occupied as a highway is incapable of being turned to profitable account by the owner without encroaching on the rights of the public. In the case of a bridge carrying a public road across a railway the statutory obligation of the company, under sect. 50 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), is to provide and maintain "a good and sufficient fence on each side of the bridge of not less than four feet;" and it has been argued that, inasmuch as the parapet walls which they have erected remain the property of the appellants, they may be used by them for any profitable purpose not inconsistent with their continuing to be efficient fences. The only such purpose to which it was suggested that the walls in their present state might be turned was the letting of their surfaces for posting advertisements. The suggestion is ingenious, and may or may not have some possible foundation in fact, but it fails to satisfy me that the Legislature in framing the Metropolis Management Acts intended to deal with the surface of a mere roadside fence as "land" which might be let at a rack rent. Another suggestion, to my mind much more worthy of consideration, was this, that the appellants may take down these parapet walls, and erect tenements supported by arches in their stead, abutting and opening upon the street. I am not prepared to say that such a proceeding would be *ultra vires* of the company, but the suggestion does not appear to have any bearing upon the character of these parapet walls. If as they now stand these walls are not "land" within the meaning of the statutes, I do not think they ought to be regarded as "land" because they may be removed in order that the appellants may build houses or offices abutting on the foot pavements of the bridge. I can understand, however, an argument to the effect that the land of the appellants ought, notwithstanding its being at present below the level of Cazenove-road, to be considered as bounding or abutting upon the street in the sense of the statutes, seeing that the appellants may erect buildings upon it along the sides of the bridge. Being unable to come to the conclusion that these parapet walls are land owned by the appellant company within the meaning of the Metropolis Management Acts, I am compelled to consider whether the land owned by the appellants, irrespective of these parapets, bounds or abuts on Cazenove-road. If the land of the appellants were on the same level as the street, and only separated from it by the walls in question, I should be inclined to hold that it none the less abutted on the street because of that separation. But the appellants' railway and the slopes on either side of it are very much below the level of the street—at least I infer so from the statement in the case, which is that the line of railway is in a deep cutting. In its present condition, therefore, it appears to me that the appellants' railway bounds, or abuts upon, Cazenove-road in much the same sense in which the waters of the Thames might be said to bound, or abut upon, the foot pavements of Westminster Bridge, and that is not, according to my opinion, the sense in which the words "bound" or "abut" are used in the Metropolis Management Acts. But the question still remains, must not the appellants' land be deemed to abut upon the street, seeing that, without interfering with its use for railway purposes, part of it at least

might be utilised in order to support a line of buildings along both sides of the bridge? Whether land situated below the level of a street is or is not to be deemed as abutting on it within the meaning of the statutes appears to me to be a question of degree depending upon the circumstances of the case. One can easily imagine a case in which it would be scarcely possible to suggest that land in that position could be utilised for any other purpose than that of erecting buildings upon it having a frontage to the street; and it is not more difficult to figure a case in which it would be beyond the bounds of reasonable probability to suppose that the land could be utilised for any such purpose, although there were no absolute physical impossibility in the way. There are many cases lying between these two extremes, and the present appears to me to be one of them. To the best of my judgment, the appellants' land cannot in any reasonable sense be said to bound or abut upon the street in question. I think that, as it is laid out and used at the present time, the land does not, in point of fact, bound or abut upon the new street which has been paved by the respondents. It is used, no doubt, to support fences which do bound that new street, but those fences are mere accessories of the public highway, and are not, in my opinion, land capable of yielding a rack rent to the appellants within the meaning of the statutes. The present use of their land as railway, and the maintenance of these fences in their present condition, are strictly in accordance with the statutory powers and liabilities of the railway company; and I do not think that the possibility of the company one day or another making a different use of their land is attended with such imminent probability as would justify me in treating their land, for the purposes of this case, as if the change had actually been made. I therefore move that the judgment of the Court of Appeal be reversed with costs, and that of the Queen's Bench Division restored.

**LORD BLACKBURN.**—My Lords: I quite agree with the opinion of Lord Watson as to the facts and points to be decided. The difficulty, which is in my mind considerable, arises from the necessity of construing the words of 25 & 26 Vict. c. 102, s. 77, "the owners of the land bounding or abutting on such street shall be liable to contribute as well as the owners of houses therein," when applied to such property as is described in the special case. I think that neither the land beneath the bridge where the road is carried on the bridge, nor the bridge itself, so far as it is beneath the road, could properly be said either "to bound or abut on" the new street into which the road has been turned. In one sense, no doubt, it may be said that such subjacent land does bound the street, but not, I think, in the sense in which from the context it must be taken that the Legislature intended to express in 25 & 26 Vict. c. 102, s. 77. On the other hand, I think that the land which runs along each side of the line of street does bound and abut on it, whether that land be steep or not, and whether built on or not. Consequently I think that the decision in *London and North-Western Railway Company v. St. Pancras* (*ubi sup.*) was right. But, to adopt the illustration used, I do not think that the land covered by water, on which the Thames flows, either bounded or abutted on the road which was

carried over old London Bridge, though I think that the houses which stood on each side of the road which was carried over old London Bridge did both "bound and abut on" that road; and, if we can suppose such a case, if that road had been turned into a new street, those houses would have been liable to contribute to the expense of paving it; and I think that in this I do not differ from the court below. This disposes of all but the parapets and fences of the bridge. I agree with Lord Watson in thinking that the whole bridge, from its foundation upwards, is part of the appellants' property, with the exception of those portions of it consisting of the carriage-way and footpaths, and the materials of which they are made, which have become vested in the respondents by force of the statute. The property or fences of the bridge are not, I think, vested in the respondents; they remain part of the appellants' property; and as the bridge of which they are part is fixed to and so is part of the land, they are part of their land. But the Legislature, when framing 25 & 26 Vict. c. 102, had not present to their minds any such case as this. We have, what is always a difficult task, to say what is the intention expressed by the words of the Legislature when applied to a state of facts of which they probably were not thinking, and as to which, consequently, they had not really any intention at all. On this I have had more difficulty than seems to have been felt by either of the two other noble and learned Lords who heard the argument. I feel that the conclusion to which the Court of Appeal has come is hard upon the railway company, and is scarcely what the Legislature, if such a case had been present to their minds, would have wished to say; but I have doubts and difficulty as to whether the Legislature have not said it, and therefore have difficulty about reversing the decision. But my doubt and difficulty—for it is no more—is not strong enough to make me dissent from what I find is the opinion of both the noble and learned Lords who heard the argument.

**LORD FITZGERALD.**—My Lords: The question brought before us on this appeal is, whether the railway company is liable to be rated for paving and maintaining the street called Cazenove-road, Stamford Hill, in respect of the fence walls of a bridge by which that road is carried over the railway. The facts have been already stated. It is admitted that Cazenove-road is a "new street" within the meaning of the statute 18 & 19 Vict. c. 120, s. 105. The company exercised their statutable powers by working a deep cutting through the road for their permanent way, and have carried the road across the cutting by means of a bridge flanked by fence walls. There is a railway station close to the bridge, and, as was to be expected, Cazenove-road has become a street with houses continuously built on both sides, and as such the local board has undertaken to pave it and keep it in repair. The decision of the Court of Appeal seems to have been that the fence walls of the bridge formed no part of the roadway or street, but did constitute land, the property of the company, fronting and abutting on the street on both sides and from one end of the bridge to the other, in respect of which the company was liable to be rated. It would seem from the judgment of the Court of Appeal that, if there had been no fence walls, or if the fence, whatever

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GREAT EASTERN RAILWAY CO. v. HACKNEY DISTRICT BOARD OF WORKS.

[H. OF L.]

it was, stood within the limits of the old roadway, the decision of that court would have been for the company. The question is one of the construction of several statutes, and I prefer considering it irrespective of the cases which have been quoted. The company had authority by statute to carry their railway across the Cazenove-road, and had an option in doing so to carry the road over the railway by means of a bridge of the requisite dimensions. The statute 8 & 9 Vict. c. 20, s. 46, provides that "such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained, at the expense of the company." Sect. 50 of the same statute enacts rules for the construction of bridges to carry a road over the railway, and amongst others, that "there shall be a good and sufficient fence on each side of the bridge, of not less height than four feet, and on each side of the immediate approaches of such bridge of not less than three feet;" and that the road over the bridge shall in the case of a turnpike-road have a clear space between the fences of thirty-five feet. Sect. 51 provides that if the available width of the road should thereafter be increased beyond the width of the bridge, the company shall be bound, at the request of the trustees of the road, to increase the width of the bridge. The regulations thus made are for the public safety and convenience. The statute does not prescribe what the fences of the bridge should be made of, and it may be that a fence of wood or of iron, or an iron rail, might constitute a good and sufficient fence. In the case before us the fence appears to be a brick wall. It seems also that, although the bridge must have a clear space of certain dimensions between the fences, it need not necessarily be of the same width as the roadway of the road with its footpaths, if any, and we may suppose instances in which the whole bridge with its fence walls might be erected within the boundaries of the roadway as it stood before being interfered with by the company. The bridge in question, with its fence walls and approaches, was, I assume, made in conformity with the regulations of the statute. When completed with its fence walls, it was intended by the Legislature as a substitute for the piece of public road or public highway which the company had appropriated to the use of the railway. It seems to me that the roadway and the fence walls are parts of one entire thing, and form together the statutable bridge provided for the public convenience and safety in lieu of that which the company had taken, and are to be "at all times thereafter maintained at the expense of the company," for the use of the public." In the view which I take it is not necessary now to consider in whom the property in the bridge and its necessary works was vested when completed and opened for public use. The determination of that question, if it was necessary, would involve the consideration of some rather complicated statutes; but assuming that the Legislature intended by the Act of 8 & 9 Vict. for wise purposes, and for the protection of railway companies, that save as to the mere roadway or space between the fences the dominion should belong to the company, so as to prevent any other body or persons from interfering with the structure, it was nevertheless a dominion given to or left in them for the benefit of the public, and subject to the obligation of

maintaining the structure for the public use, and at their own cost. I proceed now to consider the question arising under the subsequent statutes of 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, and for that purpose I shall assume that the following passage from the judgment of Brett, L.J. is in fact accurate: "That which is found to be a new street consists only of the width of the footway and carriage-way. The walls, which are along the whole length of the bridge on either side, are no more part of the street than houses would be which bound the street. They form the street, but are no part of the street. They are walls supported by brickwork, or other permanent work fixed into the land." And I shall further assume that the walls of the bridge rest on a structure fixed into land belonging to the company, and that, as such, the walls represent land in legal and technical phraseology, and that the ownership of both land and walls is in the company. The question then is, whether the company is liable to be rated in respect of these fence walls. Every owner of land bounding or abutting on the street is not necessarily liable to be rated—I may refer to *Plumstead Board of Works v. British Land Company* (*ubi sup.*), and to other authorities which have been cited—but only such owners as come within the interpretation clause, sect. 250 of the first of the two Acts, which declares "owner" to mean the person for the time being receiving the rack rent, or who would receive the same if let at a rack rent. Then is this company in respect of these fence walls the owner of land within that meaning? In my judgment they are not such owners. The bridge is by the statute dedicated to public use, and its fence walls are provided for public protection; and if the ownership and control of the walls is in the company, it is so for public purposes, and subject to the obligation of perpetual maintenance, unless and until some other good and sufficient fences shall be provided by the company instead for the public protection. The company could not let the walls at a rack rent; and if they might use them for any purpose it must be a use subordinate to the public purposes to which the bridge as a structure is in its whole devoted. If the view that I have taken is correct, it is unnecessary to consider the cases which have been cited, or the reasons given in the Court of Appeal for the judgment now under consideration; but I desire to say that, having heard the judgment of Lord Watson, I concur in his criticism on the authorities which he has cited, and in the final conclusion at which he has arrived.

*Order appealed from reversed; order of the Queen's Bench Division restored; cause remitted.*

Solicitor for the appellants, *O. A. Curwood*.  
Solicitor for the respondents, *B. Ellis*.

H. OF L.]

DOBBS v. THE GRAND JUNCTION WATERWORKS COMPANY.

[H. OF L.]

Aug. 2, 3, 7, and Nov. 30, 1883.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN, WATSON, BRAMWELL, and FITZGERALD.)

DOBBS v. THE GRAND JUNCTION WATERWORKS COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Water rate—Basis of assessment—Annual value—Rateable value.**The expression "annual value" of property in an Act of Parliament must, prima facie, be taken to mean the net annual value after deducting the necessary burdens upon the property.**One of the special Acts of the respondent company (7 Geo. 4, c. cxl.) provided that water was to be supplied at a scale of rates graduated according to the rents of the houses supplied, and by sect. 27 the rates were to be payable "according to the actual amount of the rent, where the same can be ascertained, and where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor's rate is computed." By a later special Act (15 & 16 Vict. c. clvii., s. 46) water was to be supplied at the following rates, "where the annual value of the dwelling-house shall not exceed 200l. at a rate not exceeding 4 per cent. per annum on such value, and where such annual value shall exceed 200l., at a rate not exceeding 3 per cent. per annum." In the case of a house held for a long term of years at a ground rent:* *Held (reversing the judgment of the court below), that whether the words of the later Act had or had not the same meaning as those in the earlier Act, the water rate should not be calculated on the gross annual value, but on the rateable value appearing in the assessment to the poor rate.**Colvill v. Wood (2 O. B. 210) explained.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Coleridge, C.J., Baggallay and Lindley, L.JJ.) reported in 10 Q. B. Div. 337, and 47 L. T. Rep. N. S. 504; which had reversed a judgment of the Queen's Bench Division (Field and Bowen, JJ.) reported in 9 Q. B. Div. 151, and 46 L. T. Rep. N. S. 816, upon a case stated by a metropolitan police magistrate in pursuance of the Act 20 & 21 Vict. c. 43.

The case raised the question as to the basis on which the waterworks companies of the metropolis are entitled to assess their rates upon the occupiers of houses within their respective districts. The respondents claimed a right to rate the appellant upon the "gross annual value" of the house, No. 34, Westbourne-park, in the parish of Paddington, of which he was the owner and occupier, and their claim was resisted by the appellant, who contended that the company were only entitled to rate him on the amount of the "net annual value" of the property. The appellant was the occupier of a house, No. 34, Westbourne-park, in the parish of Paddington, and was possessed thereof for a term of ninety-seven years from the 25th March 1852, under a lease dated the 31st Dec. 1853, at a ground rent of 15l. per annum, the lease containing, among other covenants, a covenant by the lessee to repair and insure. The house was within the district which the respondents were entitled to supply with water. The respondents were incorporated by Act of Parliament, and their rights,

privileges, and liabilities are controlled by several Acts of Parliament, and among others by the Act 7 Geo. 4, c. cxl. By the 27th section of that Act it is provided, among other things, that the rate to be levied by the company "shall be payable according to the actual amount of the rent, where the same can be ascertained, and where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor's rate is computed in the parish or district where the house is situated." By the 46th section of the Act 15 & 16 Vict. c. clvii., it was provided that the company should be entitled to levy a rate upon the "annual value" of the houses they supplied. By sect. 4 of the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), the expressions "gross value" and "rateable value" are thus defined: "The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rent charge, if any, and the landlord undertook to bear the cost of the repairs and insurance and other expenses, if any, necessary to maintain the hereditament in a state to command that rent. The term 'rateable value' means the gross value after deducting therefrom the probable average cost of repairs, insurance, and other expenses as aforesaid." The "gross value" and the "rateable value" of the appellant's premises, as appearing in the valuation list for the time being in force under the Valuation (Metropolis) Act 1869, were 140l. and 118l. respectively. The respondents claimed a right to charge the appellant for water supplied by them for domestic purposes at the rate of 4l. per cent. upon the gross value of 140l., and the appellant disputed such claim, contending that the basis upon which the charge was claimed to be made was erroneous, and that it should have been made on the net annual value of 118l. The case was referred to the decision of a magistrate at Marylebone Police-court, who decided in favour of the company, but granted a special case for the opinion of the Queen's Bench Division upon the question of law as to whether he was right in deciding that sect. 46 of the 15 & 16 Vict. c. clvii. was applicable, and that the "gross value," as interpreted by the Valuation (Metropolis) Act 1869, was the proper basis of assessment, or whether he should have decided that such basis should be the rateable value of the premises. The special case came on for argument in the Queen's Bench Division in March 1882, when the Court reversed the decision of the magistrate, holding that the 27th section of 7 Geo. 4, c. cxl. was not repealed, and that the rent of the premises could not be ascertained, and that, upon the proper construction of the section in question, the rate should be based upon the rateable value of the premises. The Court of Appeal reversed the judgment of the Queen's Bench Division, holding that the 27th section of 7 Geo. 4, c. cxl., was not repealed, but that, upon the proper construction of such section, the rate should be based upon the gross value.

From this decision the present appeal was brought.

Davey, Q.C., Webster, Q.C., Sutton, and Poley, appeared for the appellant.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Finlay*, Q.C., and *J. Clerk* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Nov. 30.—Their Lordships gave judgment as follows:

LORD BRAMWELL.—My Lords: I think this case may be dealt with as governed by the 15 & 16 Vict. c. clvii., s. 46. For either that is the same in effect as the 7 Geo. 4, c. cxi., s. 27 (which I do not think), or it is different. If the former, the meaning of the two being the same, either may be considered; if the latter, then the provisions of the later Act put an end to the operation of those of the former. In either case it may be disregarded. An Act which says the law in future shall be different from what it was, may not, strictly speaking, be said to repeal it, but it abrogates it for the future. The question then is, what is the meaning of "annual value" in sect. 46 of the 15 & 16 Vict. c. clvii. ? Now, without undertaking an all-sufficient definition, it seems to me that we may safely adopt that in the 6 & 7 Will. 4, c. 96, viz.: "the rent at which they would let free of all usual tenant's rates and taxes, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." This is their value. If a rent exceeding this cost could not be got, they would be valueless. It is as impossible to say that the annual rent without such deduction is the annual value, as it is to say, that the daily hire of a horse is its daily value without deduction for its keep, etc. This is the value, the net, the only value. The *Solicitor-General* said that this was to interpolate the word "net." That is not so. Value means net value; net value means value. He did propose to interpolate a word, "gross." Now gross value is different from value. It is though a convenient, an inaccurate expression, like "gross profits." The difference between what a thing costs and the larger sum it sells for is not profit, if the buying and selling are attended with expense to the trader. Value is net value, and involves those reductions from rent which the appellant claims. I am confirmed in this by the provision in the 15 & 16 Vict., which makes the owner liable for the water rate of small tenements. What is the value of them to him? What he gets minus what it costs him to get it. But the value cannot be greater in the hands of the tenant. *Hamilton v. Bass* (12 C. B. 631) is really in point. Property was let at a gross yearly rent of 75l. 15s. with an agreement that the landlord should pay all rates and taxes. Deducting them and 1l. 6s. for expenses of collection and 4l. for repairs, the net rent was reduced below 60l.; and it was held that this did not qualify thirty 40s.-freeholders; the statute 8 Hen. 6 c. 7, giving the right of voting to those who have "free land or tenement of the value of 40s. by the year at the least, above all charges." Maule, J. said, "If a man has a piece of land by means of which he can enable himself to expend 40s. a year by laying out 5s. upon it—can that be said to be of the value of 40s. a year?" Judgment was given against the vote on this reasoning. In *Cobhill v. Wood* (2 O. B. 210) it was, indeed, held that the fair annual rent of premises is the proper

criterion of their clear yearly value within the statute 2 Will. 4, c. 45, s. 27, without making any deductions for landlord's repairs. But that case was expressly decided on the ground that the vote was given to the occupier, and that it was "obvious the Legislature could never have intended that the right of a tenant to vote should depend on calculations so nice, artificial, and difficult of application" as what the value was to the tenant, that depending "on the use to which he puts it," and other matters.

THE LORD CHANCELLOR (Selborne).—My Lords: I agree, as I believe all your Lordships agree, in the result and generally in the reasoning of the opinion which has just been delivered. I should like to add a few words, because I confess that there is a single point, which is not material to the result, upon which I am not sure that my opinion is quite the same as that of Lord Bramwell. My noble and learned friend, as I understood, expressed an opinion that the meaning of the words "annual value" may be, if it is not, different in the two Acts, namely, 7 Geo. 4, c. cxi. and 15 & 16 Vict. c. clvii. He gives reasons in which I concur, for thinking that if that be so, or whether it be so or not, it makes no difference in the result. I confess that I am not inclined myself to differ from the two courts below upon that particular point. They thought that nothing was really altered by the later Act except the steps of the scale, if I may so name them, but that the words "annual value" in the later Act had the same meaning with those in the earlier Act, and made it competent, if it were necessary or useful, to refer to the earlier Act for the elucidation of that meaning. I confess that that having been the opinion, as I read it, of all the judges in both courts below, I am not prepared to dissent from them. The words in the original Act are "the actual amount or annual value," and then it refers to the computation of the assessment to the poor rate. The words in the later Act are "the annual value" throughout, it being expressly declared that the earlier Act is not to be "repealed, altered, interpreted, or in any manner affected" by the later Act except as expressly follows from it. I cannot but think that reading the earlier Act with the later, the words "the annual value" upon those Acts alone ought to be taken to mean the same thing in the second Act as they mean in the first. That might be unimportant if I agreed (as I do not agree) with the interpretation which is placed upon the words in the first Act by the Court of Appeal; but I confess that the words of the first Act only appear to me to make that which I should have thought reasonably clear without them, more expressly clear, namely, the words "the actual amount or annual value upon which the assessment to the poor's rate is computed in the parish or district where the house is situated." Now, that does not appear to me to relate to the computation in any particular year, but it is as from time to time computed; and whether you look to the principle of valuation upon which the computation of the assessment to the poor rate proceeds in the seventh year of King George IV., or to that which, in order to cut off all opportunity for abuse, was expressly declared by the Poor Rate Valuation Act of the 6 & 7 Will. 4, some years afterwards, it appears to be perfectly clear that the mode of valuing for the purpose of computing the assessment to the poor rate was first to ascertain what is called the gross value,

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then to make the deductions necessary in order to arrive at the real value, and the value having been so ascertained, the computation of the assessment to the poor rate was practically the same whether it did or did not proceed to cut off equally all round a certain part of the value ascertained with reference to the real facts of the case. That appears to affect the assessment merely, but not the principle of valuation or the principle of computation. I agree with Lord Coleridge, C.J., that the Act did not refer to the assessment itself, but referred to the value upon which the assessment was computed. But the value upon which the assessment was computed was in principle and properly the net value and not the gross value; and it is expressly so declared to be, for the purposes of the poor rate, by the later Act of the 6 & 7 Will. 4. I thought it desirable to say as much as I have now said, because, assuming the second Act as far as the use of the words "annual value" is concerned, not to use them in a different sense from the first, I think that the light which the former Act throws upon the latter is not against but will favour the conclusion at which your Lordships have arrived. I entirely agree with Lord Bramwell that, as we have to deal with the word "value," we must take that word in its natural sense, unless there is something in the Act that points to an artificial or arbitrary sense, which I do not discover. Therefore, I understand my noble and learned friend to move that the judgment under appeal be reversed and that the order of the Queen's Bench Division be affirmed.

LORD BLACKBURN: My Lords, I entirely agree with the result which has been arrived at by your Lordships, namely, that the order of the Court of Appeal should be reversed and the order of the Queen's Bench Division affirmed; and I rather think that in substance there is no great difference in the way in which one comes to that result. I quite agree with Lord Bramwell in what he says, that when the second Act was passed reciting the first and saying that it was not repealing it, if it enacted a rule that was contrary to it, it had really the effect of repealing it, and it was the same thing as if it had been repealed. I quite agree also with what the Lord Chancellor has said, namely, that if the former Act had the same meaning as the second one has, which of course involves the question whether the Court of Appeal are right in the construction which they put upon it, it would be a great additional reason for saying, "We hold this construction of the Act." But the real point upon which it seems to me that the whole thing ultimately turns is this, are the words "annual value," as used in this Act, *prima facie* to mean the real annual value expressed and explained in the Parochial Assessment Act, that is to say the value after deducting the necessary burdens upon it, or not? After considering the case, and considering what has been said and the cases which have been cited, I cannot bring myself to doubt that that is the ordinary and proper meaning of the word "value" when it is used, unless there be something to show that the Legislature intended it in a different sense, which of course there might be. And the one point upon which I was rather desirous of saying a word is this, that I do not think it is to be understood (and certainly I myself do not so understand), that

the case of *Colvill v. Wood*, which has been referred to, in which it was decided that in the Reform Act the words "annual value" were to be understood not in this way but as meaning the rent, is in fact overruled—I do not think that it is—I do not inquire at present whether the reasoning there is to my mind quite satisfactory or is not—I do not care how that is—but as regards the Reform Act, after the thirty years that it has been acted upon, I should not hesitate in saying that it is too late to cast any doubt upon it. But the question is whether or not that is the general rule. Now, I quite agree with what has been said by Lord Bramwell as to the circumstances of that Act, and as to giving the franchise to a person, that that might apply to cut down or alter the words used there as meaning something different, and something less than they would have meant generally if they had been used in another way. But if that case is to be considered as saying that in all cases the value is to mean what was contended for by the Waterworks Company here, namely, the rental without regard to the deductions from it in order to make it the real value, I cannot agree with it. I think that the general meaning of these words, unless there be something to alter it, is that which is put upon them by your Lordships, and consequently that the decision of the Queen's Bench Division was the right one, and that the decision of the Court of Appeal was founded upon a mistake and ought to be reversed.

LORD WATSON.—My Lords: I concur. I agree with the process of reasoning by which Lord Bramwell has shown that in his opinion the words "annual value" occurring in the statutes which we have to construe signify annual net value, which I should take to be the primary meaning of the words. I do not understand that the judgment of this House or the opinion of my noble and learned friend goes beyond that, or decides that in every statute, no matter what is the context, these words are to be read as meaning net value.

LORD BRAMWELL.—My Lords: I wish to state that Lord Fitzgerald is unable to attend to-day but has sent to me to say that he concurs in the reasons which I have suggested to your Lordships for this judgment.

*Order of the Court of Appeal reversed. Order of the Queen's Bench Division restored. The respondents to pay the costs of the appeal in the Court of Appeal, and of the appeal in this House.*

Solicitors for the appellant, *Hollingsworth, Tyerman, and Andrewes*.

Solicitors for the respondent, *Bircham and Co.*

# Supreme Court of Judicature.

## COURT OF APPEAL.

May 29 and 30, 1888.

(Before BRETT, M.R., LINDLEY and FRY, L.JJ.)

PEARSALL v. THE BRIERLEY HILL LOCAL BOARD. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Compensation—Settlement by arbitration—Action on award—Right to have amount assessed before question of liability is determined—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 308.*

*By sect. 308 of the Public Health Act 1875 compensation is to be made by the local authority to any person who sustains damage by reason of the exercise of the powers of the Act; "and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration," &c.*

*Plaintiff made a claim against defendants, the local authority, in respect of damage sustained by their raising the level of a street, and an arbitrator was appointed under the Act. Defendants contended that the amount of compensation could not be settled until after the question of their liability had been determined, and attended the reference under protest.*

*The arbitrator awarded compensation and costs to plaintiff.*

*In an action to recover the amount of compensation so awarded and the taxed costs of the reference:*

*Held (reversing the judgment of Bowen, L.J.), that the decision of the question of liability was not a condition precedent to the right to have the amount of compensation assessed by arbitration, and therefore, as on the facts proved at the trial it was shown that defendants were acting in exercise of the powers of the Act, plaintiff was entitled to recover the amount of compensation awarded by the arbitrator and the costs of the reference.*

The plaintiff in this case was possessed of a house and premises in High-street, Brierley Hill, within the urban sanitary district of the defendants, who where the Urban Sanitary Authority of Brierley Hill. The defendants in the course of certain paving operations raised the soil of the street three feet in front of the plaintiff's premises, and otherwise altered the street. The plaintiff alleged that he had sustained damage by reason of the defendants' operations, and made a claim for compensation, and appointed an arbitrator to determine the amount of compensation, and gave notice of such appointment to the defendants. The defendants did not within fourteen days appoint an arbitrator, and the arbitrator appointed by the plaintiff took upon himself the reference as sole arbitrator. The defendants appeared at the reference under protest. The arbitrator awarded a sum of 234*l.* 10*s.* 8*d.* to the plaintiff as compensation, and also directed the defendants to pay the plaintiff's costs, which were taxed at 152*l.* 0*s.* 3*d.*

The action was brought on the award to recover the compensation and costs, amounting together to 386*l.* 10*s.* 11*d.*

The defendants based their defence to the plaintiff's claim on three grounds: first, that the alterations complained of were not alterations effected by them under the powers conferred

upon them by the Public Health Act 1875 (38 & 39 Vict. c. 55), but were nothing more than a restoration to its former level of an ancient highway, which they were legally justified in effecting under their powers as surveyors of highways; secondly, that the award was invalid on the ground that there was a dispute as to the legal liability of the defendants, and the question of liability had not been decided at the time of the arbitration; and thirdly, that the plaintiff's notice of claim was insufficient because it did not specify any amount.

The case came on for trial at the summer assizes in 1882 at Gloucester before Bowen, L.J. without a jury, and was reserved for further consideration.

On the 5th Dec. 1882 the Lord Justice delivered judgment. As to the first ground of defence, he found as a fact on the evidence before him that what had been done was not the restoration of the old road, but an act done by the defendants under the Public Health Act, and therefore decided that point in favour of the plaintiff. As to the second ground of defence, he held that the arbitration was premature, as the question of liability was in dispute and undecided when the award was made, and gave judgment for the defendants on this ground. It therefore became unnecessary to consider the question as to the sufficiency of the claim, which accordingly was not decided.

The plaintiff appealed.

By the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 308:

Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage, or amount of compensation, shall be settled by arbitration, in manner provided by this Act, or, if the compensation claimed does not exceed the sum of twenty pounds, the same may, at the option of either party, be ascertained by, and recovered before, a court of summary jurisdiction.

The power to pave streets, and alter the levels, is contained in sect. 149, and the provisions as to arbitration in sects. 179, 180.

The appeal was argued by *Dosanquet, Q.C.* (*H. Matthews, Q.C.* with him) for the plaintiff; and by *Jelf, Q.C.* and *Anstie, Q.C.* (*Kettle* with them) for the defendants. The arguments are sufficiently referred to in the judgments. The following authorities were cited:

*Reg. v. The Metropolitan Commissioners of Sewers*, 1 E. & B. 694; 22 L. J. 234, Q. B.;

*Reg. v. The Burslem Local Board of Health*, 1 E. & B. 1077; 29 L. J. 242, Q. B.;

*Re Dare Valley Railway Company*, 20 L. T. Rep. N. S. 717; L. Rep. 4 Ch. 554;

*Sutton Harbour Commissioners v. Hutchins*, 21 L. J. 73, Ch.;

*Burgess v. The Northwich Local Board*, 37 L. T. Rep. N. S. 355; and the same case at a later stage of the proceedings, 44 L. T. Rep. N. S. 154; 6 Q. B. Div. 264;

*Reg. v. The Wallasey Local Board*, 21 L. T. Rep. N. S. 90; L. Rep. 4 Q. B. 351;

*Bradley v. The Southampton Local Board of Health*, 4 E. & B. 1014;

*The Bradford Local Board of Health v. Hopwood*, 6 W. E. 818.

BRETT, M.R.—I decide with some hesitation, because I have the misfortune to differ from the view which has been taken by Bowen, L.J., but I have come to the conclusion that this appeal ought

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.



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to be allowed, and that the plaintiff is entitled to recover the amount found to be due to him by the award. Bowen, L.J. decided that the action could not be maintained solely on the ground that the question of liability had not been determined before the amount was determined by arbitration; that is, that it was a condition precedent to the jurisdiction of the arbitrator to award the amount that the question of liability should previously have been determined. It is said on behalf of the respondents that if there is a dispute the right must be decided before there is any arbitration, or else there must be no dispute. Bowen, L.J. did not decide, and it was not argued, that the jurisdiction of the arbitrator only arises where there is no dispute; he decided that where there is a dispute the right must be first determined, and the question now is whether we agree with his decision. The learned Lord Justice did not decide on the words of the Act in their ordinary and grammatical sense, but he gave the Act a particular construction on the ground that it seemed to him after consideration that it would give rise to an obvious and insurmountable inconvenience to construe the Act in any other way, and he therefore either interpolated words by implication, or else gave a particular meaning to the words of the Act different from that which they would naturally bear. The argument before us did not turn very much on the words of the section, for the learned counsel for the respondents rather avoided them, and argued more on the ground of the inconvenience which it was contended would arise if the ordinary meaning of the words were adopted. It is said that the Act now before us is different from the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), and no doubt the two statutes are different from one another in some respects; but a construction has been put on the Lands Clauses Consolidation Act which cannot now be denied to be right, and this construction is the same as that which the appellant seeks to put on the Act now before us. It is said that the effect of adopting this construction would be to produce inconvenience; but, if that is so, the same inconvenience would equally arise in cases under the Lands Clauses Consolidation Act. It is said that, if the parties go to arbitration before they have settled the question of liability, this would give rise to expense which might be thrown away, because the inquiry before the arbitrator would prove futile if it should afterwards be decided that no liability existed; but that would be so in cases under the Lands Clauses Consolidation Act. If the parties go to arbitration on an erroneous claim, the claimant will be defeated, because when an action is brought on the award he will fail to prove his right, and therefore will not obtain judgment, and if a right is proved which is obviously different from that on which the award is based, the claim must fail. If we construe the section to the effect that the question of liability must be tried before the question of amount the same difficulty arises, for the trial of the question of right may require a long and expensive investigation, which may turn out to be futile in the event of the arbitrator finding that nothing is due, while the question of amount may be simple and easy. In whichever way, therefore, the statute is construed there must be separate inquiries, and the inconvenience is equal

in both cases. Therefore, the argument of inconvenience does not enable us to construe the Act of Parliament otherwise than according to the ordinary meaning of the words. The effect of doing so would be to alter the construction which has been placed upon the Lands Clauses Consolidation Act, and the inconvenience would be the same either way. I think, therefore, that the construction should be adopted which gives their ordinary meaning to the words of the statute. Then as to the decisions. The case of *Reg. v. The Metropolitan Commissioners of Sewers* (1 E. & B. 694) turned on a statute, which is to my mind substantially the same as that now before us. It is said that we should have to overrule that decision if we were to allow the appeal in the present case. It is said that the result in that case was arrived at on the construction of 11 & 12 Vict. c. 112, because it is in different terms from the Lands Clauses Consolidation Act. I cannot understand Mr. Anstie's argument on that point. He suggested a difference between two statutes, which give a right and a remedy, depending on whether the right is given by express words or by necessary implication from the mode in which the statute is worded. I think that if the right is given by necessary implication that is the same as if it were given by express words written in the statute. But I do not think *Reg. v. The Metropolitan Commissioners of Sewers* is inconsistent with our decision in the present case. I agree that we must consider the case with regard to previous decisions, and if the case before us turns on the same point as the previous decisions, we must be guided by the reasons there given. But in *Reg. v. The Metropolitan Commissioners of Sewers* the ground and reason of the decision was that the arbitrator had determined the question of liability, and not only the question of the amount of compensation; I cannot see that we are called upon to interfere with that judgment. I have no doubt that in that case the award was bad on the ground on which it was contested, and on which the Court of Queen's Bench would not act upon it. Also in the case of *Bradley v. The Southampton Local Board* (4 E. & B. at pages 1017, 1019) Lord Campbell said that the ground of the decision in *Reg. v. The Metropolitan Commissioners of Sewers* was that the award was bad, because the arbitrator had taken upon himself to determine the question of liability. It seems to me that the case of *Reg. v. The Burslem Local Board of Health* (1 E. & E. 1077) does not raise the question. I will not go through all the cases, for it is admitted that the point has never been decided, and therefore we are not bound by authority. Then, if the argument based on inconvenience is gone, what is left but the words of the statute? If we decide this case—as I think we must—in the same way as the cases under the Lands Clauses Consolidation Act have been decided, we so decide not because this statute is exactly like the Lands Clauses Consolidation Act, or because we construe it by the Lands Clauses Consolidation Act, but because this statute leads to the same result as the Lands Clauses Consolidation Act. We decide not on the Lands Clauses Consolidation Act and the decisions which have been given on it, but on the words of the Act on which the question in the present case arises. I decide that the words of the Act must be read according to their ordinary

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grammatical meaning, and we cannot add to or alter them. The question is whether, on the words of the statute, there is anything to show that an inquiry can only be held as to the amount of compensation, either where there is no dispute as to liability, or else, if there is a dispute, after it has been settled; that is, whether it is a condition precedent to the holding of the inquiry that the dispute shall have been settled. The words of sect. 308 are, "any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act." There is no limitation contained in those words, and no statement as to time; nothing need take place before the arbitration except the dispute. I am therefore of opinion that the determination of one question is not a condition precedent to the determination of the other, and therefore the arbitration as to the amount of compensation can be held before the question of liability is settled. For these reasons I cannot agree with the judgment of Bowen, L.J., and I think that the fact that the amount has been determined before the liability is no bar to the right to recover, and therefore the action can be maintained. In the action there can be no difficulty in determining the question of liability. As to the objection taken to the claim that no specific amount is mentioned, I think there is nothing in it. I think the procedure on all the statutes is uniform. There may be the alternative forms of procedure, but on all the statutes it is alike.

LINDLEY, L.J.—I am also of opinion that the plaintiff is entitled to recover. The question is whether the award is binding on the defendants. The real substantial question as to whether the local board could justify what they did as surveyors was decided on further consideration after the trial. The question argued before us was, whether it was incumbent on the plaintiff, before proceeding to obtain an award as to the amount of compensation, to take proceedings to get the question of the defendants' liability determined. This must depend on the words of the Act. There is nothing said in sect. 308 about the order in which the proceedings are to be taken. The section does not say when the compensation is to be assessed, or that the question of liability must be determined first. Why then should we say more than the Act says? Why should we say that it is a condition precedent that the person claiming compensation should have the question of liability settled before the amount of compensation can be assessed? I do not see how, under the language of the Act, we can impose any such obligation. I cannot see what the plaintiff has done wrong, or what he has omitted that he ought to have done. We must look at the literal language of the Act, which in my opinion ought to conclude the case. But it is said that the decisions on the Sewers Act (11 & 12 Vict. c. 112) and on the old Public Health Act (11 & 12 Vict. c. 63) are authorities the other way. Mr. Jelf and Mr. Anstie referred to the cases of *Reg. v. The Metropolitan Commissioners of Sewers* (1 E. & B. 694) and *Reg. v. The Burslem Local Board of Health* (1 E. & B. 1077). As to the case of *Reg. v. The Metropolitan Commissioners of Sewers*, the date of the decision is important. It was decided in 1853, and at that time there was a difference of opinion as to the proper method of proceeding under the Lands Clauses Consolidation Act. It was not settled

then whether a public body who took part in proceedings for the settlement of compensation was not precluded from afterwards denying its liability, and it was not settled what the functions of the arbitrator were. It is now settled that a party who takes part in settling the amount of compensation is not precluded from afterwards disputing the question of liability, and it is now settled that the functions of an arbitrator and of a jury are narrowed to settling the amount of compensation, and that the party against whom the award is made is not prejudiced by it in contesting the question of liability. In the case of *Reg. v. The Metropolitan Commissioners of Sewers*, the arbitrator unquestionably assumed to determine the question of liability. The question there was whether the Commissioners of Sewers were liable to make compensation out of the rates; they said they were not, because the liability rested with the contractors. The arbitrator determined that the commissioners were liable, and the court was asked for a *mandamus* to compel them to make compensation. The decision there was unavoidable, but it is now contended that it goes to this, that the award was bad because the arbitrator could not ascertain the amount of compensation until after the question of liability had been settled. No doubt there are expressions which are favourable to that view, but in *Bradley v. The Southampton Local Board of Health* (4 E. & B. 1014) Lord Campbell expressly says that in *Reg. v. The Metropolitan Commissioners of Sewers*, the damage was admitted, and the only question to be decided was that of liability. Also in the case of *Reg. v. The Burslem Local Board of Health* (1 E. & B. 1077) the amount of compensation was not in dispute. It is impossible to say that the present case is governed by *Reg. v. The Metropolitan Commissioners of Sewers*, or *Reg. v. The Burslem Local Board of Health*. In *Burgess v. The Northwich Local Board* (37 L. T. Rep. N. S. 355) the court refused to set aside the award, though the board disputed their liability; and in *Uitley v. The Todmorden Local Board of Health* (31 L. T. Rep. N. S. 445) no objection seems to have been taken to assessing the compensation first. On the other hand, in *Reg. v. The Wallasey Local Board* (L. Rep. 4 Q. B. 351) a *mandamus* was applied for before the compensation was assessed, and the application was successful. I see no reason why the practice under the Lands Clauses Consolidation Act should not be applied to cases arising under a similar Act. The course of procedure is well settled. The question whether the court would refuse a *mandamus* on the ground that an action lies on the award is another matter.

Fry, L.J.—I entirely agree. I will first look at the words of the Act, and it does not appear to me that sects. 179 and 180 in any way explain sect. 308. The result is peculiar. The claimant may have several questions which he must get settled before he can obtain compensation, but only two of them are determined by the award settling the amount of compensation. The claimant is *dominus litis* so far as regards the order in which he will have those questions determined, for the Act has not said that any of them must be determined before the others. Then is there any such balance of convenience or inconvenience as to induce us to construe the

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Act in a way different from its natural meaning? It appears to me that there is no such balance. It is said that it is inconvenient to determine the question of the amount of compensation when it may turn out to be immaterial in the event of the claimant failing to establish his right to compensation at all; but in the same way it may be said that it is inconvenient to determine the question of title to compensation when it may turn out immaterial if it is afterwards ascertained that no damage has been done for which compensation is payable. I cannot say which would be the most inconvenient. Therefore I think on that ground there is no reason for putting any restriction on the claimant's right. It is said that there is authority for the respondent's contention. There are two lines of cases upon analogous statutes. The decisions in *Reg. v. The Metropolitan Commissioners of Sewers* (1 E. & B. 64) and *Reg. v. The Burslem Local Board of Health* (1 E. & B. 1077) show that it was thought best that the question of liability should first be settled; but the other cases, which were decided on the Lands Clauses Consolidation Act, show that it was there considered right that this question should be determined last. In my opinion, therefore, there is nothing to take away the claimant's right to try the question of amount first. I do not say whether he could try the question of right first if he preferred doing so. I rather think he might, subject to this, that an application might be made for a *mandamus* to compel him to proceed to determine the question of amount, the granting of which would be in the discretion of the court.

*Judgment reversed.*

Solicitors for the plaintiff, *Mackeson, Taylor, and Arnould*, for *Joseph Higgs*, Brierley Hill.

Solicitors for the defendants, *Byrne and Lucas*, for *Homfray and Halberton*, Brierley Hill.

June 26 and 27, 1883.

(Before BRETT, M.R., LINDLEY and FRY, L.JJ.)

THE MIDLAND RAILWAY COMPANY v. THE WITHERINGTON DISTRICT LOCAL BOARD. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Public Health Act 1875 (38 & 39 Vict. c. 55), s. 264*—Urban authority—Expense of repairing street—Payment by mistake—Action for money received—Notice of action—Things done or omitted to be done under Act.

Defendants, who were an urban authority, gave notice to plaintiffs, under sect. 150 of the *Public Health Act 1875*, to execute certain works, and, on the notice not being complied with, defendants executed the works themselves, and demanded from plaintiffs their proportion of the expenses, which plaintiffs paid.

Both parties then believed that the street where the works were executed was a highway not repairable by the inhabitants at large. It was afterwards discovered that it was not such a highway, and plaintiffs sued to recover the amount which they had paid, as money received by defendants, having been paid by plaintiffs under a mistake of fact.

Held (affirming the judgment of North, J.), that plaintiffs' claim was for something "done or intended to

be done, or omitted to be done under the provisions of" the *Public Health Act 1875*, within the meaning of sect. 264, and therefore, as the notice of action did not comply with the requirements of that section, and the action had not been commenced within six months next after the accruing of the cause of action, plaintiffs were not entitled to recover.

THE plaintiffs, the Midland Railway Company, had made a line of railway in the township of Witherington, and within the district of the defendants, the Witherington Local Board. This line of railway abutted upon a lane called Lapwing Lane. The defendants, who were the urban sanitary authority for the district, determined to pave, flag, and sewer Lapwing Lane under the *Public Health Act 1875* (38 & 39 Vict. c. 55). In consequence they gave notice to the plaintiffs as owners and occupiers of land abutting upon the lane, requiring them to sewer, level, pave, flag, and channel a portion of the lane within three months from the date of the notice. This notice not being complied with the defendants did the work themselves, and demanded from the plaintiffs their proportion of the expenses incurred. The plaintiffs' proportion of the expenses was apportioned by the surveyor at 1146l. 4s. 7d., which sum was paid by the plaintiffs to the defendants on the 30th Oct. 1880. Both the plaintiffs and the defendants then believed that the lane in question was not a highway repairable by the inhabitants at large. It was afterwards ascertained that both parties had been mistaken in so believing.

On the 2nd Feb. 1882 the plaintiffs gave notice of action to the defendants, but the notice did not state the name and place of abode of the plaintiffs' solicitor, and therefore did not comply with the requirements of sect. 264 of the *Public Health Act 1875*. (a)

The writ was issued on the 3rd March 1883, and therefore not within six months next after the accruing of the cause of action, as required by the same section.

(a) 38 & 39 Vict. c. 55, s. 264: A writ or process shall not be sued out against or served on any local authority, or any member thereof, or any officer of a local authority, or person acting in his aid, or anything done or intended to be done or omitted to be done under the provisions of this Act, until the expiration of one month after notice in writing has been served on such local authority, member, officer, or person, clearly stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause, and on the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served; and unless such notice is proved the jury shall find for the defendant. Every such action shall be commenced within six months next after the accruing of the cause of action, and not afterwards, and shall be tried in the county or place where the cause of action occurred, and not elsewhere. Any person to whom any such notice of action is given as aforesaid may tender amends to the plaintiff, his attorney or agent, at any time within one month after service of such notice, and, in case the same be not accepted, may plead such tender in bar; and in case amends have not been tendered as aforesaid, or in case the amends tendered are insufficient, the defendant may, by leave of the court, at any time before trial, pay into court under plea such sum of money as he may think proper; and if upon issue joined, or upon any plea pleaded for the whole action, the jury find generally for the defendant, or if the plaintiff be nonsuited or judgment be given for the defendant, then the defendant shall be entitled to full costs of suit, and have judgment accordingly.

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The plaintiffs' claim was for money received, and they sought to recover the above-mentioned sum of 1146l. 4s. 7d., as money paid to the defendants under a mistake of fact. The defendants relied on the insufficiency of the notice of action, and the fact that the action was not brought within six months next after the accruing of the cause of action.

The plaintiffs in their reply set up a waiver of the provisions of the statute, alleged to be contained in certain letters which had passed between the parties.

At the trial the jury found that Lapwing Lane was a highway repairable by the inhabitants at large.

North, J. on further consideration gave judgment for the defendants, and the plaintiffs appealed.

*Gully, Q.C.* and *S. Taylor* for the plaintiffs in support of the appeal.—The first question is, whether the defendants are entitled to one month's notice of action, and to have the action brought within six months' under the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 264, in a case where they are sued to recover back money which has been paid to them under a mistake of fact. The provisions of the section in question only apply to actions of tort, and not to actions of contract, as is shown by the last clause of the section enabling defendants to tender amends and plead the tender in bar; such a provision can only be intended to apply to actions of tort. If the section can apply at all to an action for money received, it can only be where the circumstances are such that an action for tort would lie, but the plaintiff has elected to waive the tort, and sue in this form of action. It is true that this section contains the words "or omitted to be done," which were not in the former Acts, but this makes no difference in the construction, and these words cannot have the effect of bringing the present case within the section, if it is a case which would not have been within the former statutes. It was not necessary, therefore, to bring the action within six months, and the defects in the notice of action are immaterial, for, the case not being within the statute, no notice of action was necessary. Even if this contention is not well founded, the plaintiffs are entitled to succeed, for on the true construction of the correspondence the defendants have waived compliance with the provisions of the statute. They referred to

*Irving v. Wilson*, 4 T. R. 485;  
*Wallace v. Smith*, 5 East, 115;  
*Umphalby v. McLean*, 1 B. & A. 42;  
*Waterhouse v. Keen*, 4 B. & C. 200;  
*Greenway v. Hurd*, 4 T. R. 553;  
*Davies v. The Mayor of Swansea*, 8 Ex. 808; 22 L. J. 297, Ex.;  
*Davies v. Ourling*, 8 Q.B. 286;  
*Selmes v. Judge*, L. Rep. 6 Q. B. 724; s.o. nom.  
*Judge v. Selmes*, 24 L. T. Rep. N. S., 904;  
*Newton v. Ellis*, 5 E. & B. 115; 24 L. J. 387, Q. B.;  
 16 L. T. Rep. N. S. 324;  
*Poulsom v. Thirst*, L. Rep. 2 C. P. 449;  
*Wilson v. Mayor and Corporation of Halifax*, 17 L. T. Rep. N. S. 660; L. Rep. 3 Ex. 114;  
*Flower v. The Local Board of Low Leyton*, 36 L. T. Rep. N. S. 760; 5 Ch. Div. 347.

*Ambrose, Q.C.*, *Le Riche*, and *Heywood* appeared for the defendants, but were not called upon.

*BRETT, M.R.*—In this case an action was brought by the Midland Railway Company to recover

money which was alleged to have been paid under a mistake of fact. It is to be taken for the purpose of this argument that it was so paid, and that if the right procedure were adopted the plaintiffs could recover. The question is, whether they are prevented from recovering because the notice of action was insufficient, and the action was not commenced within the time limited by sect. 264 of the Public Health Act 1875 (38 & 39 Vict. c. 55). This depends on the construction of that section, and its application to the facts of the case. The facts are these: The local board, supposing that the road was not a highway repairable by the inhabitants at large, exercised certain rights which they supposed belonged to them, and gave notice to the railway company requiring them to make sewers, and execute other works in the road in question, and gave notice that they would do the work themselves if it was not done by the company, and would charge the company with the expenses. The local board accordingly did the work, and charged the railway company with the expenses, and the railway company, acting under a mistake equally with the local board, paid the amount so charged against them. All through these transactions it is obvious that the defendants supposed they were exercising the powers conferred on them by the statute; at each step they deliberately took proceedings which they could have no right to take unless it were by virtue of the powers given by the Act. The mistake was afterwards found out, and the plaintiffs demanded the return of the money which they had paid, and the defendants refused to return it. I am inclined to think that in so refusing they still thought they were acting under the Act, but it is unnecessary to decide this. The plaintiffs brought their action for money received, and the action was commenced more than six months after the cause of action, whatever it was, accrued. The cause of action might be said to have accrued on payment of the money, or possibly it might be said to have accrued when the demand for repayment was refused; but, however this may be, if the case is within sect. 264, the action was commenced too late. The question is whether the defendants are entitled to notice of action, and to the limitation of six months, in this action for money received. It is obvious that the words "every such action" in the second paragraph of the section refer to an action against a local authority "for anything done or intended to be done or omitted to be done under the provisions of this Act." The question is, whether this action comes within the terms, for the second paragraph of the section provides that "every such action shall be commenced within six months next after the accruing of the cause of action, and not afterwards." I am inclined to think that the person who drew the section had his mind directed to an action of tort rather than an action of contract, for it goes on to provide that a person who has received notice of action may tender amends and plead such tender in bar. This provision looks as if it were directed to the case of an action which sounds in damages rather than an action to recover a debt. But the real question to be considered is, what is the meaning of the whole section, and I am prepared to say that the section applies to every action, whatever its form may be, where the cause of action is something done or intended to be done, or

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omitted to done, under a *bond fide* belief that it was done or omitted under the provisions of the Act. It is urged that the section applies only where the action might be brought for a tort, but the tort is waived, and the action is brought for money received, and that in cases where the action is brought for money received, but the plaintiff could not sue for damages for a tort, the section does not apply. I think that is too narrow a view, for the section is applicable wherever the action is brought to obtain relief for anything done, or intended to be done, or omitted to be done under the provisions of the Act. It is said that the action is brought on a contract, and that wherever there is a contract and an action in respect of the contract the section does not apply. I think that is true where the thing is done or omitted to be done by virtue of a previous contract, as in the case that has been cited (*Davies v. The Mayor of Swansea*, 8 Ex. 808), where building materials were seized. There the materials were seized under a contract contained in a deed made between the plaintiff and the defendants, which gave the defendants power to do so in certain cases; therefore they did not take the materials by virtue of the Act. There was nothing in the Act which gave them power to seize the materials. Here it is said that because the action is for money received there was an implied contract to pay back the money; but it seems to me that this is a fallacy, for there never was a contract. When the old forms of action existed a difficulty arose as to the question under which form of writ this kind of action should be brought, and the judges held that it came under the writ for money had and received, as if there were a contract, not because there was a contract. They said it was a *quasi* contract, which shows there was not in fact a contract. The action for money had and received was applied by the common law courts for different purposes, such as the case of money paid under a mistake of fact, or the case of a toll demanded when in fact there was no right to exact a toll. How can anyone say there was a contract there? The parties were at arm's length. Therefore the fact that the action is in form for money received does not show that the matter in dispute arose out of a contract. The question is, whether what the defendants did was done under the Act, and they were therefore entitled to notice of action, and to have the action brought within six months. Then it is said that the provision enabling defendants to tender amends shows that actions like the present were not intended to come within the section; but, though I think that provision probably was introduced with a view to actions of tort, still it seems to me that the use of the word "amends" alone is not strong enough to exclude a case that otherwise would come within the previous words. Then as to the cases, I think none of them are inconsistent with the view we take. In *Waterhouse v. Keen* (4 B. & C. 200) the judgments show that even on the old Acts in a case like the present notice of action was necessary, but the judges in giving their reasons show that they would not be bound by the mere form of the action, but would consider the substance. We cannot decide here in favour of the plaintiffs without overruling *Selmes v. Judge* (24 L. T. N. S. 904; L. Rep. 6 Q. B. 724), which is in accord with the present case. It is said

that the attention of the judges there was not called to the point, but I cannot think it was overlooked. I cannot disagree with that decision. I think it was right. There the Act of Parliament did not contain the words "omitted to be done." Then those words were added in the new Act. It is said that those words have no meaning; but the draftsman must have known of the cases, and it was always argued that the statute did not apply to acts of omission. It seems to me that, in order to avoid this contention, these words were put in. Even if I thought that without those words the plaintiffs would prevail, I should be of opinion that with the words in the Act they cannot. I think, therefore, that the judgment of North, J. was right, and ought to be affirmed. As to waiver, I think the point cannot be maintained, for there was no mis-statement on the part of the defendants.

LINDLEY, L.J.—I am of the same opinion. The action was brought to recover money paid for the expenses of repairing a street, which afterwards turned out to be a highway repairable by the inhabitants at large. I assume that the circumstances are such as would entitle the plaintiffs to recover but for the question which we are now deciding. The defence raised is under sect. 264 of the Public Health Act 1875 (38 & 39 Vict. c. 55). The defendants rely on that section, and say that the plaintiffs cannot maintain this action because the notice of action which has been given does not comply with the requirements of the statute, and more than six months have elapsed from the accruing of the cause of action. These two defences turn on a few words in sect. 264, namely, "for anything done, or intended to be done, or omitted to be done under the provisions of this Act;" if the action was so brought the defendants are entitled to succeed. All that was done by the defendants was done *bond fide*, and they would have been in the right if the facts had been as they thought. All was done under the impression that the defendants were acting within their province as the local authority, and that is how the money came to be paid. Now what gives the plaintiffs the right to bring an action? The taking and keeping of the money. I cannot separate the taking from the keeping. The taking of the money was an Act done under the provisions of the Act of Parliament, and if the keeping is the cause or a main part of the cause of action, the defendants are sued for keeping money which they have claimed under the powers conferred by the Act. Taking either view I think the true construction is, that the case comes within the words of sect. 264. This view is supported by the cases of *Waterhouse v. Keen* (4 B. & C. 200) and *Selmes v. Judge* (L. Rep. 6 Q. B. 724). On a minute analysis there may be some difference between the facts of those cases and those of the present case, but substantially they are similar. I decline to decide the case on the difference between actions of contract and of tort. The distinction as to this is fine, and will be found fully discussed in *Brown v. Boorman* (11 Cl. & F. 1). What we have to consider is this; did the defendants take and keep this money under the *bond fide* belief that they were entitled to take and keep it? I think they did, and therefore that sect. 264 applies, and I think it clear that the defendants have done nothing to deprive them of their right to set up the defence under the statute.

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I am therefore of opinion that the judgment is right and ought to be affirmed.

FRY, L.J.—I can express my concurrence in the judgments which have been delivered in a very few words. I think sect. 264 means anything done, or intended or omitted to be done under colour of the provisions of the Act. Then to what is the inquiry to be directed? To the substance, not the form of the action. What is the substantial thing for which this action is brought? It is the unlawful taking and keeping of the money. The defendants thought they did this under the Act. I am therefore of opinion that sect 264 applies. In *Waterhouse v. Keen* (4 B. & C., at page 213) Holroyd, J. said: "The action in form is for money had and received to the plaintiff's use, but in substance it is brought to recover money alleged by the plaintiff to have been unlawfully taken by the defendant as toll under colour of the authority of the Act. The demanding and taking the toll was an act done in pursuance of the Act. This is a case therefore within the words of the Act." In *Selmes v. Judge* (L. Rep. 6 Q. B., at pages 727, 728) Blackburn, J. said: "The only illegal act done by the defendants was to make an informal rate; they proceeded to collect it, and received from the plaintiff the amount assessed upon him; in these transactions it is clear that the defendants intended to act according to the duties of their office as surveyors, although they mistook the legal mode of carrying out their intention." It is said on behalf of the plaintiffs here that sect. 264 does not apply because illegal reception of money is not an act done or intended to be done under the provisions of the Act, unless the person receiving the money has some kind of power to take it, in which case it is said that if the power were exercised there would be a tort. That is an argument on the form of action. As to the question of waiver, I have nothing to add.

*Judgment affirmed.*

Solicitors: for plaintiffs, *Beale, Marigold, and Beale*; for defendants, *Chester and Co.*, for *H. T. Crofton*, Manchester.

### CROWN CASES RESERVED.

Saturday, Nov. 24, 1883.

(Before Lord COLERIDGE, C.J., DENMAN, HAWKINS, WILLIAMS, and MATHEW, JJ.)

REG. v. G. HOLMES. (a)

*Jurisdiction—False pretence—Posting the letter containing the pretence—Obtaining of money thereby.*

*A false pretence was made by letter in N., England, and posted there to, and received by, a person in France. In consequence of the letter that person drew a cheque in France, payable at N. in England, and sent it to the prisoner at N. in England, who cashed the cheque in England.*

*Held, that the prisoner was properly indicted and tried at N. in England.*

THIS was a case stated for the opinion of this Court by Huddleston, B.

The prisoner was tried and convicted at the Assizes at Nottingham, on Thursday, the 26th July 1883, for obtaining from Louis Gabet Gabet 150*l.* by false pretences.

The prisoner, who was a machine manufacturer at Nottingham, had entered into a contract at Caudry, in France, to build at Nottingham, for Gabet, a Lovas lace machine, to be completed within a certain time, to be paid for on certain terms, and to be sent to France to Gabet.

The prisoner had written, at Nottingham, a letter containing the pretence which was proved to be false, in consequence of which the prosecutor had parted with his money.

The letter was written and posted at Nottingham, and received by the prosecutor Gabet at Caudry, in France, from whence a draft for 150*l.* was sent, according to and in compliance with the directions of the prisoner contained in his letter. The draft was received by the prisoner in Nottingham, and cashed there.

It was objected on the part of the prisoner that, as the false pretence was made in England, but did not operate to obtain the money until it reached its destination in France, no offence was committed over which the English court had jurisdiction.

For the prosecution it was contended that, as the representation was made in England, and the money received there, the offence was within the English jurisdiction.

*Reg. v. Cooke* (1 Fos. & Fin 64) was quoted.

The only question for the Court is, whether the prisoner could be indicted and tried for the offence in Nottingham. If he could, the conviction is to stand; if not, the conviction is to be quashed.

J. W. HUDDLESTON.

No counsel appeared to argue the case on either side.

LORD COLERIDGE, C.J.—I think that when the facts are ascertained there can be no reasonable doubt that the conviction was proper. The false pretence was made by means of a letter written and posted in Nottingham, and sent to a gentleman in France, who, in consequence of it, drew a cheque in France for 150*l.* payable in Nottingham, and sent it to the prisoner at Nottingham, and he received the money there. For this offence the prisoner was indicted and tried in the county of Nottingham, and the question put to this court is, whether there was jurisdiction in the court of assize at Nottingham to try the prisoner. I confess that it did not occur to me that there could be any doubt upon the question, nor, upon consideration, does there appear to be any. The pretence was made in the county of Nottingham, for it was held in *Rees v. Burdett* (4 B. & Ald. 95) and other cases that the delivery at the post-office of a sealed letter inclosing a libel, is a publication of the libel at the place of posting; and the money, which was the result of the false pretence, was obtained in Nottingham. Therefore the two necessary ingredients of the offence both took place in the county where the prisoner was tried. What was done in the meantime between the making of the offence and the obtaining of the money is immaterial, for all the necessary ingredients to constitute the offence took place at Nottingham. The conviction, therefore, is right, and must be affirmed.

DENMAN, J.—I am of the same opinion. This case appears to me to be covered by *Reg. v. Cooke* (1 Fos. & Fin. 64).

HAWKINS, WILLIAMS, and MATHEW, JJ. concurred.  
*Conviction affirmed.*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

CR. CAS. RES.]

REG. v. HOLLIS—REG. v. THE JUSTICES OF MIDDLESEX.

[CT. OF APP.]

Saturday, Nov. 24, 1883.

(Before Lord COLERIDGE, C.J., DENMAN, HAWKINS, WILLIAMS, and MATHEW, JJ.)

REG. v. HOLLIS. (a)

*Larceny—Binging the changes—Money obtained by a trick.*

The prisoner and another person went to an inn. The prisoner asked the barmaid for whisky. He put down half a sovereign, and received 9s. 6d. in silver in change. He then asked for the half-sovereign back, saying he thought he had change. She gave it back. His companion then asked for a cigar. She served him with it. The prisoner then put down 10s. in silver and a half-sovereign, asking the barmaid to give him a sovereign for it, which she did. His companion kept on engaging the barmaid's attention. The prisoner never returned the 9s. 6d. which the barmaid gave him in the first instance. The barmaid never intended to part with her master's money except for full consideration.

The prisoner having been convicted on an indictment for larceny of the money, the Court sustained the conviction.

CASE stated for the opinion of this Court by the Chairman of the Worcestershire Quarter Sessions.

At the last Worcestershire quarter sessions Thomas Hollis was tried before me on a charge of larceny of money, to the amount of ten shillings, the property of Charles Parkes. He was indicted jointly with William Wicks, who pleaded guilty.

The money the subject of the indictment was obtained by the trick commonly known as "ringing the changes."

The prisoner Hollis and Wicks went to an inn kept by the prosecutor: Wicks asked the barmaid for sixpennyworth of whisky; he put down a half-sovereign; the barmaid gave him 9s. 6d. change. Wicks then said, "Did I give you a half-sovereign? I wish you would give it me back. I think I have change." The barmaid gave him the half-sovereign, but he did not return the 9s. 6d. At that moment the other prisoner, Hollis, asked for a cigar, which the barmaid gave him. He handed her a shilling in payment, and she returned him the change. Wicks then gave the barmaid 10s. in silver (9s. 6d. of which was the change she had previously given him) and a half-sovereign, and asked her to give him a sovereign for it. She took the money to her master, and received from him a sovereign, which she gave to Wicks. Wicks then asked her to fasten his glove, upon which Hollis remarked, "Isn't he fussy?" The two prisoners then left, and in a few minutes afterwards the barmaid discovered the fraud.

The barmaid stated in her evidence that she did not intend to part with the sovereign, except for full change of the prisoner's money; and her master also stated in his evidence that she had no authority to part with it except for full consideration.

It was contended by counsel for the prisoner that the barmaid had general authority to act for her master in such a matter as giving change, and that the transaction was complete before she discovered the fraud; therefore that the property in the money had passed, and that the prisoner could not be convicted of stealing it.

After referring to *Reg. v. McKale* (L. Rep. 1

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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C. C. R. 125; 11 Cox C. C. 32; 18 L. T. Rep. N. S. 335) and *Reg. v. Middleton* (L. Rep. 2 C. C. R. 38; 12 Cox C. C. 417; 28 L. T. Rep. N. S. 777), I overruled the objection; and the jury found the prisoner guilty, and, in reply to questions put by me, also found specially that the barmaid had no intention to part with the property in the sovereign except for full change of the prisoner's money, and that her master had given her no authority to part with it for other than full consideration.

The question reserved for the consideration of the Court is, whether, under the circumstances above set forth, the prisoner was properly convicted of larceny.

G. W. HASTINGS,

Chairman of the above Court of Quarter Sessions.

No counsel appeared for the prisoner to argue the case.

Godson, for the prosecution, relied upon the authority of *Reg. v. Middleton* and *Reg. v. McKale* (*ubi sup.*).

Lord COLERIDGE, C.J.—I cannot see the difficulty in the case.

HAWKINS, J.—Suppose you were counsel for the prisoner, how would you put his case?

Godson.—I should contend that the barmaid had parted with the possession of the money to the prisoner.

Lord COLERIDGE, C.J.—She was induced to do so momentarily by a trick, and did not intend to part with it but for an equivalent.

DENMAN, J.—The jury did not find that the prisoner from the first intended the fraud, but it may be inferred from the evidence that he did so intend.

Lord COLERIDGE, C.J.—I have no doubt in this case. If a man imposes upon another person by saying what the prisoner said to the barmaid, who had no authority to part with the money, and who did not intend to part with the money except for full consideration, and obtains money from that person, it is a stealing of money. Here the prisoner got the money by a deliberate trick, and I should be very sorry that there should be any doubt that to obtain money so is larceny.

The rest of the Court concurred.

*Conviction affirmed.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

April 7, 9, and May 11, 1883.

(Before BRETT, M.R., LINDLEY and BOWEN, L.JJ.)

REG. on the prosecution of THE COMMISSIONERS OF THE TREASURY v. THE JUSTICES OF MIDDLESEX. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Prisons—Superannuation of officers—Liability of county for—Prisons Act 1877 (40 & 41 Vict. c. 21), s. 36—Superannuation Act 1859 (22 Vict. c. 26), s. 7.*

*At the time of the coming into operation of the Prisons Act 1877, C., a governor of a prison, had*

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

2 O



been in the prison service for more than twenty years. In order to facilitate improvements in the organisation of the Prisons Department, the Lords of the Treasury, pursuant to sect. 36 of the Prisons Act 1877, granted to O. an annuity, by way of compensation allowance, in consideration of his retirement from office, and made an order pursuant to paragraph 4 of that section, apportioning the amount between the rates and funds provided by Parliament. The amount so granted did not exceed two-thirds of O.'s salary. Upon objection taken by the justices that the Lords of the Treasury had no power to order that a portion of such allowance should be paid out of the rates, on the ground that the annuity was not by way of superannuation allowance within the meaning of paragraph 1 of the above section, but was a special compensation allowance made for the purpose of facilitating improvements in the department to which O. belonged, which, according to paragraph 2, could only be dealt with in manner provided by the Superannuation Act 1859:

*Held (Bowen, L.J. doubting), that the apportionment was rightly made, and judgment of Field and Stephen, JJ., making absolute an order for a mandamus commanding the justices to pay out of the county rates the portion charged upon them, affirmed.*

A RULE nisi was obtained on behalf of the Commissioners of the Treasury, calling upon the justices for the county of Middlesex to show cause why a writ of mandamus should not issue commanding them to pay to Col. Colvill the sum of 429l. 6s. 8d., being the proportion of the pension awarded to him as the late governor of the Middlesex House of Correction, which the justices were liable to pay to Col. Colvill on his being retired.

Afterwards a special case was stated for the opinion of the court.

The following are the material parts of the case:

1. Previously to and up to the 1st April 1878 (the date of the coming into operation of the Prisons Act 1877), the justices for the county of Middlesex in quarter sessions assembled were the prison authority in respect of Coldbath Fields Prison, in the county of Middlesex, a prison belonging to that county, and were the local authority, having before that date the management and control of the prison and its officers.

2. On the 7th Dec. 1854 the justices appointed Col. T. H. Colvill governor of Coldbath Fields Prison under the provisions of 4 Geo. 4, c. 64, s. 25, and 2 & 3 Vict. c. 56, s. 24, and the other public general Acts then in force. Col. Colvill continued to act as governor of the above prison beyond the 1st April 1878, namely, until the 24th Aug. 1878, as hereinafter mentioned.

3. After the coming into operation of the Prison Act 1877, the prison, together with all the officers thereof, was taken over by and became subject to the control of the Secretary of State for the Home Department and the Prison Commissioners, according to their respective functions, as by that Act is provided. Col. Colvill continued subsequently to the transfer to be the governor, and to discharge the duties of governor down to the 24th Aug. 1878; but he ceased to be governor as from the 1st Aug. 1878, under the circumstances hereinafter appearing.

4. Shortly after the coming into operation of the Prison Act 1877, namely, in June 1878, Col.

Colvill was informed by one of the Prison Commissioners that he might if he pleased resign his appointment of governor at once, and receive the full rate of pension, and he told the Prison Commissioners that he was willing to retire on a pension of two-thirds of his salary and emoluments, and he wrote a letter to that effect to the Prison Commissioners. Another gentleman was shortly after this communication appointed governor of the prison by the commissioners, and from that time Col. Colvill was unable to act as governor of the prison. He was, after he was so unable to act, informed by one of the Prison Commissioners that his pension was fixed at 582l. 13s. 4d. per annum, but he had no official notice of that fact or of his resignation being accepted.

5. The Secretary of State, after the transfer of the prison mentioned in paragraph 3, caused particulars of Colonel Colvill's services, accompanied by a letter, dated the 15th May 1878, to be forwarded to the Commissioners of the Treasury, in order that they might be moved to award to him such an amount of compensation allowance as they might consider adequate to meet the circumstances of the case, and in order that payment of the allowance might be apportioned between the funds to be provided by Parliament and the rates which, at or immediately before the commencement of the Prison Act 1877, were applicable to the payment of the salary of Colonel Colvill. The Commissioners of the Treasury thereupon awarded to Col. Colvill an annuity of 582l. 13s. 4d. per annum, commencing from the 1st Aug. 1878, and apportioned it as requested, namely, 429l. 6s. 8d., to be borne by the justices of Middlesex as the prison authority of Coldbath Fields Prison, and 153l. 6s. 8d., to be borne by grants provided by Parliament.

6. From the documents contained in the appendix to the special case it appeared that Col. Colvill had served as governor of the prison upwards of twenty-three years, and that his pension 582l. 13s. 4d. represented thirty-eight-sixtieths (one-sixtieth per annum) for a service of twenty-three years, with ten-sixtieths (ten years) added on his retirement from the public service for the purpose of facilitating improvements in the organisation of the department to which he belonged, and five-sixtieths (five years) added under sect. 4 of the Superannuation Act 1859, the pension being calculated on a salary and emoluments reckoned at 920l. per annum.

7. Col. Colvill at the time of his retirement was less than sixty years of age, and he had not become incapable from confirmed sickness, age, or infirmity, or injury received in actual execution of his duty, of executing his office in person, nor had a medical certificate of any such age, infirmity, or injury ever been made or given.

8. The office held by Col. Colvill had not been abolished, nor had he been deprived of any salary or emolument by reason of the abolition of the office which he held. By reason, however, of his ceasing to be governor as aforesaid, he ceased to enjoy the salary and emoluments which as governor he had enjoyed.

9. Col. Colvill retired from his governorship for the purpose of facilitating changes in the general system of administration of all the prisons vested in the Secretary of State by the Prison Act 1877, and the improvements in the organisa-

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tion of the Prison Department which were then in the course of being carried out for the purpose of economy and efficiency. This re-organisation applied generally to the whole Prison Department, including the prisons which were retained as prisons, a number being discontinued.

11. No special minute within the meaning of sect. 7 of the Superannuation Act 1859 had ever been made or laid before Parliament with reference to Col. Colvill or his office.

12. Col. Colvill's only right to a pension or allowance before the passing of the Prison Act 1877 depended on public general statutes.

13. No grant or award had been made by the Treasury of any pension or superannuation allowance to Col. Colvill, other than as above mentioned. The defendants declined to pay to Col. Colvill the portion of the allowance demanded from them, and on the 18th Nov. 1879 a formal demand to pay the same was addressed to the defendants through their clerk by the Solicitor to the Treasury. The defendants subsequently to the receipt of such demand assembled in quarter sessions, and on the 16th Feb. 1880 the defendants, through their clerk, refused to pay the same.

The question for the opinion of the court was, whether the defendants ought to discharge out of the county rates the portion of the annuity so charged upon them as aforesaid, or any part thereof.

Field and Stephen, JJ. held that the defendants were liable to discharge the whole of the portion so charged, and made the rule for a *mandamus* absolute. Their judgment is reported 48 L. T. Rep. N. S. 480.

The defendants appealed.

April 7 and 9.—The appeal was argued by *B. S. Wright* for the justices, appellants, and by *A. L. Smith* (Sir *H. James*, A. G., with him) for the prosecution in support of the judgment of the Divisional Court.

The arguments turned mainly on the construction of the Superannuation Act 1859 (22 Vict. c. 26) sect. 7, and the Prison Act 1877 (40 & 41 Vict. c. 21) s. 36.

By the Superannuation Act 1859 (22 Vict. c. 26) s. 7:

It shall be lawful for the Commissioners of the Treasury to grant to any person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs, by which greater efficiency and economy can be effected, such special annual allowance by way of compensation as, on a full consideration of the circumstances of the case, may seem to the said commissioners to be a reasonable and just compensation for the loss of office, and if the compensation shall exceed the amount to which such person would have been entitled under the scale of superannuation provided by this Act if ten years were added to the number of years which he may have actually served, such allowance shall be granted by special minute stating the special grounds for granting such allowance, which minute shall be laid before Parliament, and no such allowance shall exceed two-thirds of the salary and emoluments of the office.

By the Prison Act 1877 (40 & 41 Vict. c. 21), s. 36:

If, at any time after the commencement of this Act, it appears to the Treasury that any existing officer of a prison has been in the prison service for not less than twenty years, and is not less than sixty years of age, or

that any existing officer of a prison has become incapable, from confirmed sickness, age or infirmity, or injury received in actual execution of his duty, of executing his office in person, and such sickness, age, infirmity, or injury is certified by a medical certificate, and there shall be a report of the prison commissioners testifying to his good conduct during his period of service under them, and recommending a grant to be made to him, the Treasury may grant to such officer, having regard to his length of prison service, an annuity, by way of superannuation allowance, not exceeding two-thirds of his salary and emoluments, or a gratuity not exceeding the amount of his salary and emoluments for one year.

If any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison who by reason of such abolition, retirement, or removal is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act 1859, with respect to a person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs.

"Prison service" for the purposes of this section means, as respects the period before the commencement of this Act, service in a particular prison, or in the prisons of the same authority, transferred to the Secretary of State, and, as respects the period after the commencement of this Act, service in any such prison or, in any other prison transferred to the Secretary of State under this Act.

Any annuity by way of superannuation allowance or gratuity granted under this section shall be apportioned between the period of service before the commencement of this Act and the period of service after the commencement of this Act, and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid, but without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department, shall be paid by the prison authority of the prison in which the officer to whom such annuity or allowance is granted was serving at the date of the commencement of this Act, out of rates which at or immediately before the commencement of this Act were applicable to the payment of the salary of such officer, and the residue shall be paid out of moneys provided by Parliament.

The following statutes were also referred to: 5 & 6 Vict. c. 98, s. 30 (which was in force when Col. Colvill was appointed governor); 4 & 5 Will. 4, c. 24: 22 Vict. c. 26, ss. 2, 4 28 & 29 Vict. c. 126 (the Prison Act 1865), ss. 15, 73, 74, 79; 34 & 35 Vict. c. 36; 35 & 36 Vict. c. 83; 39 & 40 Vict. c. 73; 41 & 42 Vict. c. 63.

*Cur. adv. vult.*

May 11.—*LINDLEY, L. J.*—The facts are all set out in the special case, and therefore it is only necessary for me to state the point which we have to decide. The question is whether the justices of Middlesex are bound to discharge out of the county rates that portion of the annuity granted to Col. Colvill which the Commissioners of the Treasury have charged upon them, or any part of such portion. The facts relating to Col. Colvill will be found stated in paragraphs 6, 7, 8, and 9 of the special case. The first statute to which it is necessary to refer is the Prison Act 1877 (40 & 41 Vict. c. 21) s. 36. We have all felt great difficulty in interpreting that section, for the words which are introduced by way of parenthesis make it extremely obscure. The section must be construed with reference to the provisions of the Superannuation Act 1859 (22 Vict. c. 26), and that Act must be construed with reference to 4 & 5 Will. 4, c. 24. There is a series of statutes dealing with allowances, superannuation, compensation, and pensions, and there appears to be a

tendency to class the various matters dealt with in different classes, and to call them by different names. The statutes distinguish between superannuation and allowance and compensation. In 4 & 5 Will. 4, c. 24, the word "compensation" is used, and it applies to offices which are abolished or reduced in value, and in the same statute we also find the following expressions, "pension," "allowance," "superannuation," "superannuation allowance or compensation," and "retired allowance." Looking at 4 & 5 Will. 4, c. 24 alone, it seems to me that the three words, "compensation," "superannuation," and "allowance," are used to denote different things, and that the word "allowance" is applied mainly to unusual superannuation allowances. It is important to ascertain and appreciate the distinction between the various words used. I now come to sect. 36 of the Prison Act 1877 (40 & 41 Vict. c. 21). Col. Colvill is clearly not within the first clause of that section, for he was under sixty years of age, and had not become incapable, from confirmed sickness, age, or infirmity, or injury received in the execution of his duty, of exercising his office in person; this clause applies to an annuity by way of superannuation allowance, that is to say, a retiring allowance, which may be granted in the cases specified. The second clause, I think, does apply here. It is urged that Col. Colvill is not within it because the expression is, "if any officer is retired," and it is said that this does not apply to him because his retirement was voluntary; but I think he is in the position of an officer who is "retired," for he was allowed to retire, and I am of opinion that this comes within the clause, and that the words do not refer exclusively to compulsory retirement. This second clause goes back to the Superannuation Act 1859, for it provides in substance that the officers of the prisons referred to shall be dealt with as provided by the Superannuation Act. If sect. 36 of the Act of 1877 had stopped there, it would have come to this, that an officer such as Col. Colvill would be entitled to be paid by the Treasury out of the public funds (not out of the rates) such sum as might be awarded under the Superannuation Act 1859. Sect. 2 of the Superannuation Act relates to the ordinary rate of allowance, and this depends on the period of service. Sect. 4 provides for the mode of computing the amount of superannuation in certain cases there mentioned; I refer to it in order to show the scheme on which the Act is based. This scheme is that, when an additional allowance is intended to be made, a certain number of years is to be added to the number of years which the officer who is to receive the allowance has served, and he is to be treated as if he had served more years than he has in fact served, and the scale applicable to such longer period of service is to be applied. Sect. 7 is the important section, for it would have governed the present case if sect. 36 of the Act of 1877 had stopped at the end of the second clause. The first half of sect. 7 of the Act of 1859 seems to show that, in theory at least, the Treasury could grant what they liked, without having regard to any definite scale; but, in my opinion, the last part of that section shows that it was contemplated that the Treasury would have regard to the period of service, and would apply as a standard the scale referred to in sect. 2. In theory the Treasury might make an arbitrary grant, without regard to

scale, but that was not the mode of proceeding contemplated. I think we ought not to assume that the Treasury would exercise their powers arbitrarily, but ought to attribute to them the intention of proceeding upon the lines sketched out for them by the Act of Parliament. I now come to the last clause of sect. 36 of the Prison Act 1877. The whole difficulty in the present case arises from the words "without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department." These words cannot apply to the case of an officer who is only entitled to a superannuation allowance under the first clause of the section; they can only apply to the case of a person who is entitled to compensation as distinguished from superannuation allowance. There is therefore this difficulty, that in order to give effect to these words, it becomes necessary to extend the meaning of the expression "superannuation allowance or gratuity" so as to include compensation, or we must deprive the words of the effect which it was intended they should have, and defeat the purpose for which they were introduced into the Act. We cannot interpret the words with strict accuracy. Mr. Wright, in his able argument, suggested that the words might have been inserted to meet such a case as this: A governor of a prison has served his full time, and is more than sixty years old, but does not wish to retire, although, if he did retire, he would be entitled to a superannuation allowance under the first clause of the section; the prison authority, however, considers it desirable for the purpose of facilitating the reorganisation of the department that he should retire and receive compensation. It is said that the words in question were put in to meet such a case as that. I do not say the words would not meet such a case, but I can see no reason for confining them to such a case. The section is extremely obscure, but I think the true explanation is that, by a blunder in drafting, the expression "superannuation allowance," in the early part of the last clause, is used as excluding compensation, but later, in the same clause, has been inserted upon the supposition that "compensation" has been included in "superannuation allowance." On any other explanation I cannot understand the section. The difficulty is that the words would cease to be applicable if the Treasury were to adopt an arbitrary mode of granting compensation under sect. 7 of the Superannuation Act 1859; but I assume that the Treasury will act in accordance with the intention of the Legislature, and, in granting compensation, will base their calculation upon past services. If they do this, the difficulty is got over. I am, therefore, of opinion that the judgment appealed from was right, and ought to be affirmed. The Master of the Rolls wishes me to state that he concurs in this view.

BOWEN, L.J.—I have also bestowed much time and reflection upon the construction of the 36th section of the Prison Act 1877. It is an obscure enactment, and difficult to construe, and, in my opinion, we cannot arrive at a conclusion either one way or the other in the present case without doing violence to the words of the section and also of the Superannuation Act 1859. I do not feel justified in expressing dissent from the view

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taken by the Queen's Bench Division and by the Master of the Rolls and Lindley, L.J., but I still feel much doubt and difficulty.

*Judgment affirmed.*

Solicitor for prosecution, *The Solicitor to the Treasury.*

Solicitors for defendants, *Nicholson and Herbert.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Tuesday, Dec. 4, 1883.*

(Before Lord COLERIDGE, C.J., STEPHEN and MATHEW, JJ.)

WEST LANCASHIRE RAILWAY COMPANY (apps.) v. IDDON (resp.). (a)

*Railways Clauses Act 1863 (26 & 27 Vict. c. 92), s. 15—Bridge with an opening span—Detention of any vessel, barge, or boat—Barge with mast which could be lowered.*

*By sect. 15 of the Railways Clauses Act 1863, "where the company constructs a bridge with an opening span, it shall not be lawful for the company to detain any vessel, barge, or boat for a longer time than may be necessary for admitting a carriage or engine traversing the railway, and approaching the bridge, to cross the bridge, and for opening the bridge to admit the vessel, barge, or boat to pass; and the company shall be subject to, and shall abide by, such regulations with regard to the user of the bridge as may from time to time be made by the Board of Trade. If the company detains a vessel, barge, or boat longer than the time aforesaid, or fails in any respect to abide by such regulations as aforesaid, they shall for every such offence be liable to a penalty not exceeding twenty pounds, without prejudice to any remedy against them for any loss or damage sustained by any person."*

*The railway of the appellant company was carried over the river D., which was a navigable river, by a bridge with an opening span.*

*Held, that the railway company were not bound to open the bridge for a barge with a mast so constructed that it could be lowered, and that refusing to open the bridge for such a vessel was not a detention within the meaning of the Act.*

CASE stated by two of Her Majesty's justices of the peace for the county of Lancaster, under sect. 33 of the Summary Jurisdiction Act 1879.

1. Upon the hearing of a certain information and complaint preferred by the respondent against the appellants, for that the appellants on the 9th Feb. 1883, at Tarleton in the said county, then being incorporated by the West Lancashire Railway Act 1871, and which Act is incorporated with and forms part of the Companies Clauses Consolidation Act 1845, and part 1 (relating to cancellation and surrender of shares), and part 3 (relating to debenture stock) of the Companies Clauses Act 1863, the Companies Clauses Act 1869, the Lands Clauses Consolidation Acts 1845, 1860, and 1869, the Railways Clauses Consolidation Act 1845, and part 1 (relating to construction of a railway)

of the Railways Clauses Act 1863, unlawfully did detain a vessel, barge, or boat belonging to the respondent at a certain bridge with an opening span, belonging to the appellants, for a longer time than was necessary for admitting a carriage or engine traversing the railway and approaching the bridge, to cross the bridge, and for opening the bridge to admit the vessel, barge, or boat to pass, contrary to sect. 15 of the Railways Clauses Act 1863, and sect. 31 of the West Lancashire Railway Act 1871, we adjudged that the appellants had detained the respondent's barge for a longer time than aforesaid, and we convicted the appellants in a penalty of 10s. and costs.

2. The following facts were either proved before us or admitted by both parties:

3. Sect. 13 of the Act 6 Geo. 1, c. 38, is as follows:

And it is hereby also further enacted and declared by the authority aforesaid, that the said river Douglas, *alias* Asland, is and for ever hereafter shall be esteemed and taken to be navigable from the said river Ribble to the said place called Miry Lane End, in the township of Wigan aforesaid, and that all the King's liege people whatsoever may have and lawfully enjoy their free passage in, along, through, and upon the said river Douglas, *alias* Asland, or any part thereof, between the said river Ribble and the said place called Miry Lane End in the township of Wigan aforesaid, with boats, barges, lighters, and other vessels, and also all necessary and convenient liberties for navigating the same without any let, hindrance, or obstruction from any person or persons whatsoever, paying such rate and duty, rates and duties, as are by this Act appointed to be paid to the said undertakers, their heirs or assigns.

4. The railway of the appellants is carried over the river Douglas or Asland by a bridge having two opening spans. By sect. 31 of the West Lancashire Railway Act 1871, sub-sect. D., it is enacted that sect. 15 of the Railways Clauses Act 1863 (incorporated with that Act) shall extend and apply to the bridge or viaduct, not only when constructed, but also during the construction thereof. Part I., which includes the said sect. 15 of the Railways Clauses Act 1863, is incorporated with the West Lancashire Railway Act 1871.

5. Sect. 15 of the Railways Clauses Act 1863 is as follows:

Where the company constructs a bridge with an opening span, it shall not be lawful for the company to detain any vessel, barge, or boat at the bridge for a longer time than may be necessary for admitting a carriage or engine traversing the railway, and approaching the bridge to cross the bridge, and for opening the bridge to admit the vessel, barge, or boat to pass, and the company shall be subject to and shall abide by such regulations with regard to the use of the bridge as may from time to time be made by the Board of Trade. If the company detains a vessel, barge, or boat longer than the time aforesaid, or fails in any respect to abide by any such regulations as aforesaid, they shall for every such offence be liable to a penalty not exceeding twenty pounds without prejudice to any remedy against them for any loss or damage sustained by any person.

6. The respondent is the owner of a vessel or barge fitted with a mast, and with such vessel or barge has the right to navigate the said river at the point where it is crossed by the said bridge.

7. The said vessel or barge passes along canals, and on account of the low arches of canal bridges is fitted with an apparatus whereby the mast can be raised or lowered. The canal lock nearest to the bridge is distant therefrom about three-quarters of a mile. The sail is not always raised on the river, but before the bridge was constructed there was no need to lower the mast at that point. The

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river is tidal, and the respondent's vessel or barge passes up or down only with the tide. The height of the bridge above the river is not sufficient to allow the vessel or barge to pass under with raised mast, except when the tide is at still water. At the time of the detaining complained of the vessel or barge could not pass under with raised mast. The respondent had before such time given notice to the appellants that his vessel or barge would be passing the bridge at 10 a.m., and requested the appellants to have the bridge open. The respondent's vessel or barge approached the bridge coming down from the lock with hoisted sail, arriving at the bridge half an hour later than the time he had fixed. The respondent had to lower his sail and mast in order to get through the bridge, which would take, as stated by witness, from fifteen to twenty minutes, and he then had to put it up again when he got through the bridge. No evidence was given, nor was it contended by appellants, that any carriage or engine was traversing the railway and approaching the bridge at the time respondents vessel or barge arrived at the bridge. It was admitted on behalf of the appellants that they would have refused to open the bridge for the respondent if he had come punctually at ten o'clock or any other hour.

8. The respondent had paid toll to the Leeds and Liverpool Canal Company for his voyage.

9. It was admitted by both appellants and respondent that no regulations with regard to the use of the bridge have been made by the Board of Trade.

10. The respondent contended that he had a right, under sect. 13 of the Act 6 Geo. 1, c. 38, set out above, to enjoy free passage along the said river at the point in question, and to pass the bridge with hoisted sail as a convenient liberty for navigating such river without obstruction, and therefore to have the bridge open for him accordingly.

11. The appellants contended that, as the barge could, and in fact did pass with lowered mast without the bridge being opened, they, the appellants, had not detained the barge within the meaning of sect. 15 of the Railways Clauses Act 1863.

12. We were of opinion that, as a matter of fact, the progress of the respondent's vessel or barge was retarded by the bridge being unopened for a longer time than allowed by sect. 15 of the Railways Clauses Act 1863, and as a point of law this was a detaining of the vessel or barge within the meaning of sect. 15 of the Railways Clauses Act 1863, and convicted the appellant in the manner before stated.

13. The question of law therefore upon which this case is stated for the opinion of the court is, whether upon the facts and admissions stated, and having regard to the provisions of sect. 13 of the statute of 6 Geo. 1, c. 38, and sect. 15 of the Railways Clauses Act 1863, the appellants ought to have opened the bridge for respondent's vessel or barge to pass through.

A. T. Lawrence for the appellants.—The construction put upon the statute by the justices is an unreasonable one. It would make the traffic of the railway impossible; the train could not leave the preceding station until the bridge is re-connected. Of course it must be opened for ocean-

going vessels, but that traffic is very much less than the barge traffic. By the Act the bridge had to be built a certain height, and that in itself shows that it was never intended that it should be opened for all kinds of vessels. These barges have masts which are made in such a way that they can be lowered, and therefore they are not the class of vessels for which the railway company are bound to open the bridge.

Fullarton for the respondent.—It is not found as a fact in the case that this boat is not an ocean-going vessel; these barges go on both the canal and the river. The Act does not apply to one class of vessels more than another. The public have a right to use a navigable river without any obstruction, and such right is preserved by the Act which compels the railway company to open the bridge. The bridge is made in this way for the very purpose of protecting the right of the public in navigating the river. The justices have found as a fact that there was a "detention," and therefore there is no appeal.

Lord COLERIDGE, C.J.—It is clearly the duty of the railway company to open the bridge for ships having masts which will not lower, but the question here is, whether they are bound to open the bridge for vessels having masts which will lower. I am of opinion that they need not do anything of the kind. By sect. 15 of the Railways Clauses Act 1863 the company are liable to pay a penalty not exceeding 20*l.* if they detain a vessel, barge, or boat for a longer time than is necessary for admitting a carriage or engine traversing the railway and approaching the bridge to cross the bridge, and for opening the bridge to admit the vessel, barge, or boat to pass; but here it is not necessary that the barge need be detained at all, because the mast can be lowered, and it is constructed for that purpose. I think the true construction of the Act is, that it is not necessary to open the bridge for a barge which can lower the mast; and refusing to open the bridge in such a case is not a detention within the meaning of sect. 15 of the Railways Clauses Act 1863. The appellants are entitled to succeed, and the conviction must be quashed.

STEPHEN and MATHEW, JJ. concurred.

*Conviction quashed.*

Solicitors for the appellants, *Sandys and Trevenner.*

Solicitors for the respondent, *Hamlin and Grammer.*

Monday, Dec. 10, 1883.

(Before Lord COLERIDGE, C.J., STEPHEN and MATHEW, JJ.)

DINNING (app.) v. SOUTH SHIELDS GUARDIANS (resps.). (a)

*Wife chargeable—Maintenance by husband—Payment towards cost of relief—Limit of amount to be ordered—31 & 32 Vict. c. 122, s. 33.*

*By the Poor Law Amendment Act 1868, s. 33, when a married woman requires relief without her husband, guardians or overseers may apply to justices, who may summon such husband to appear before them to show cause why an order should not be made upon him to maintain his wife, and make an order upon him to pay such*

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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*sum weekly or otherwise towards the cost of the relief of the wife, as after consideration of all the circumstances of the case shall appear to them to be proper, and shall determine in such order how and to whom the payments shall from time to time be made.*

*Respondents proved upon an application under this section that they had granted relief to the appellant's wife to the amount of 3s. a week, and that the appellant was able to maintain her at 15s. a week.*

*Held, upon a case stated by Stephen and Mathew, JJ. (dissentients, Lord Coleridge, C.J.), that the justices had no power under this section to order payment beyond the actual relief granted, and that an order of 15s. a week was bad.*

THIS was a case stated by two of Her Majesty's justices of the peace in and for the borough of South Shields in the county of Durham, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as therein stated.

1. At a petty sessions holden at South Shields aforesaid, in and for the said borough, on the 17th Nov. 1882, a complaint preferred by the respondents against the appellant, charging the appellant for that on the 2nd day of Nov. 1882, Elizabeth Dinning, being a married woman, and requiring relief without her husband, did become chargeable to the South Shields Poor Law Union, and that the said Thomas Dinning was the husband of the said Elizabeth Dinning, and liable to maintain her, and why an order should not be made upon him for a sum to be paid weekly towards the relief of his said wife pursuant to sect. 33 of 31 & 32 Vict. c. 122 was heard and determined, the said parties then being respectively present, and upon such hearing the said appellant was by us ordered to pay the sum of 15s. per week for his wife's relief and maintenance.

2. And whereas the appellant, being dissatisfied with this determination upon the hearing of the said complaint, as being erroneous in point of law, duly applied in writing to state and sign a case, setting forth the facts and the grounds of such determination, for the opinion of this court, but the said justices being of opinion that the application of the appellant was merely frivolous, refused to state and sign such case, and at his request signed and delivered to him a certificate of such refusal. And whereas the Queen's Bench Division of the High Court of Justice have since granted a rule calling upon the justices to state such case, setting forth the facts and the grounds of their determination.

3. Now therefore the said justices, in obedience to the said rule and order of the said Queen's Bench Division, and the provisions of the said statute, stated and signed the following case:

4. Upon the hearing of the complaint it was proved on the part of the respondents, and found as facts, that the said appellant had allowed his lawful wife, the said Elizabeth Dinning, to become chargeable to the respondents' poor law union, that she was unable to maintain herself, that the said appellant was liable to maintain her, and that he was able by work and other means to provide for her, that the appellant was rated to the poor for property for which he was owner on an annual value of 329½, exclusive of the annual value

of the house in which the appellant resided, and of his business premises, and that he was also a coal merchant.

5. It was further proved by the evidence of Thomas Fosback, a relieving officer of the respondents, who was called as a witness in support of the complaint, that the amount of relief granted by the respondents to the said Elizabeth Dinning was the sum of 3s. per week, and no more.

6. It was contended on the part of the appellant that the justices had no power to order a sum to be paid weekly which would more than cover the whole sum paid by the union to the defendant's wife for her relief, that the union having considered 3s. per week sufficient for her relief had paid her that sum, and that as the statute under which the complaint was made only enabled the justices to make an order towards her relief, they could only make an order for a sum under the amount granted by the union, i.e., they might order 2s. 11d. per week, but could not order the full sum of 3s.

7. On the part of the respondents it was contended that the statute was an enabling statute, that there were other poor law provisions by statute enabling the respondents to recover the full sum expended by them in maintaining the appellant's wife by reason of her becoming chargeable to the union, and that the statute 31 & 32 Vict. c. 122, s. 33 expressly conferred power on justices to summon the appellant to show cause why an order should not be made upon him to maintain his wife, and that having regard to all the circumstances of the case, and the means of the appellant, that they should make an order upon the appellant to pay such a sum weekly or otherwise as they should deem proper for the relief and maintenance of the appellant's wife.

8. The said justices carefully considered the whole of the facts and circumstances of the case, and respective contentions of the appellant and respondents, and decided that the appellant was bound to maintain his wife, and that as it had been proved that the appellant had ample means, the sum of 15s. per week was a reasonable sum for the appellant to pay towards the relief and maintenance of his wife, which said sum they directed to be paid by the appellant weekly, and every week to Thomas Fosback, a relieving officer of the said union.

9. The question of law arising on the above statement for the opinion of the court was, whether the said order was valid or otherwise. And the court was solicited according to the power vested in the court by the statute to remit the case to the said justices with the opinion of the court thereon, or to make such other order as to the court might seem fit.

By the Poor Law Amendment Act 1868 (31 & 32 Vict. c. 122), s. 33:

When a married woman requires relief without her husband, the guardians of the union or parish, or the overseers of the parish, as the case may be, to which she becomes chargeable, may apply to the justices having jurisdiction in such union or parish in petty sessions assembled, and thereupon such justices may summon such husband to appear before them to show cause why an order should not be made upon him to maintain his wife, and upon his appearance, or in the event of his not appearing upon proof of due service of such summons upon him, such justices may after hearing such wife upon oath, or receiving such other evidence as they may deem sufficient, make an order upon him to pay such sum

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weekly or otherwise towards the cost of the relief of the wife as after consideration of all the circumstances of the case shall appear to them to be proper, and shall determine in such order how and to whom the payments shall from time to time be made; which order shall, if the payments required by it to be made be in arrear, be enforced in the manner prescribed by the Act of 11 & 12 Vict. c. 43, for the enforcing of orders of justices requiring the payment of a sum of money; Provided that such order may be at any future time revoked by the justices in petty sessions assembled, if they see sufficient cause for so doing.

*Bremner* for the appellant.—The justices have no authority under this section to assess the maintenance which a husband ought to provide for his wife. The guardians are the persons empowered to make the application, upon whom is the duty to fix the amount of relief to be granted, and they can only recover something "towards the cost of the relief of the wife." The justices may order only part of this cost, or at all events not more than the whole, and may determine how and to whom the payments shall be made, but they cannot grant anything for maintenance beyond the actual cost of relief. This order therefore was beyond the jurisdiction of the justices.

*Cock* for the respondents.—The only words to be interpreted are "towards the cost of the relief of the wife," but they must be read with the rest of the section, which requires the husband to show cause why an order should not be made upon him to maintain his wife, and which directs consideration of all the circumstances of the case. If it were intended to limit the order to the actual cost of relief, it is difficult to imagine why the justices' order should determine the person to whom payments were to be made. The persons who drew up the marginal note to the section certainly must have considered the justices to have the more extended jurisdiction which they have exercised in this case; that note is, "Order may be made in petty sessions upon a husband to maintain his wife."

*MATHEW, J.*—I am of opinion that the justices had not the power to make the order appealed against in this case. The section enables the guardians or overseers to apply to the justices, who may summon the husband of a wife chargeable to their union or parish; the husband is to show cause why an order should not be made upon him to maintain his wife, but the only order which the justices can make after hearing the husband, or in his absence, is "to pay such sum weekly or otherwise towards the cost of the relief of the wife, as after consideration of all the circumstances of the case shall appear to them to be proper, and shall determine in such order how and to whom the payments shall from time to time be made." I quite see room for doubt whether justices were not under this section intended to fix the proper amount the husband should pay for his wife's maintenance, but the guardians are expressly mentioned as the parties concerned, and they must make the application. The payment is to be towards the cost of relief, and I can see nothing in the subsequent words to extend the power of the justices beyond the amount of that cost. In this case the justices have interpreted the section differently, but it appears to me they were wrong.

*STEPHEN, J.*—I am of the same opinion, and I not only entertain the same doubts which have

been mentioned by my brother Mathew, but I find them much strengthened by the difference in opinion of the Lord Chief Justice. The difficulty occurs from the use of the two words "maintain" and "relief." Cause is to be shown why an order should not be made on the husband to maintain his wife. The section might have gone on to provide for payment for this purpose, but as it does not do so I think we can only give effect to the words it contains. The order which the justices can make may be to pay such sum as they think proper "towards the cost of the relief of the wife." If it had been intended to enable the justices to order a sum which they thought proper for the maintenance of the wife, the Legislature would more probably, as it seems to me, have enabled her to make the application. It must, however, be the guardians or overseers who are to apply, and they are the only persons interested. They can only be interested to the extent of the costs of the actual relief granted, and to my mind it seems that the costs of relief is the superior limit of the payment which the justices can order. I cannot think that the consideration of all the circumstances, nor the determination of how and to whom the payments are to be made, both of which are directed, throw much light upon the matter, for there may be circumstances under which the cost of relief might be appropriately paid to some other person than the guardians or overseers. I am at a loss to attribute any meaning to the change of expression in the latter part of the section from that used in the earlier part, unless it is meant thereby to lay down a limit to the payment which the justices may order.

*LORD COLERIDGE, C.J.*—I need scarcely say that I differ in opinion on this point with considerable doubt. I am far from saying that it is not exceedingly arguable, or that the statute is at all clearly expressed; indeed, whatever be the meaning of the section, it certainly is unfortunately expressed, for cause is to be shown against an order to maintain the wife, and the order is to be made for payment towards the costs of her relief. The only question for us is as to the meaning of the costs of relief, and whether it can refer to the same maintenance against which cause is to be shown, according to the fair sense of the words used in the section. I agree that the wife must first become chargeable as a condition precedent to the jurisdiction of the justices, but that being established we are at liberty to consider what the justices may do. If we can, we should read the whole section together, and interpret the various parts consistently. It is clear that the first part contemplates an order for the maintenance of the wife, without limiting the amount to the cost of relief. Cause is to be shown by the husband against an order to maintain the wife, the wife or other evidence is to be heard, and the justices may "make an order upon him to pay such sum weekly or otherwise towards the cost of the relief of the wife as after consideration of all the circumstances of the case shall appear to them to be proper, and shall determine in such order how and to whom the payments shall from time to time be made." The question for us is whether, taking together all the expressions of this section, the words "towards the cost of the relief of the wife" more appropriately fit the meaning of maintenance generally, or the sum already ascertained by the



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guardians as the proper sum for her relief. I have some hesitation, but I think the order made by the justices should be upheld. I should add that I am unable to imagine how the justices could in the first instance have thought the appellant's objection frivolous. We remit the case to the justices, and direct an order to be made against the appellant for payment of 3s. instead of 15s. a week.

*Judgment for the appellant. Leave to respondents to appeal.*

Solicitor for appellant, J. S. Coleman, for J. J. Benthall, Sunderland.

Solicitors for respondents, Iliffe, Russell, Iliffe, and Cardale, for Mabane and Graham, South Shields.

Friday, Nov. 23, 1883.

(Before Lord COLERIDGE, C.J. and MATHEW, J.)

SHELLEY (app.) v. BETHELL (resp.). (a)

*Keeping a house for public performance of stage plays—Private theatre—Performances for a charity—Licence—Conviction—6 & 7 Vict. c. 68, s. 2.*

*The appellant was the owner and occupier of a private theatre which he gratuitously permitted to be used for dramatic performances on four occasions for the benefit of a charity. Tickets of admission were sold to the general public away from the building, no money was received at the doors, but the performances drew crowded audiences. The appellant kept control of the building, and his servants opened the doors and set the scenes, but he had no licence from the Lord Chamberlain or the Justices.*

*Held, upon a case stated, that the appellant was rightly convicted by a stipendiary magistrate of having or keeping a house or other place of public resort in Great Britain for the public performance of stage plays without authority, under 6 & 7 Vict. c. 68, s. 2.*

THIS was a case stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43, on the hearing of four several complaints by the respondent against the appellant, charging that the appellant, on the 13th, 15th, and 16th Dec. 1882, and on the 16th Jan. 1883, being the occupier and keeper of a certain house of public resort, called the Shelley Theatre, did have and keep open the said house for the public performance of stage plays therein without authority or licence, as required by law, contrary to sect. 2 of 6 & 7 Vict. c. 68.

The facts appear from the judgment.

*Willis Bund* for the appellant.—The circumstances of this case cannot constitute the having or keeping a house or other place of public resort for the public performance of stage plays, within the meaning of the 2nd section of this statute. The words "have or keep" must refer to habitual use, as was held in the case of *Reg. v. Strugnell* (L. Rep. 1 Q. B. 93). [Lord COLERIDGE, C.J.—That case turned upon the appellants having parted with the control of the room. Here there is no suggestion of that kind. MATHEW, J.—And I observe a penalty is provided for each day's infringement of the enactment.] The "have" and "keep" merely express the same meaning,

and it could not be intended that one night's performance should constitute the keeping a place of public resort for a public performance; the fees for licences are for at least a month, and nothing less seems to have been contemplated as forbidden by the enactment.

*Poland and Coleridge* appeared for the respondents, but were not heard.

LORD COLERIDGE, C.J.—It is reasonably clear that in this case Sir Percy Shelley, I dare say with the best possible intentions, has acted against the law, and has therefore been properly convicted, in a nominal penalty, for so acting. He has acted in violation of the statute 6 & 7 Vict. c. 68, s. 2. That section enacts that it shall not be lawful for any person to have or keep any house or other place of public resort for the public performance of stage plays without the authority of Letters Patent from the Crown or a licence from the Lord Chamberlain. Here Sir Percy Shelley has built a theatre, which is constructed only as a theatre, and in which from time to time stage plays are performed, and it is proved that, on several occasions for the benefit of charities and other excellent objects, stage plays were performed in this house, which was thus intended for stage plays, and was erected for the purpose of having them from time to time performed. The performances were advertised and the tickets were sold, and on one occasion 300 tickets were sold, and as many as 200 or 300 persons were brought together, and all the ordinary incidents of a public performance of stage plays occurred in this house or theatre, which is owned by Sir Percy Shelley. It would be frittering away the language of the Act if we encouraged the slightest doubt whether this could legally be done without a Royal patent or a licence from the Lord Chamberlain. It is obvious that it is extremely important that the law on this subject should be maintained, for the collection of large numbers of persons in buildings for the purpose of public exhibitions leads to considerable danger of fire and otherwise, and it is therefore important that the jurisdiction of the Lord Chamberlain should be maintained, and that in a wealthy country persons of wealth and position should not be able to erect buildings which may possibly be open to grave public dangers or objections—I do not say it was so in the present case, but only say that it may possibly be so—merely because he is able to dispense with the receipt of money. The very object for which the jurisdiction is kept up would be defeated. If we could countenance such a notion we encourage any doubt that where private theatres are built for the performance of stage plays, and such plays are performed there before large numbers of persons, and money is taken for those performances, the Act of Parliament is violated. It is not manifest that the words "have or keep" are in this Act intended to be synonymous, for under this second section every single day on which such a performance takes place incurs the penalty. It is not necessary, therefore, that there should be a constant or habitual performance of plays, for a single performance, it is clear, incurs the penalty; and it is to my mind clear that the magistrate was perfectly right in convicting under the first of these two sections; and that on that ground, therefore, this conviction must be affirmed. As to the other section—the 11th—I do not express

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

an opinion. The inclination of my mind is that the case does not come within that section, but as to that I do not give an opinion and have only an impression, and it is not necessary to decide upon it, as we are both agreed that upon the 2nd section the conviction must be upheld.

MATHEW, J.—I am of the same opinion. The appellant's argument has been that a private theatre kept open occasionally for public performances is not a place of public resort for the public performance of stage plays within the meaning of this 2nd section of the Theatres Regulation Act 1843. The earlier part of the section no doubt contains these words without particularly defining the number of occasions necessary to make the offence; but it proceeds to impose a penalty "for every day on which such house or place shall have been so kept open for the purpose aforesaid without legal authority." This implies that one day's performance may be an offence, and I think the conviction under the 2nd section of the Act should be affirmed.

*Judgment for respondent.*

Solicitor for appellant, *C. E. Withall.*

Solicitors for respondent, *C. and S. Harrison and Co.*

### CROWN CASES RESERVED.

*Friday, Dec. 21, 1883.*

(Before Lord COLERIDGE, C.J., DENMAN, J., HUDDLESTON, B., Sir HENRY HAWKINS, and STEPHEN, J.)

REG. v. HATTS AND CULFFE. (a)

*Evidence — Confession — Admissibility — Inducement to confess.*

*The prisoners H. and C. were taken into their master's (the prosecutor) room where there were two policemen. The prosecutor said, "I presume you know who these gentlemen are." H. said "Yes." The prosecutor then said to H., "I know what has been going on between you and C. for some time. You had better speak the truth." H. then made a confession.*

*Held, that the confession was not admissible in evidence.*

*Reg. v. Fennell (7 Q. B. Div. 147; 14 Cox C. C. 607) followed.*

CASE reserved for the opinion of this court by Sir Thomas Chambers, Q.C., M.P., Recorder of London.

Joseph John Hatts and William Culffe were tried before me on Friday, Nov. 23, 1883, at the Central Criminal Court on an indictment which charged them with conspiracy by false pretences to defraud.

Admissions were made by the prisoner Hatts in the presence of the prosecutor, who was his master, and two police officers, before he was charged, which amounted in effect to admissions of the guilt of himself and the other prisoner, Culffe.

The admissions were made under the following circumstances:

Previously to being charged, Hatts was taken by the prosecutor into his office where there were two police officers. The prosecutor then said to Hatts, "I presume you know who these gentlemen

are?" Hatts said "yes," and one of the police officers said, "We are police officers." The prosecutor then said to Hatts, "I know what has been going on between you and Culffe for some time, you had better speak the truth." Hatts then made the admissions before referred to.

Counsel for both prisoners objected to the admissions being received in evidence, on the ground that the words "You had better speak the truth," spoken by the prosecutor in the presence of two police officers, amounted to such an inducement or threat by a person in authority as to render the admissions inadmissible.

I overruled the objection, and received the evidence of the admissions.

The two prisoners were convicted, and in my judgment the evidence of the admissions contributed materially to their conviction.

I reserved the following question for the opinion of the court, viz.:

Whether the admissions made by the prisoner Hatts were properly received in evidence under the circumstances above stated.

If the court should be of opinion that the evidence of the admissions of the prisoner Hatts was properly received, the conviction of both prisoners is to be affirmed; if, on the other hand, the court should be of opinion that such evidence ought not to have been admitted, the conviction of both prisoners is to be quashed.

I deferred passing sentence on the prisoners, both of whom remain in goal.

THOMAS CHAMBERS.

*A. Collins, Q.C. (Forest Fulton with him) for the prisoners.*—The confession of the prisoner Hatts was not admissible in evidence by reason of the inducement held out by the prosecutor to him to confess, "I know what has been going on between you and Culffe for some time, you had better speak the truth." This point has been often discussed, and in fact appears now to be settled. In *Reg. v. Garner* (1 Den. C. C. 329; 3 Cox C. C. 175), on a charge of attempting to poison, a medical man said to the prisoner in the presence of her mistress, "It will be better for you to tell the truth," and this inducement was held to render a confession so obtained inadmissible. The observations of Pollock C.B., in *Reg. v. Baldry* (2 Den. C. C. 430; 5 Cox C. C. 523; 19 L. J. 146) are important: "A simple caution to the accused to tell the truth, if he says anything, has been decided not to be sufficient to prevent the statement made being given in evidence; and although it may be put that when a person is told to tell the truth he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything; but if he says anything, let it be true. It has been decided that that would not prevent the statement being received in evidence by Littledale, J. in the case of *Reg. v. Court* (7 Car. & P. 486), and by Rolfe, B. in a case at Gloucester (*R. v. Holmes*, 1 Car. & K. 248); but where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable, the objectionable words being that it would be better to speak the truth, because they import that it would be better for him to say something. This was decided in the case of *Reg. v. Garner*" (*ubi sup.*).

WESTERN CIRCUIT.]

KENNARD v. SIMMONS AND OTHERS.

[WINTER ASSIZES.]

HUDDLESTON, B. referred to the cases of *Reg. v. Jarvis* (L. Rep. 1 C. C. R. 97, 10 Cox C. C. 574) and *Reg. v. Reeve and another* (L. Rep. 1 C. C. R. 362; 12 Cox C. C. 179) as showing that the confession in this case was not admissible in evidence.

DENMAN, J.—There is also, to the same effect, the recent case of *Reg. v. Fennell* (7 Q. B. Div. 147; 14 Cox C. C. 607; 50 L. J. 126, M. C.), where the prosecutor, in the presence of a police inspector, said to the accused, "He (meaning the police inspector) tells me you are making house-breaking implements; if that is so, you had better tell the truth, it may be better for you."

Lord COLERIDGE, C.J. (to the prisoner's counsel). Can you distinguish the present case from that?

Forbes, Q.C. (*Besley* with him), for the prosecution, admitted that the weight of the authorities was against the admissibility of the confession of the prisoner.

Lord COLERIDGE, C.J.—It is impossible to distinguish the present case from *Reg. v. Fennell* (*ubi sup.*). It has been decided that the evidence of a confession after such inducement as held out in this case is inadmissible. The conviction must be quashed.

The rest of the Court concurring,

*Conviction quashed.*

## WESTERN CIRCUIT.—WINTER ASSIZES.

Jan. 18 and Feb. 9, 1884.

(Before LINDLEY, L.J.)

KENNARD v. SIMMONS AND OTHERS. (a)

"Criminal prisoner"—*Prisons Acts 1865 and 1877—Vaccination Act 1867—Summary Jurisdiction Act 1879—Jervis's Act 1848.*

A person who is committed to prison in default of distress for nonpayment of a sum of money adjudged to be paid by a court of summary jurisdiction on an information under sect. 31 of the Vaccination Act 1867, is a "criminal prisoner" within the meaning of the Prisons Act 1865, s. 5, and must be treated as such while in prison.

This was in form an action of assault brought against the Governor of Her Majesty's Prison at Portsmouth and two of his warders, for improperly treating the plaintiff while an inmate of the gaol. The plaintiff is a commercial traveller, now residing at Brighton. On Feb. 26, 1883, he was ordered by a magistrate for the county of Sussex to cause his daughter Charlotte Mabel Kennard, aged three, to be vaccinated. This he refused to do "on principle," as he said.

On the 7th May he was consequently summoned before the magistrates at Steyning, under sect. 31 of the Vaccination Act 1867, and fined 1l. inclusive of costs. He refused to pay this fine. A distress was accordingly levied on his goods, but was returned unexecuted, no goods being found. The magistrates accordingly ordered the plaintiff to be imprisoned, but without hard labour, for fourteen days in the Portsmouth Prison in default of payment of the fine.

The plaintiff was accordingly arrested under a

warrant on the 16th May, and conveyed to Portsmouth gaol. There he was ordered to take a bath, and whilst he was in the bath his ordinary clothes were taken from him and prison clothes substituted which he was compelled to wear. His deceased wife's wedding-ring, which he always wore, was removed from his finger. He was also throughout the fortnight compelled to pick oakum, to sleep on a plank bed, and to take his exercise with the ordinary prisoners. He was also not allowed to procure his own food, though he offered to pay for it, but was compelled to live on the prison fare.

By sect. 4 of the Prisons Act 1865, a "criminal prisoner" is defined as meaning "any prisoner charged with or convicted of a crime," and this definition is incorporated into the Prisons Act 1877, by sect. 61 thereof.

By sect. 38 of the Prisons Act 1877 it is enacted as follows:

The Secretary of State may from time to time make, and when made repeal, alter, or add to rules with respect to the classification and treatment of prisoners imprisoned for non-compliance with the order of a justice or justices to pay a sum of money, or imprisoned in respect of the default of a distress to satisfy a sum of money adjudged to be paid by order of a justice or justices, so that such rules are in mitigation and not in increase of the effect of such imprisonment, as regulated by the Prisons Act 1865.

In pursuance of the authority given by this section, Her Majesty's Principal Secretary of State for the Home Department, on the 19th Feb. 1878, made certain rules, including "special rules for debtors," of which the fifteenth is as follows:

The foregoing rules relating to debtors shall apply to any person committed to prison for default in payment of any debt, or instalment of any debt, or any sum of money due from or payable by such person in pursuance of any order or judgment of any County Court or other competent court, or any order of a justice or justices, unless by the terms of the warrant of commitment, the imprisonment is to be with hard labour.

The action came on for hearing before Lindley, L.J. without a jury, at the Winchester Assizes, on the 18th Jan. 1884. The damages were agreed at 30l., if any. It was admitted that the plaintiff had not been treated in accordance with the "Special Rules for Debtors," but as a criminal prisoner not sentenced to hard labour. Picking oakum is not now considered "hard labour."

Petheram, Q.C. and Odgers contended that the plaintiff was, under rule 15 above, entitled to be treated as a debtor. It may be that he was not in the strict sense of the word a debtor, but he was a "person committed to prison for default in payment of a sum of money due from him in pursuance of an order of justices," such imprisonment being expressed to be "without hard labour."

Charles, Q.C. and Matthews for the defendants.—The plaintiff is a "criminal prisoner," for he was convicted of a crime. There is a great and fundamental distinction between a conviction and an order of justices. In this case the plaintiff was convicted on an information within the meaning of sect. 5 of the Summary Jurisdiction Act 1879, which is confined to criminal proceedings; he was not ordered on complaint to pay a sum of money under sect. 6 of that Act, which is confined to civil debts. The plaintiff must come

under one section or the other; there is no third class:

*Allen v. Worthy*, L. Rep. 5 Q. B. 168; 39 L. J. 36, M. C.;

*Reg. v. Paget*, 45 L. T. Rep. N. S. 794; 8 Q. B. Div. 151;

*Mellor v. Denham*, 42 L. T. Rep. N. S. 494; 5 Q. B. Div. 467.

*Petheram*, Q.C. in reply.—There is a third class. The Summary Jurisdiction Act itself, in sect. 21, speaks of "a warrant for committing a person to prison for nonpayment of a sum of money not a civil debt adjudged to be paid by an order." And the schedule 1 to the Prisons Act 1865, r. 102, expressly empowers the justices in sessions assembled to "make such rules as they think expedient with respect to the classification and treatment of prisoners who are not debtors, and are not criminal prisoners within the meaning of this Act." Neither sect. 38 of the Act of 1877, nor rule 15, made thereunder, is restricted to civil debtors, as is clear from the concluding words as to imprisonment without hard labour, which would otherwise be quite unnecessary. The plaintiff was not sentenced to any definite term of imprisonment; he could have come out at any moment on paying a sovereign:

*Reg. v. Whitcross-street*, 6 B. & S. 371; 34 L. J. 193, M. C.;

*Reg. v. Master and others*, L. Rep. 4 Q. B. 285.

*Cur. adv. vult.*

Feb. 9.—LINDLEY, L.J. (after briefly recapitulating the facts of the case, continued as follows:—The plaintiff was committed to prison without hard labour for fourteen days unless the penalty and costs of commitment and conveyance to prison were sooner paid. The commitment was under 11 & 12 Vict. c. 43, s. 19, and 42 & 43 Vict. c. 49, s. 21, and was in all respects regular. Under this commitment the plaintiff was arrested and imprisoned. When in gaol he was treated as an ordinary criminal prisoner not subject to hard labour. He complains of this, and alleges that he ought to have been treated more leniently, viz., as a debtor or as a person entitled to the benefit of the rules relating to debtors. The 11. which he was ordered to pay was money adjudged to be paid on a conviction, and was not money simply ordered to be paid. The difference between convictions and orders for the payment of money runs through the whole magisterial law and through the whole of Jervis's Act (11 & 12 Vict. c. 43, see ss. 1, 14, 17, and 18), and is thoroughly understood. Nor does the difference depend on whether hard labour can or cannot be added to commitment to prison. A conviction is not an order, because no hard labour is or can be imposed; nor does an order become a conviction because hard labour is or can be imposed in case of disobedience to it (see 11 & 12 Vict. c. 43, ss. 19, 21, 23, and 24, and the forms in the schedules I and K. and O. 2.) These sections and forms show that hard labour, where warranted by statute, may be imposed both in cases of convictions and in cases of money ordered to be paid. One instance of an order which can be enforced by imprisonment with hard labour is furnished by the Act of Geo. 2, relating to the fraudulent removal of goods to avoid a distress; another instance is afforded by the Hackney Carriage Act (1 & 2 Will. 4, c. 22), s. 41, and I believe there are other instances of the same sort. It will be important to bear this in

mind in construing the prison rules of Feb. 1878 hereafter referred to. Up to this point there appears to me to be no difficulty. The plaintiff became a debtor to the Crown in respect of the penalty or fine imposed upon him by the justices; but he was also guilty of a wilful breach of a statutory public duty; and for this he was duly convicted. It would be contrary to all legal principles to hold that the plaintiff was legally entitled on payment of the fine to disobey the plain injunctions of the statute. His breach of duty was a punishable offence. It was made punishable summarily by the statute imposing the duty, and if no provision had been made for its punishment summarily the breach of duty would have been an indictable misdemeanour, punishable by fine or imprisonment, or both, like other wilful breaches of public statutory duties, for the punishment of which no express provision is made (see Com. Dig. "Indictment" D. & E.). The case of *Allen v. Worthy* (*ubi sup.*) seems to me to be in accordance with this view, and to show that the order of the 7th May 1883, imposing the fine of 11. was a conviction as distinguished from an order in its technical sense. If, therefore, there were no other statutes or rules to consider, I should hold, without hesitation, that the plaintiff was properly treated in prison as a criminal prisoner, and that he was not entitled to be treated as a debtor or other non-criminal prisoner. I will now pass to the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), in order to see whether that Act has in any way altered the character of the plaintiff's offence. Sect. 5 is the one applicable to this case. Sect. 6 is not applicable; for the penalty here is not a sum claimed to be due and to be recoverable by complaint. No sum was due to anyone before the penalty was imposed, when it became a debt due to the Crown. Sect. 35, in my opinion, refers only to cases within sect. 6. The decision in *Reg. v. Paget* supports this view, but the case before me is much plainer than that. Sect. 21, it is true, mentions "a sum not a civil debt, adjudged to be paid by an order." This expression evidently refers to a sum of money recoverable by summary process before justices; but recoverable by an order as distinguished from a conviction. A sum of money not a civil debt may yet be recoverable by an order. An illustration of this is afforded by sect. 34, sub-sect. 2. The object of the Legislature in sect. 6, sect. 34, sub-sect. 2, and s. 35, seems to have been to abolish imprisonment for debt in all cases of nonpayment of money, payable under or by virtue of orders of justices when the debtor cannot pay. In other words, the object apparently was to extend sect. 4 of the Debtors Act 1869, which excepts from its provisions all sums recoverable summarily before justices, so as to include in future all sums recoverable summarily under, or by virtue of, an order. But this modification does not apply to sums payable on convictions as distinguished from orders. The conclusion at which I have arrived is, that the Summary Jurisdiction Act 1879 has no real bearing one way or the other on the question I have to determine. I pass, therefore, to the Prison Acts, and to the rules made under them. It is apparent from them, and it was very properly admitted on both sides, that the question before me depends upon whether the plaintiff was or was not entitled to be treated

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[WINTER ASSIZES.]

in accordance with the rules issued in Feb. 1878, under the Prisons Act 1877, and headed "Special Rules for Debtors." On looking through the Prisons Act 1865, and the rules contained in the schedule to it, I find the following words used in the following senses, viz., 1. "Prisoner" not defined, but evidently used generically to denote all persons committed to prison and in custody of the gaoler. 2. "Criminal prisoner" defined to mean any prisoner charged with or convicted of a crime (28 & 29 Vict. c. 126, s. 2), but excluding misdemeanants of the first division: (see sect. 67.) 3. "Debtors" not defined, but apparently used to denote persons in prison for debt as contrasted with "criminal prisoners." In some places debtors are in express terms contrasted with criminal prisoners. See for example Prisons Act 1865, s. 17, sub-sect. 4; see also ss. 59, 60. But there may be prisoners who are not "criminal prisoners" and are not "debtors." Persons committed for contempt of court naturally occur to the mind as being neither debtors nor criminal prisoners; and persons committed to prison by justices for disobedience to other orders than orders for payment of money may be neither criminal prisoners nor debtors. Such persons are referred to in sect. 24 of the Act 11 & 12 Vict. c. 43, and in sect. 34 of the Summary Jurisdiction Act 1879, and in rule 102 in the schedule to the Prisons Act 1865. Many of the rules in the schedule to the Prisons Act 1865 draw a distinction between the treatment of debtors and criminal prisoners; e.g., rules 16, 18, 31, and 39; and rule 102 authorises the making of rules as to prisoners who are neither criminal prisoners nor debtors. But, so far as the Prisons Act of 1865 is concerned, I find nothing in the Act itself or in the schedule to it which entitled the plaintiff to be treated other than as a criminal prisoner not subject to hard labour. I now come to the Prisons Act 1877 (40 & 41 Vict. c. 21), and to the rules made under its provisions. The Act of 1877 contains in sect. 57 a definition of "prisoner," and the word seems to mean any person committed to prison for whatever cause. "Criminal prisoners," "debtors," and "prisoners who are neither criminal prisoners nor debtors," are referred to in sects. 25 and 26; and by sect. 40 persons committed for contempt of court are to be treated as misdemeanants of the first division. The Prisons Act 1877 contains several provisions enabling the Home Secretary to make rules, viz.: sect. 5, which vests in him the power vested in the justices in sessions assembled under the Prisons Act 1865, sect. 21, and the schedule, rule 102; sects. 24-26, which relate to prisons to which prisoners may be sent; sect. 38, which relates to prisoners ordered by justices to pay a sum of money; sect. 39, which relates to persons awaiting trial; sect. 51, which provides for laying rules before Parliament. I have not been able to ascertain clearly why sect. 38 was inserted; probably it was to remove any obscurity or doubt which might arise upon the construction of sect. 21 and rule 102 in the Prisons Act 1865, and the schedule to it. However this may be, I am of opinion that under sects. 5 and 38 of the Prisons Act 1877 the Secretary of State had power to make rules respecting the treatment of all classes of prisoners, criminal prisoners, debtors, or others, subject of course to the provisions in the Acts of

1865 and 1877. In pursuance of this power, the Home Secretary in Feb. 1878 made various special rules with respect to prisoners, who are debtors; and rule 15 is as follows: "The foregoing rules relating to debtors shall apply to any person committed to prison for default in payment of any debt or sum of money due from or payable by such person, in pursuance of any order or judgment of any court or any order of a justice, unless by the terms of the warrant of commitment the imprisonment is to be with hard labour." The question I have to decide is narrowed down to the true construction of this rule. The expression "sum of money payable in pursuance of any order of a justice" would, in ordinary parlance, include a penalty ordered to be paid on a conviction; but in its technical sense it does not, in my opinion, include a case of that kind. To hold it to do so would be to suppose that the Home Secretary did not know the distinction between convictions and orders for payment, and I cannot suppose anything of the sort. I at one time thought that the words relating to hard labour showed that convictions were intended to be included in the expression "money payable in pursuance of an order of a justice;" but, as I have already pointed out, the addition of the words relating to hard labour does not solve the difficulty or show that the orders referred to in the rule include convictions. The use of the word "debtor," the absence of all allusion to convictions, and the expression "order of a justice," which is not synonymous with, but in magisterial and prison law is contrasted with, convictions, these circumstances satisfy me that rule 15 does not apply to persons convicted of an offence and ordered to pay a fine, as the plaintiff in fact was. It must not be forgotten that orders for commitment are in forms familiar to those to whom they are addressed, or who have to act upon them; and although of course the defendants in this case may have made a mistake, I must say I think no governor of any gaol would have understood the warrant for the plaintiff's imprisonment as a warrant issued for the nonpayment of a sum ordered to be paid, as distinguished from a warrant issued for the nonpayment of a penalty ordered to be paid by way of punishment for an offence of which the plaintiff had been convicted. I am of opinion, however, that the governor in this case made no mistake. The conclusion at which I have arrived is, that the plaintiff was not entitled to the benefit of the special rule relating to debtors, and was properly treated in prison as an ordinary criminal prisoner not subject to hard labour. My judgment, therefore, is for the defendants with double costs, as provided by the Prisons Act 1865, s. 49.

*Odgers* applied for a stay of execution; this his Lordship granted.

Solicitors for the plaintiff, *Shaen, Roscoe, Massey, Shaen, and Henderson.*

Solicitor for the defendants, *The Solicitor to the Treasury.*

# Supreme Court of Judicature.

## COURT OF APPEAL.

Nov. 4 and 5, 1883.

(Before BRETT, M.R. and BOWEN, L.J.)

REG. v. THE RECORDER OF SHEFFIELD. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 150, 257, 268—Urban authority—Order to pave street—Recovery of expenses of paving—Objection that ground is not part of a street—Appeal to Local Government Board.*

*The respondents, acting as the urban authority, served a notice on the appellant under sect. 150 of the Public Health Act 1875, requiring him to sewer, level, pave, &c., a street on which his premises abutted. The notice was not complied with, and the appellants executed the works themselves, caused the expense to be apportioned among the frontagers, and summoned the appellant under sect. 257 for his share.*

*At the hearing of the summons the appellant took the objection that part of the place where the works were executed was not a street within the meaning of the Act, and therefore the respondents had no power to order the execution of the works, or to demand payment.*

*An order for payment having been made, and confirmed by the court of quarter sessions, the appellant applied for a writ of certiorari to bring up and quash the order.*

*Held (affirming the decision of Watkin Williams, Cave, and Smith, JJ.), that the appellant's remedy was by appeal to the Local Government Board against the decision of the local authority under sect. 268, and therefore the objection which he took could not be entertained on the hearing of the summons, and a rule for a certiorari had been rightly discharged.*

THE appellant, Mr. Wake, was the owner of certain premises in Sheffield, abutting on a street called Platt-street.

On the 6th Nov. 1879 the Corporation of Sheffield, acting as the urban sanitary authority, served a notice on Mr. Wake, under sect. 150 of the Public Health Act 1875, requiring him within one month to sewer, level, pave, &c., part of Platt-street. Mr. Wake did not comply with the notice, and the corporation executed the required works at a cost of 340*l*. The borough surveyor apportioned Mr. Wake's share of the expenses at 74*l*.

On the 25th Nov. 1880 notice was given to Mr. Wake, of the execution of the works, and of the apportionment.

On the 25th Feb. 1881 Mr. Wake gave notice to the corporation that he disputed the apportionment and the whole of their acts in reference to the matters mentioned in the notice of the 25th Nov. 1880.

On the 22nd Sept. 1881 the corporation gave notice to Mr. Wake that they had appointed an arbitrator to settle the apportionment, and to do all other acts required by the Public Health Act 1875. Mr. Wake did not appoint an arbitrator, or attend the arbitration, and his share of the expenses was apportioned by the arbitrator

appointed by the corporation at the sum fixed by the surveyor, 74*l*.

The corporation took out a summons to enforce payment of this sum of 74*l*., and at the hearing of the summons before the stipendiary magistrate for the borough of Sheffield Mr. Wake objected that the plans referred to in the notice of the 6th Nov. 1879, showed that part of the works in question was executed upon two pieces of land which did not form part of Platt-street, but were private property. The magistrate found that these pieces of land did form part of the street, and made an order for payment.

On appeal to quarter sessions the recorder found that these two pieces of land did not form part of the street, and was therefore of opinion that the corporation had no power to order the execution of the works under sect. 150 of the Public Health Act 1875; he came to the conclusion, however, that this was not an objection to which the magistrate could give effect, because the proper remedy was by appeal against the decision of the local authority under sect. 268 of the Act, and therefore confirmed the order for payment.

Mr. Wake thereupon applied for a writ of certiorari to bring up and quash the magistrate's order for payment, and the order of the recorder confirming the order of the magistrate.

The rule for a certiorari was discharged by Watkin Williams, Cave, and Smith, JJ.

Mr. Wake appealed.

By the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 3:

Street includes any highway (not being a turnpike road) and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not.

Sect. 150: Where any street within any urban district (not being a highway repairable by the inhabitants at large), or the carriage-way, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good or to provide proper means for lighting the same within a time to be specified in such notice.

If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein, and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses.

Sect. 257. Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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reckoned from the date of the service of notice of demand.

Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same.

The local authority may, by order, declare any such expenses to be payable by annual instalments within a period not exceeding thirty years, with interest at a rate not exceeding five pounds per centum per annum, until the whole amount is paid; and any such instalments and interest, or any part thereof, may be recovered in a summary manner from the owner or occupier for the time being of such premises, and may be deducted from the rent of such premises, in the same proportions as are allowed in the case of private improvement rates under this Act.

By sect. 268:

Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said Board may seem equitable, and the order so made shall be binding and conclusive on all parties.

*Charles, Q.C. and C. Gould* for the appellant.—As a part of the land, in respect of which the expenses for the payment of which the order in question has been made were incurred, is no part of a street within the meaning of the Public Health Act 1875, therefore the provisions of the Act have no relation to such land, and the whole of the proceedings relating to the pavement of such land were unauthorised. The jurisdiction given by the Act to make an order for payment only enables the magistrate to make an order for the payment of such expenses as are legally payable under the Act. Here the urban sanitary authority were not entitled to recover the expenses, and therefore the magistrate was not justified in making the order for payment, but such order was made without jurisdiction, and ought to be brought up by *certiorari* and quashed.

The *Solicitor-General* (Sir F. Herschell, Q.C.) (with him *J. E. Barker* and *C. S. Hunter*) for the respondents.—The argument in support of the appeal is based on a fallacy arising from a confusion between a magistrate giving a wrong decision and a magistrate acting without jurisdiction. A magistrate is not acting without jurisdiction because he decides wrong either in fact or in law. If, therefore, the magistrate made a wrong order the proper remedy was by appeal to quarter sessions, but the magistrate was right, for he was bound to make an order for payment of the amount apportioned by the surveyor. What is really complained of is that the local authority wrongly decide that the place in question was a street, and that the appellant was liable for the expense of repairing it. For this the proper remedy is by appeal to the Local Government Board, as provided by sect. 268. [He was stopped by the Court.]

*Charles, Q.C.* replied.

The following authorities were cited:

*Nisbet v. Greenwich Board of Works*, 32 L. T. Rep. N. S. 762; L. Rep. 10 Q. B. 465;  
*Cook v. Ipswich Local Board*, 24 L. T. Rep. N. S. 579; L. Rep. 6 Q. B. 451;  
*Reg. v. The Local Government Board*, 48 L. T. Rep. N. S. 173; 10 Q. B. Div. 309;  
*Hesketh v. Atherton Local Board*, 29 L. T. Rep. N. S. 530; L. Rep. 9 Q. B. 4;  
*Bunbury v. Fuller*, 9 Ex. 111;  
*Reg. v. Bolton*, 1 Q. B. 66.

BRETT, M.R.—In this case everything that was done was intended to be done under and by virtue of the statute, and if the case is within the statute, the statute has pointed out the whole course of procedure. The statute imposes on certain persons liabilities not known to the common law, and gives to other persons powers and duties which also were not known to the common law. It seems to me to follow that where a statute imposes a new liability and shows the means of enforcing it, then if a case is within the statute, the only mode of procedure is the mode so pointed out. If the present case is within the statute, the course of the transaction is this: The local authority is bound to decide whether there shall be expenditure, and to determine the proper amount of that expenditure, then the amount is laid before the surveyor who is bound to apportion it among the frontagers according to the measurement of their frontages. The surveyor has no authority to inquire whether the expenditure was upon a subject matter within the statute, or whether it was proper or reasonable; he has merely to apportion the amount. When the amount has been apportioned, the local authority is entitled to give notice to each frontager of the amount apportioned against him, and to demand payment, and, if payment is refused, to go before the magistrate and obtain an order for payment. It is not necessary to inquire what the remedy would be in a case where the person charged found fault with the apportionment of the surveyor, for in the present case he does not find fault with what the surveyor has done, but with the decision of the local authority, on the ground that, although they might properly have paved the street upon which he was a frontager, and might have fixed the sum to be paid for doing so, yet the sum which they decided should be expended, and which they did expend, was expended partly on the street and partly upon private land which formed no portion of the street. He says there is a wrong decision of the local authority to the extent that they have fixed a wrong sum to lay before the surveyor, by not having confined it to the amount expended upon the street, but by having added to it the sum spent upon the private land. The objection, therefore, is not that the local authority can make no order upon the applicant at all, but that they have laid before the surveyor a larger sum, part of which was composed of expenditure on private land. If the case is within the statute, his complaint is, that he is aggrieved by the decision of the local authority, and therefore, the grievance would be within the exact terms of sect. 268. The statute gave the local authority the power and imposed upon them the duty of deciding these matters; that authority has aggrieved the appellant by what he considers a wrong decision, and if that be so, sect. 268 has pointed out the course to be pursued, that is, it shows that he must appeal to the Local Govern-



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ment Board. If the case is within the statute, the statute has imposed a new liability, and as regards the new grievance, the statute gives a particular remedy, and therefore, that is the only remedy the person aggrieved has under the statute. If the case is within the statute, Mr. Wake ought to have appealed under sect. 268 to the Local Government Board, and when he failed to do so, and the local authority went before the magistrate to ask for an order for payment, it seems to me that the magistrate could not determine whether the decision of the local authority was right or wrong. That was not for him, but for the Local Government Board. The magistrate could only inquire whether the proper notice had been given and the order made, and if that was so, he could only make the order for payment. But it is said that the magistrate was bound to inquire whether the case came within the Act, and that if the local authority has assumed to impose a liability in respect of a subject-matter not within the statute, as for paving land which is not part of a street, and therefore not within the statute, then the case is not within the Act at all, and if the magistrate, on inquiry, finds that it is not, then he has no jurisdiction. On the other side, it was said that if the magistrate has to make that inquiry, he has jurisdiction to make it and to enter upon the facts, and that if he does so and comes to a wrong conclusion, inasmuch as he is exercising a summary jurisdiction given by another Act of Parliament, there is an appeal to quarter sessions. It seems to me that it is unnecessary to decide either of those points. It may be that the magistrate has power to inquire whether the case is within the Act, and that if it is not he may have no jurisdiction to make any further order. It may be that he is bound to make the inquiry, and that if he comes to a wrong decision there is an appeal to quarter sessions. It may be that he has no power to enter on the inquiry; but it is unnecessary to inquire into that question now, because, assuming the magistrate has jurisdiction to try the question whether the case is within the Act, and that, if it is not, he has no jurisdiction to make any further order, I cannot come to the conclusion that in this case the matter was wholly without the statute. The case would be wholly without the statute in that view, if the facts were such that no order at all could be made by the local authority. Upon that view of the case, if there had been no pavement in respect of a street within the statute, no order could properly have been made against anyone. But if any part of the expenditure has been made with regard to a street within the statute, it is obvious that as to that part the local authority may fix upon a proper sum and obtain an apportionment from the surveyor and make orders upon the frontagers. In this case it cannot be denied that part of the expenditure was in respect of a street within the Act, or that Mr. Wake was a frontager upon that street. It follows that an order might properly be made upon him. The order has been made, and, the only defect he can point out is that although an order can be made, yet a wrong one has been made. The case of *Cook v. The Ipswich Local Board* (*ubi sup.*) seems to me to be an authority that where an order can be made, but that which has been made is wrong, it is no defect of jurisdiction but an error in judgment

in respect of an order within the jurisdiction. Here the local authority had power to make an order and has made what is said to be a wrong order. Then, with respect to that grievance, the magistrate could not inquire, and could not set it right by modifying the order of the local authority. If the local authority had power to come to a decision at all, the magistrate could not inquire whether it was right or wrong, but was bound to make an order for payment, because, if the decision was erroneous, the only remedy given was an appeal to the Local Government Board. I am therefore of opinion that the decision of the Divisional Court was right and this appeal must be dismissed.

BOWEN, L.J. concurred.

*Appeal dismissed.*Solicitors for the appellant, *Richard Smith and Wilmer*, for *John Yeomans*, Sheffield.Solicitors for the respondents, *Geare, Son, and Pease*, for *A. E. Maxfield*, Sheffield.

Wednesday, Nov. 14, 1883.

(Before Lord COLERIDGE, C.J., BRETT, M.R., and BOWEN, L.J.)

HENRY AND OTHERS (pets.) v. ARMITAGE (resp.). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Municipal election—Nomination paper—Statement of name of candidate—Situation of property in respect of which nominating burgess is enrolled on burgess-roll—Municipal Elections Act 1875 (35 & 39 Vict. c. 40), s. 1, sub-sect. 2, and schedule I, form 2—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 55, and schedule III, part 2, rule 5.*

*The Municipal Elections Act 1875 (38 & 39 Vict. c. 40), s. 1, sub-sect. 2 (which is repealed and in part re-enacted by 45 & 46 Vict. c. 50), enacted that at municipal elections of councillors "the nomination paper shall state the surname and other names of the person nominated, with his place of abode and description, and shall be in the form No. 2, set forth in the first schedule to this Act, or to the like effect."*

*A foot-note to form No. 2 in the first schedule to the Act directed the situation of the property in respect of which the burgess subscribing is enrolled on the burgess-roll to be placed after his signature to the nomination paper.*

*Held, that the words of the section and form were imperative, and not directory only.*

*In a nomination paper the Christian name of the person nominated, being William, was written "Wm."*

*A burgess subscribing the same nomination paper placed after his signature "6, Belle Vue Crescent," that being the place where he was living, while his qualification on the burgess-roll was "houses in succession, 6, Belle Vue Crescent, and Linden Terrace."*

*Held, that the Christian name of the person nominated was sufficiently stated within the meaning of the section, and that the nomination paper was in the form set forth in the schedule to the Act, or to the like effect, and was valid.*

*Judgment of Field and Watkin Williams, JJ. reversed.*

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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APPEAL by the petitioners, on a municipal election petition, against the judgment of Field and Watkin Williams, JJ. (reported 48 L. T. Rep. N. S. 576), where the special case (containing the nomination papers and the objections thereto) and the material provisions of the Municipal Elections Act 1875 (38 & 39 Vict. c. 40) are fully set out.

The above-mentioned statute is repealed by the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 5, schedule I., which came into operation on the 1st Jan. 1883.

The only point decided which can be material in questions arising under the Act now in force is the following:

The first objection to the first nomination paper was made on the ground that the nomination paper did not state the surname and other names of the person nominated, as required by sect. 1, sub-sect. 2, of the (now) repealed statute.

The Christian name of Mr. Skinner, the person nominated, being William, what appeared on the nomination paper was the abbreviation "Wm."

The repealed provisions relating to this point are re-enacted in the following terms:

By 45 & 46 Vict. c. 50, s. 55:

The nomination of candidates for the office of councillor shall be conducted in accordance with the rules in part 2 of the third schedule.

By the fifth of these rules:

The nomination paper must state the surname and other names of the candidate, with his abode and description.

The appeal was argued by *McClymont* and *R. Lamb Wallace* for the petitioners (appellants), and by *Edward Clarke*, Q.C. and *Atherley Jones* for the respondent.

The arguments were similar to those used in the court below.

The following authorities were referred to:

*Gothard v. Clarke*, 42 L. T. Rep. N. S. 776; 5 C. P. Div. 253;

*Reg. v. The Mayor of Shrewsbury*, 26 J. P. 84;

*Roper v. The Mayor of Basingstoke*, 36 L. T. Rep. N. S. 468; 2 C. P. Div. 440;

*Ex parte McHattie*, 10 Ch. Div. 398;

*Jones v. Harris*, 25 L. T. Rep. N. S. 702; L. Rep. 7 Q. B. 157;

*Reg. v. Tugwell*, L. Rep. 3 Q. B. 704;

*Reg. v. Plenty*, L. Rep. 4 Q. B. 346;

*Mather v. Brown*, 34 L. T. Rep. N. S. 869; 1 C. P. Div. 596;

*Reg. v. Bradley*, 3 E. & E. 634; 30 L. J. 180, Q. B.;

*Howes v. Turner*, 35 L. T. Rep. N. S. 58; 1 C. P. Div. 670.

LORD COLERIDGE, C.J.—On the best consideration I can give to this case I am of opinion that the judgment of the court below cannot be supported. I adhere to what I said in *Mather v. Brown* (1 C. P. Div. 596) as to the great importance of adhering to the words of the statute. As to the first question, I have come to the conclusion that the case of *Reg. v. Bradley* (3 E. & E. 634; 30 L. J. 180, Q. B.) is directly in point. As I understand that case, the judges of the Court of Queen's Bench there decided the very matter which now comes before us, for they held that "Wm." was a statement of the Christian name, and therefore that "Wm. Bradley" in a voting paper was sufficient to come within the words of 7 Will. 4 & 1 Vict. c. 78, s. 14, "containing the Christian names and surnames of the persons for whom he votes." I was under the impression at first that this had been treated as a misnomer, but had been

held to be cured by 5 & 6 Will. 4, c. 76, s. 142, and that because the paper contained such a description as to be commonly understood the Court of Queen's Bench had held that sect. 142 applied so as to cure the defect. If that were so, the decision would be in point in favour of the objection; but, on looking at the judgments, I can come to no other conclusion than that the court held that the paper came within 7 Will. 4 & 1 Vict. c. 78, s. 14, and contained the Christian name of the person referred to. In the written judgment delivered by Hannen, J. in *Reg. v. Plenty* (L. Rep. 4 Q. B. 346) the Court of Queen's Bench took the same view of the decision in the earlier case. I am therefore of opinion that *Reg. v. Bradley* decides that "Wm." is a statement of the Christian name, and therefore that it comes within the words of the statute now before us. I prefer to go on the authority of the cases rather than to reason out the point. I am aware that similar questions may be raised as to other names, but this is unavoidable. It was clearly decided in *Reg. v. Plenty* and *Mather v. Brown* that a mere initial will not do, and *Reg. v. Bradley* is an authority that the abbreviation "Wm." will do. The other cases referred to on this question are not in point. (a)

BRETT, M.R.—I am of the same opinion, and as to the first point my opinion is stronger than that of the Lord Chief Justice. I think that in *Reg. v. Bradley* (3 E. & E. 634; 30 L. J. 180, Q. B.) the court did decide the point, but, whether it had been already decided or not, I should have come to the same conclusion, and therefore I decide not merely on authority, but from a clear conviction. I do not think this can be called a dangerous decision. The words of the statute are, "shall state the surname and other names of the person nominated," but there is nothing about spelling the names. The question is whether what is put in writing in this nomination paper is in a form which everyone would conclude meant that particular name, and no other. Judges have come to the conclusion that the abbreviation "Wm." meant "William," because they had sufficient knowledge of the world to know that it would be taken to mean "William" and no other name, and everyone would think so. Mr. Clarke suggested it might be taken to mean "Wilbraham," but I do not think this is so. Not one man in England would say it meant "Wilbraham," while everyone would say it meant "William," and where something is put in writing which everyone would take to mean one name only, I think it may be said that that name is stated by the writing. Other instances have been suggested which do not come within the statute; clearly "W." is not a statement in writing of the name of "William;" or take "B.," or any other single letter; can it be said that a letter would state any name? There may be other abbreviations which would have the same

(a) The Lord Chief Justice then proceeded to give judgment as to the second objection to the first nomination paper, overruling the objection, and reversing the decision of the court below, as stated in the head-note to this report. Brett, M.R. and Bowen, L.J. also gave judgment to the same effect. This part of the judgment turned on the effect of the note at the end of form 2 in schedule I. to 38 & 39 Vict. c. 40, which is repealed and not re-enacted by 45 & 46 Vict. c. 50. The Court, having thus held the first nomination paper to be good, gave no decision as to the objections to the second.

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effect. If by universal acceptance an abbreviation signifies one name only, I should say it would amount to a statement of that name; if it does not it would not be within the Act. I am therefore of opinion, even independently of the authority of the case of *Reg. v. Bradley*, that although "Wm." does not spell the name of "William," it states it.

BOWEN, L.J.—I am of the same opinion. It is important to see that the forms which Parliament has laid down are not frittered away. It would be unfortunate if we were to fall into the notion that a little deviation from that which is prescribed by statute can make no difference. In the present case, however, both on authority and reason, I think the judgment of the court below cannot be supported. The first question is, whether the Christian name of the person nominated was stated within the meaning of 38 & 39 Vict. c. 40, s. 1, sub-sect. 2), and I think this question is concluded by authority. What was written on the nomination paper was "Wm."; is that a statement of the Christian name of the person nominated within the meaning of the Act? I think this question is settled by *Reg. v. Bradley* (3 E. & E. 634; 30 L. J. 180, Q.B.). I agree with Mr. Clarke that the court there might have applied sect. 142 of 5 & 6 Will. 4, c. 76 so as to cure the misnomer, but, on looking through the judgments, both as reported in *Ellis & Ellis* and in the *Law Journal*, and the judgment in *Reg. v. Plenty* (L. Rep. 4 Q. B. 346), I have formed the same opinion as the Lord Chief Justice and the Master of the Rolls, which is, that the court in *Reg. v. Bradley* did decide on the ground that "Wm." was equivalent to "William." It must be remembered that every abbreviation will not do, but everyone would see that, if this particular abbreviation means anything, it must mean "William."

*Appeal allowed.*

Solicitor for the petitioners, *T. Balfour Allan*.

Solicitors for the respondents, *Johnson and Weatherall*, for *Bowen and Brewis*, *Sunderland*.

*Saturday, Aug. 4, 1883.*

(Before BRETT, M.R., COTTON and BOWEN, L.JJ.)

REG. v. MARSHAM. (a)

*Rates—Assessment—Appeal—Agreement to pay old rate—Order of judge—Jurisdiction—Refusal of magistrate to issue warrants—Valuation of Property (Metropolis) Act 1869 (32 & 33 Vict. c. 67) s. 44—11 & 12 Vict. c. 44, s. 5—20 & 21 Vict. c. 43.*

*The rateable value of certain property having been re-assessed at a much higher sum, the owners appealed.*

*Before the hearing of the appeal it was agreed that a special case should be stated for the opinion of the Queen's Bench Division, and that in the meantime rates should be paid on the former valuation, and these terms were embodied in an order made by Cave, J. on the 23rd March 1881. In 1883 the overseers applied to the magistrates for a distress-warrant for the amount of the rates according to the new assessment, but the application was refused on the ground that as the appeal was still pending the overseers were bound by the order of Cave, J.*

*The overseers then applied to the Queen's Bench Division for a mandamus to the magistrates to issue the warrant.*

*Held, that in consequence of the provisions of 32 & 33 Vict. c. 67 s. 44, which enacts that, pending any appeal from any new assessment, the rate shall be paid according to the new assessment, Cave, J. had no jurisdiction to make the order, and that the consent of the assessment committee to that order did not bind the overseers.*

*Held also, that the application for a mandamus was properly made under 11 & 12 Vict. c. 44, s. 5, the issue of the warrants being a merely ministerial, and not a judicial act.*

THIS was an appeal from two orders of a Divisional Court, consisting of Pollock, B. and Manisty, J., by which it was ordered that R. H. B. Marsham, Esq., and J. Balguy, Esq., police magistrates of the Greenwich Police Court, should respectively issue their warrants to levy by distress on the goods of the mayor, aldermen, and commonalty of the City of London, the respective sums of 3419l. 4s. 4d., and 8325l. 15s. 10d., being unpaid rates for the relief of the poor of the parish of St. Nicholas, Deptford, and other purposes, made and assessed between the 10th May and the 16th Aug. 1882, and between the 6th April 1881 and the 25th March 1883 respectively, in respect of the Deptford Foreign Cattle Market.

In 1878 a provisional valuation of the Cattle Market was made, the gross value being assessed at 6605l., and the rateable value at 5465l.

Upon the quinquennial valuation list being made out for the parish of Deptford in Nov. 1880, which was finally approved by the Greenwich Union Assessment Committee in accordance with the provisions of the Valuation of Property (Metropolis) Act 1869, the gross value of the property was assessed at 25,000l. and the rateable value at 20,000.

This valuation came into effect on the 6th April 1881, and in Jan. 1881 the Corporation gave notice of appeal against it.

Before the case came on for hearing the parties came to an arrangement, which was embodied in an order by Cave, J., dated the 23rd March 1881, by which it was ordered that the proceedings should be stayed, and that the facts should be stated in a special case under the 40th section of the Valuation of Property (Metropolis) Act 1869, for the opinion of the Queen's Bench Division, such case to be settled in case of difference by Mr. Roland Vaughan Williams, and that, upon the Queen's Bench Division giving their decision upon the questions of law, Mr. R. V. Williams should fix the amount of gross and rateable value in accordance therewith if the parties should differ, and that in the meantime the appellants should pay rates upon the basis of the last valuation list in force before that then questioned by the appeal.

On the 9th May 1882 a provisional valuation was made, by which the premises in question were rated at 35,000l. gross and 28,000l. rateable. Up to Aug. 1882 the overseers of the parish had acquiesced in the rates being assessed on the old basis; but on the 16th Aug. 1882 they took out a summons, at the Greenwich Police Court, calling on the Corporation to show cause why a distress-warrant should not be issued for 3419l. 4s. 4d. for arrears of rates from the 10th May, on the footing of the provisional assessment. On the 6th Sept.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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Mr. Marsham dismissed the summons on the ground that the appeal was still pending, and that, by the order of the 23rd March 1881, the rates were payable on the basis of the original valuation list until the decision of the special case.

On the 27th Feb. 1883 the special case was heard by the Queen's Bench Division, and the valuation list of 1880 was affirmed.

On the 13th May 1883 the new overseers issued a summons for a distress-warrant for 11,745*l.* 0*s.* 2*d.*, being the former amount of 341*l.* 4*s.* 4*d.*, together with a further amount of 832*l.* 15*s.* 10*d.* for rates levied on the same footing. This summons was dismissed by Mr. Balguy on the 11th of July 1883 upon the same grounds as those given by Mr. Marsham.

The overseers then applied to the Queen's Bench Division for a *mandamus* to the said magistrates to compel them to issue their warrants in accordance with the said summons, on the ground that the order of Cave, J. was *ultra vires* in so far as it fixed the basis upon which the rates were to be paid until the disputes between the parties should be settled, such interim rates being provided for by sect. 44 of the Valuation Act 1869.

That section is as follows:

Notwithstanding any appeal under this Act which may be pending at the commencement of the year, the valuation lists shall come into force unaltered, and every assessment, contribution, rate, and tax in respect of which the valuation list is conclusive shall be made, required, levied and paid in accordance with such valuation list; and where, in consequence of the decision on any appeal under this Act to assessment sessions or a superior court, an alteration in such valuation list is made which alters the amount of the assessment, contribution rate, or tax levied thereunder, the difference, if too much has been paid, shall be repaid or allowed; and if too little, shall be deemed to be arrears of the assessment, contribution, rate, or tax (except so far as any penalty is incurred on account of arrears), and shall be paid and recovered accordingly.

On the 30th July the *mandamus* was granted by the Queen's Bench Division, and from that order the present appeal was brought.

*Webster, Q.C., Poland, and F. Mead* for the appellants.—Sects. 33 and 40 of the Valuation Act are in our favour. Sect. 44 does not apply, as it did not contemplate the appeal being decided on a special case as here. Then this is not a ministerial act on the part of the magistrates, but a judicial act:

*Harper v. Carr*, 7 T. Rep. 270.

Therefore they must apply to the magistrates to state a special case under 20 & 21 Vict. c. 43:

*Sweetman v. Guest*, 18 L. T. Rep. N. S. 52; L. Rep. 3 Q. B. 262.

The assessment committee represented the overseers, and they are therefore bound by the order of Cave, J.

Sir F. Herschell (Solicitor-General) and *Glen* for the respondents.—When it is shown that a rate has been made the magistrate's action is merely ministerial, and he has no discretion. This case is governed by *Reg. v. Bradshaw* (29 L. J. 176, M. C.). [BRETT, M.R.—Was *Harper v. Carr* cited in that case?] No. Our application is under 11 & 12 Vict. c. 44, s. 5, as was that in *Reg. v. Bradshaw*.

*Webster, Q.C.* in reply.

BRETT, M.R.—In this case an order has been made upon two magistrates to issue their distress

warrants, that order being made under the 11 & 12 Vict. c. 44. That order would seem to be a right order if the magistrates were bound, as a matter of course, to issue a distress warrant. It is said that they were not, and that the circumstances of the case show that they were not. The circumstances of the case are that two or more valuations have been made, which value the premises in question at particular amounts, and then an order was obtained from Cave, J. that a special case should be stated. The parties who were then before Cave, J. agreed that he should put into his order, as part of it, that the rates should be made upon a former valuation, until the dispute as to the then existing valuation was decided. The parties then before him were the assessment committee and the Corporation of London. Now, for myself, I have very little doubt that we should decide that the assessment committee and the Corporation of London could not by agreement give Cave, J. jurisdiction to make that part of the order and that part of the order, therefore, would not have bound them. Whether, if they had been the sole parties, the Queen's Bench Division would have acted, is another matter. That I say nothing about; but I do not think they could have bound themselves—they could not by consent give the judge jurisdiction to make an order which, it seems to me, is an order in the very teeth of the Act of Parliament. But, however that might be, the assessment committee and the corporation certainly could not by agreement between themselves give the judge jurisdiction to make an order as against the overseers. I confess, myself, I do not think that the assessment committee represented the overseers on that appeal, so as to make them a party to that appeal and to that order, so that the consent of the assessment committee to that part of the order should be taken as the consent of the overseers. I do not agree with it. Therefore, the question must be, not whether the consent gave jurisdiction to the judge—for if he had it not otherwise, I do not think the consent would give it to him—but whether he had jurisdiction to make that part of the order; and that depends, it seems to me, upon what is the true meaning of sect. 44 of the Valuation Act. That seems to me a plain enactment that, "Notwithstanding any appeal under this Act which may be pending at the commencement of the year, the valuation list shall come into force unaltered, and every assessment, contribution, rate, and tax, in respect of which the valuation list is conclusive, shall be made, required, levied, and paid in accordance with such valuation list," and then the section actually goes on to show that, although it must be levied and paid, yet upon the appeal the matter may be altered after it is so levied and paid; for it says, "And where, in consequence of the decision on any appeal under this Act to assessment sessions or a superior court"—that is, a case stated—"an alteration in such valuation list is made which alters the amount of the assessment, contribution, rate, or tax levied thereunder"—that is, already levied—"the difference, if too much has been paid, shall be repaid or allowed, and if too little," and so on. Nothing can be plainer, as it seems to me, than this, that the valuation list is to be taken for the time to be conclusive as if there was no appeal, and the amount stated in the valuation list, or settled by

it, is to be levied and paid notwithstanding the appeal. Then there is an appeal, and there is a case stated, but the statement of a case on an appeal is only a means of carrying out the appeal and effecting it, and the statement of the case does not show that there is no appeal; on the contrary, it shows there is one. Therefore sect. 44, as it seems to me, absolutely, without any discretion on his part, prevented Cave, J. making that part of the order; in other words, that part of the order was *extra vires*, and is void. Therefore that void order could not stand in the way of the magistrate when he was called upon to issue a distress-warrant. Now the magistrates, both of them, thought that they were bound by that order. They thought they were bound by a void order. Except by that order there was nothing in dispute; therefore they had nothing to consider. They had nothing to consider on the application before them except this, whether that part of the order was or was not binding upon them. But it was a void order; therefore, as it seems to me, they had no discretion, and they were bound to issue this distress-warrant. There was nothing which entitled them to do anything but issue it, and if so, it was, as it seems to me, a ministerial act, and a ministerial act which they were called upon to perform. They have not performed it, and thereupon this order of the court is made, and rightly made. Then the question of delay does not seem to me one which can be urged against these overseers, if it could be urged against anyone, because these overseers have not been guilty of any delay. They are bound, when they come into office, to collect all the rates due, both those past and present. Their duty being such they did not delay in the exercise of their duty, and there is no ground therefore for this appeal.

CORRON, L.J.—This is an appeal against an order made under 11 & 12 Vict. c. 44, s. 5, and I think that, if the addition made by Cave, J. to the order which he made directing a special case was bad, the order was rightly issued. The section says this: "In all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his office as such justice, it shall be lawful for the party requiring such act to be done" to apply to the Queen's Bench Division; and then, after hearing the parties, the Queen's Bench Division may make an order requiring the act to be done. Now, here, what did the magistrates do? They declined to do what was undoubtedly an act relating to the duty of their office in issuing this distress-warrant, because they thought they were precluded from doing so by the order which had been made by Cave, J.; that is, they considered that, under the circumstances, they were not in a position to do that which, if that order were not made, it would have been their clear duty to do—namely, to issue a distress warrant for the amount at which this property had been assessed by the assessment committee. If that be so, then that section of the Act of Parliament seems to contemplate that very case, where justices, for some insufficient reason, decline to do what it would have been their duty to do if that order had not been made. That being so, if this matter were out of the way, it would be clearly an act to be done by them, and a ministerial act to issue a distress-warrant having regard to the Act of Parliament. That being so, was that direction made by Cave, J.,

that, until the appeal had been settled, the rate should be paid according to the old assessment, one which he could make so as to bind the overseers of the poor? It was said that the assessment committee represented the overseers on the appeal. Undoubtedly, in one way, they did in this sense, that, whatever was determined on the appeal to be a proper assessment would be that which the overseers must treat as a proper assessment, and in that respect the overseers would be bound, and in that sense the assessment committee represented them. But, the assessment committee did not in any way represent them, so as to agree to anything which the Act of Parliament did not allow them to agree to. Here, what we have is this—a distinct provision in the Act of Parliament that, when there is an appeal, notwithstanding the pendency of that appeal, the rate shall be paid on the later assessment, and not on the preceding one. That being so, this was a matter having regard to which the assessment committee in no way represented the overseers. They could in no way bind them so as not to enforce what the Act of Parliament required them to enforce—payment of rates on the assessment which was appealed against. In my opinion, therefore, the overseers were in no way bound by that, and the magistrates were wrong in saying that that was something which prevented them from doing the act which, independently of that, it would have been their duty to do. In my opinion, therefore, this order was right. As regards the delay, I quite agree with the Master of the Rolls that there has been no delay to prejudice the applicants in asking for this order. They are the new overseers, and, even if there had been delay, it is simply this—that they have not exercised as promptly as they might have done their rights by enforcing payment of a larger sum than that which the corporation have paid. How that could prevent them from getting payment of the sum which the corporation ought to pay I do not see. They have been too merciful in not enforcing the larger sum which they are entitled to enforce.

BOWEN, L.J.—I am of the same opinion.

*Appeal dismissed, with costs.*

Solicitor for the appellants, *The Solicitor for the City of London.*

Solicitors for the respondents, *Sandom, Kersey, and Knight.*

*Friday, Nov. 9, 1883.*

(Before BRETT, M.R. and BOWEN, L.J.)

THE CORPORATION OF PETERBOROUGH (apps.) v. THE OVERSEERS OF THE PARISH OF WILSTHORPE AND THE ASSESSMENT COMMITTEE OF THE STAMFORD UNION (resps.). (a)

*Practice—Appeal—Case stated pursuant to agreement and by judge's order—12 & 13 Vict. c. 45 s. 11—Judicature Act 1873 (36 & 37 Vict. c. 66), s. 19.*

*An appeal will lie to the Court of Appeal from the decision of the Queen's Bench Division upon a case stated under 12 & 13 Vict. c. 45, s. 11, in an appeal against a poor rate.*

*The decision of the Queen's Bench Division is an*

(a) Reported by A. A. HOPEKES, Esq., Barrister-at-Law.

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"order" within the meaning of the *Judicature Act 1873*, s. 19,

By a rate made on the 23rd Dec. 1880, for the relief of the poor of the parish of Wilsthorpe, the Corporation of Peterborough was rated for the "pumping station of Peterborough waterworks and pipes," in that parish.

Notice of appeal to the Court of Quarter Sessions for the parts of Kesteven, in the county of Lincoln, having been duly given, it was agreed between the parties that the facts of the case should be stated in the form of a special case for the opinion of the Queen's Bench Division of the High Court of Justice, pursuant to the provisions of 12 & 13 Vict. c. 45, s. 11; and in pursuance of this agreement an order was made by Day, J., and the facts were stated accordingly. Judgment in conformity with the decision of the High Court was to be entered by the Court of Quarter Sessions.

The special case was argued before the Queen's Bench Division, and the Divisional Court (consisting of Williams and Smith, JJ.) gave judgment that the works of the corporation in the parish of Wilsthorpe were liable to be rated, but that the principle on which the rate had been assessed was not correct. Leave to appeal was given.

The respondent overseers appealed against so much of the judgment of the Queen's Bench Division as declared that the principle upon which the works of the corporation had been rated was not correct.

*Crump*, for the Corporation of Peterborough, took a preliminary objection to the hearing of the appeal. This is not an appeal against any order, rule, or decision of the Queen's Bench Division. That court has only expressed an opinion; no judgment is entered in that court, but judgment is entered in the Court of Quarter Sessions pursuant to the expressed opinion of the Queen's Bench Division. Judgment must be entered in the Court of Quarter Sessions, and not elsewhere:

*Corporation of Peterborough v. Overseers of Thurlby*, 8 Q. B. Div. 586.

This case is distinguishable from *Overseers of Walsall v. London and North-Western Railway Company* (39 L. T. Rep. N. S. 453), for in that case a rule granted by the Queen's Bench Division had been discharged, but in this case the court has only expressed an opinion.

*F. Marshall*, for the overseers, was not called on to argue.

BRETT, M.R.—I have not the least doubt about this point. By statute the question is allowed to be stated for the opinion of the Queen's Bench Division, if the parties so agree; and the order of the judge is made under the authority of the statute. The question is put to the Queen's Bench Division pursuant to the statute, in order that the point may be decided so as to bind the parties; that is an adjudication or order. The *Judicature Act 1873*, sect. 19, enacts that an appeal shall lie from every "order," and therefore an appeal lies in the present case.

BOWEN, L.J. concurred.

The appeal was then heard on the merits, but was dismissed on the ground that the question involved was concluded by authority.

Solicitor for the Corporation of Peterborough, *W. D. Gaches*.

Solicitors for the Overseers of Wilsthorpe and Assessment Committee, *Joseph Mote and Son*, for *R. M. English*, Stamford.

Dec. 7, 8, 11, and 12, 1883.

(Before BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.)

THE MAYOR, &C. OF PORTSMOUTH v. SMITH AND OTHERS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Local authority—Street—Expenses of paving—Liability of adjoining owners—Towns Improvement Clauses Act 1847* (10 & 11 Vict. c. 34), ss. 3, 53.

By 10 & 11 Vict. c. 34, s. 3, "The word 'street' shall extend to and include any road, square, court, alley, and thoroughfare, within the limits of the special Act."

By sect. 53, "If any street, although a public highway at the passing of the special Act, have not theretofore been well and sufficiently paved and flagged, or otherwise made good," the occupiers of lands abutting on the street are liable for the expenses of paving, &c., and thereafter the street is to be repaired out of the rates.

A special Act incorporated sect. 53, but provided that "owners" should be substituted for "occupiers."

Plaintiffs, the local authority, made an agreement with defendants, the owners of land abutting on a road, and under this agreement plaintiffs purchased land and widened and improved the road. Afterwards plaintiffs paved and flagged the footpath beside the road, and sued defendants for the expenses. The jury found that at the time of the paving the road was not a street in the popular acceptance of the term, and that it had been "otherwise made good" by the work which plaintiffs had done under the agreement.

Held, that the road was a "street" within the meaning of sect. 53, but that, as it had been "otherwise made good," defendants were not liable.

Per Brett, M.R. and Bowen, L.J.: The word "theretofore" in sect. 53 refers to the time of the passing of the special Act.

Per Baggallay L.J.: It refers to the time of doing the work.

*Mande v. The Baildon Local Board* (48 L. T. Rep. N. S. 874; 10 Q. B. Div. 394) disapproved.

Judgment of *Lindley, L.J.* reversed.

THIS was an action brought by the plaintiffs, as the urban sanitary authority for the borough of Portsmouth, to recover from the defendants, who were the owners of land abutting upon a certain road, the expenses incurred by the plaintiffs in paving and flagging the footpath by the side of the road.

The Landport and Southsea Improvement Act 1857 (20 & 21 Vict. c. xxxvii.) incorporates, by sect. 16 the 53rd section of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34) (b) and by

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

(b) By 10 & 11 Vict. c. 34, s. 3: The word "street" shall extend to and include any road, square, court, alley, and thoroughfare, within the limits of the special Act.

By sect. 53: If any street, although a public highway at the time of the passing of the special Act, have not theretofore been well and sufficiently paved and flagged or otherwise made good, the commissioners may cause...

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sect. 20 provides that the said 53rd section "shall be construed as if the word 'owners' were substituted therein for the word 'occupiers.'"

The 6th provisional order in the schedule to the Local Government Supplemental Act 1864 (No. 2) (28 & 29 Vict. c. 83) repealed 20 & 21 Vict. c. xxxvii. s. 16, so far as it incorporated (amongst other clauses) 10 & 11 Vict. c. 34, ss. 54, 55, and also applied the unrepealed provisions of the said local Act to the whole of the district.

The road in question was within the district, and was formerly known as Milton-lane; it was a public highway, but was not paved or metalled or made into a road before 1875. The defendants owned land abutting on the lane on both sides.

In 1875 the Corporation of Portsmouth purchased from the defendants, by agreement, certain land for the purpose of widening the road. It was also agreed between the corporation and the defendants that the defendants should set back the hedges on both sides of the road, and that the expenses of widening and making up the road should be borne by the corporation. The corporation accordingly widened and made up the road, and put a kerb along the edge of the footpath at the side, but did not then pave or flag the footpath. The name of the road was changed to Asylum-road.

Afterwards, in 1880, the corporation acting as the urban sanitary authority paved and flagged the footpath, and they now sought to recover from the defendants the expenses of this paving and flagging, which expenses they alleged they were entitled to recover by virtue of the provisions of 10 & 11 Vict. c. 34, s. 53.

At the trial before Lindley, L.J. the jury found that the road, before the flagging and paving in 1880, was not in the popular acceptance of the term a street, but they also found that before it was so flagged and paved it had been otherwise made good.

Lindley, L.J. gave judgment for the plaintiffs, and the defendants appealed.

Dec. 7, 8, and 11, 1883.—*Charles, Q.C. (E. U. Bullen and B. W. Smith with him)*, for the defendants, supported the appeal.

*Bompas, Q.C. (G. Pitt Lewis with him)* for the plaintiffs.

The arguments are sufficiently stated in the judgments.

such street, or the parts thereof not so paved and flagged or otherwise made good, to be paved and flagged or otherwise made good, in such manner as they think fit, and the expenses incurred by the commissioners in respect thereof shall be repaid to them by the occupiers of the lands abutting on such street, or such parts thereof as have not been theretofore well and sufficiently paved and flagged, or otherwise made good, and such expenses shall be recoverable from such occupiers respectively as hereinafter provided with respect to private improvement expenses, and thereafter such street shall be repaid by the commissioners out of the rates levied under this or the special Act.

By sect. 54: If any street, not being a public highway at the passing of the special Act, be then or thereafter paved, flagged, or otherwise made good to the satisfaction of the commissioners—it may be declared a highway.

By sect. 55: If any street not being a public highway at the passing of the special Act, be thereafter to the extent of two-third parts thereof paved and flagged or otherwise made good to the satisfaction of the commissioners—the remainder may be paved as therein provided, and the street declared a highway.

The following authorities were referred to:

*Robinson v. The Local Board of Barton Eccles*, 50 L. T. Rep. N. S. 57; 8 App. Cas. 798;  
*Coverdale v. Charlton*, 40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104;  
*Reg. v. The Vestry of St. Mary, Islington*, E. B. & F. 743;  
*Reg. v. Platts*, 43 L. T. Rep. N. S. 159; 49 L. J. 848, Q. B.;  
*Maude v. The Baildon Local Board*, 48 L. T. Rep. N. S. 874; 10 Q. B. Div. 394;  
*Pound v. The Plumstead Board of Works*, 25 L. T. Rep. N. S. 461; L. Rep. 7 Q. B. 183;  
*Nutter v. The Accrington Local Board*, 40 L. T. Rep. N. S. 802; 4 Q. B. Div. 375;  
*Reg. v. Fulford*, 10 L. T. Rep. N. S. 346; L. & C. 408; 33 L. J. 122, M. C.;  
*Andrews v. The Mayor of Ryde*, L. Rep. 9 Ex. 302;  
*Reg. v. The Great Western Railway Company*, 28 L. J. 247, Q. B.

*Cur. adv. vult.*

Dec. 12, 1883.—The following judgments were delivered:

BRETT, M.R.—In this case an action was brought by the Corporation of Portsmouth, as the urban sanitary authority for the borough, against the owners of certain property adjacent to a road on which the plaintiffs had done certain work, to recover the expenses incurred in executing the work. At the trial before Lindley, L.J. the jury found that the road in question was not a street in the popular sense of the word before it was flagged and paved, and they also found that before it was so flagged and paved it had been otherwise made good. The Lord Justice gave judgment for the plaintiffs, and the defendants appealed. The road in question was within the district affected by the special Act, and originally had been a country road, but under an agreement the place on which the road was to be made was straightened and laid out by the corporation. Afterwards between 1875 and 1879 the corporation made a road upon the place, but they did not then flag or pave the road. There was some dispute as to what they actually did, and the question was left to the jury, having regard to the provisions of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), s. 53. In that section the particular words "paved and flagged" are followed by the general words "or otherwise made good;" these latter words therefore refer to a process *ejusdem generis*, and in my opinion they mean otherwise made into an artificial road in a similar manner to the manner in which a road is made by paving and flagging. If so, this must be the meaning of the finding of the jury. Afterwards in 1880 the corporation flagged the footpath at the side of the road, and it is in respect of this last-mentioned work that they seek to make the defendants liable. It was urged on behalf of the plaintiffs that the earlier work was done by them as the corporation, and not as the urban sanitary authority. This point was raised at the trial, and the learned judge held that they did this work as the urban sanitary authority. It appears to me that the agreement which has been referred to only dealt with the road, and I do not see how the corporation could do the work which they then executed except under that agreement, and if that is so, surely it must be assumed that they did the work in the only way in which they could legally do it. It is admitted that evidence was given from which inferences had to be drawn, and that no additional evidence could be given, and therefore we should,



if necessary, have to draw inferences ourselves, and give the judgment which we think ought to be given. There is therefore no necessity for a new trial on this point. The jury have found that the place in question was not a street in the popular acceptance of the word. If the word in the popular acceptance means a way bounded on one side, or on both, by houses, as I should think it does, this would be a right finding. But then comes the question whether this was a street within the meaning of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34). The word "street" in sect 53 must be construed according to the definition given in sect. 3, the interpretation clause, which is, "The word 'street' shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act." Undoubtedly, the road in question is within the limits of the special Act, and it is a thoroughfare. I think the meaning of the words "shall extend to and include" is that in addition to the popular meaning of the word it shall extend to and include something else, that is, the words which follow in the interpretation clause. In *Robinson v. The Local Board of Barton Eccles* (21 Ch. Div. 621) I said: "I think that the first remark to be made on the Act of Parliament is that it certainly deals with at least two different kinds of streets. One is a street which nobody in ordinary language, without the help of an Act of Parliament, would have called a street; and the other is a street which everybody, without the aid of an Act of Parliament, would have called a street" (21 Ch. Div. at p. 634). This view is not dissented from in the judgment of the House of Lords in the same case (8 App. Cas. 798), and I repeat the language which I then used and adopt it. In *Maude v. The Baildon Local Board* (10 Q. B. Div. 394) the learned judges in the Queen's Bench Division decided on the authority of *Reg. v. Dayman* (26 L. J. 128, M. C.). I must say that I differ from their decision, which seems to me to have proceeded on a misapprehension as to what really was decided in *Reg. v. Dayman*. The next question, which I think is more difficult, is as to the meaning of the word "theretofore" in 10 & 11 Vict. c. 34, s. 53. On the one side it is contended that it refers to the time when the special Act applied this clause to the locality; and on the other side, that it refers to the time when the work was done. The words "although a public highway at the passing of the special Act" occur in the section, and I think the ordinary grammatical way of construing the word "theretofore" is to hold that it refers to something which happened before the special Act was passed, and therefore has reference to the time of the passing of the special Act. If so, the second "theretofore" occurring later in the section will have the same meaning, and refer to the same time. There is nothing in the Act to the contrary, and the context is consistent with this view. The Act is dealing with the period when the roads are capable of being dealt with by the local authority, and the word "although" is used to introduce the condition on which the roads are to come under the jurisdiction of the urban sanitary authority, the time, as it seems to me, being the time when the special Act was passed. It is said that, if there is any doubt as to the construction of sect. 53, we may look at the two following sections, and that the use of the word "thereafter" in sects.

54 and 55 shows that the time intended to be fixed is the time of the passing of the special Act. On the other side, it is said that we must not consider sects. 54 and 55 because they are not incorporated in the local Act. I think there is a fallacy in that argument, for sect. 53 is incorporated according to the proper meaning of sect. 53, and if sects. 54 and 55 are looked at, it seems still more clear that "theretofore" in sect. 53 refers to the time of the passing of the special Act. I therefore agree with Lindley, L.J., as to the facts, and as to the meaning of the word "street," but at the same time I am of opinion that the defendants are not liable. The place was a street which the plaintiffs could pave, flag, or otherwise make good, and they did in fact otherwise make it good. As soon as they had done so they had a right, and, as regards the ratepayers, it was their duty, to call upon the adjoining owners to pay the expenses of the work; they did not do so, but now, having executed this second and further work, they contend that they can call upon the adjoining owners to pay for paving, flagging, or otherwise making good a street, which no adjoining owners have paid for before, and that those persons who were adjoining owners when the second work was executed must pay the expenses then incurred. It seems to me that this view would lead to injustice, for it would enable the local authority to make experiments at the expense of the adjoining owners, and I see nothing to force us to arrive at such a conclusion. The 53rd section states the condition on the fulfilment of which the local authority are to have power to make the street into an artificial road. It then becomes their duty to charge the expenses on the adjoining owners, but if any of such owners do not pay there is no power afterwards to charge the expenses on subsequent adjoining owners. If, afterwards, further works are executed upon the street, and these further works are of such a nature as not to be strictly speaking repairs, but are really the making of another kind of artificial street, nevertheless, I think such works must for the purpose of this section be taken to be repairs within the meaning of the last clause of sect. 53, which provides that such a street shall be repaired out of certain rates. This point does not appear to have been urged before Lindley, L.J., and therefore, although we allow the appeal, we are not differing from any formal judgment which he has given.

BAGGALLAY, L.J.—I agree that the appeal should be allowed, and that the defendants are entitled to judgment, but I do not come to this conclusion on quite the same grounds as the Master of the Rolls. As to the question whether this road was a "street" within the meaning of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), I agree that it was, and I think the words of the interpretation clause (sect. 3) are wider and go further than the words "shall mean." I see nothing to prevent the definition given in sect. 3 from applying to this road; there is nothing in the subject-matter to give any other meaning. With regard to sect. 53, I have formed a different opinion from that of the Master of the Rolls; I think the word "theretofore" refers to the time when the work in dispute was executed, and not to the time when the special Act was passed. The words "although a public

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highway at the passing of the special Act" may be treated as parenthetical, and if they were omitted the clause would read thus: "If any street have not theretofore been well and sufficiently paved, &c. . . . the commissioners may cause such street . . . to be paved," &c. If it were so read I think that many of the difficulties to which the other construction gives rise would be avoided. I agree that we may look at sects. 54 and 55 in order to construe sect. 53, but I think that my view, namely that the word "theretofore" in sect. 53 refers to the time when the work was done, is rather supported by a consideration of the provisions of the two following sections. Each of the three sections uses a different form of expression, and I think these different forms of expression must have been adopted for a purpose. However, whether I am right as to this point or not, I agree with the Master of the Rolls as to the other questions raised in the case, and I am of opinion that the defendants are not liable, and that the appeal ought to be allowed.

BOWEN, L.J. concurred with the judgment and reasoning of BRETT, M.R.

*Appeal allowed. Judgment for the defendants.*

Solicitors for plaintiff, *Williamson, Hill, and Co., for Hellard and Son, Portsmouth.*

Solicitors for defendants, *Ford and Ford, for R. W. Ford and Son, Portsmouth.*

Jan. 26 and 28, 1884.

(Before BRETT, M.R. and BOWEN, L.J.)

REG. v. THOMPSON AND OTHERS (Justices) AND DUNCAN. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Bastardy—Jurisdiction—Service of summons in Scotland—Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65)—Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), s. 54—Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24), ss. 4, 6.*

*Service in Scotland on a man residing in Scotland, of a bastardy summons issued in England by a magistrate for the place where the complainant resides does not give jurisdiction to magistrates in England to make an affiliation order.*

*Decision of Day and Smith, J.J. affirmed.*

THE applicant, a woman named Isabella Berkeley, who resided in Sunderland, took out a summons under the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) sect. 3, against the respondent Duncan, who resided in Scotland, alleging that he was the father of her illegitimate child. The summons was served on Duncan in Scotland; he did not attend personally before the magistrates at Sunderland, but appeared by a solicitor, who objected that the magistrates had no jurisdiction to adjudicate, on the ground that the service was invalid.

The magistrates gave effect to this objection, and refused to make any order on the summons. A rule was obtained under 11 & 12 Vict. c. 44, s. 5, calling upon the magistrates and the respondent Duncan to show cause why the magistrates should not hear and determine the summons.

Day and Smith, J.J. discharged the rule, and the complainant appealed.

*Gainsford Bruce, Q.C. and H. B. Hans Hamilton* for the appellant.—In the first place the respondent (Duncan), by appearing in answer to the summons, gave the magistrates jurisdiction. The fact that he appeared only for the purpose of objecting to the validity of the service can make no difference, for he was before the court, and there was power to hear and determine the complaint:

*Oulton v. Radcliffe*, 30 L. T. Rep. N.S. 22; L. Rep. 9 C. P. 189;

*Reg. v. Smith*, 17 L. T. Rep. N.S. 263; L. Rep. 1 C. C. E. 110.

Secondly, there is jurisdiction to serve a summons in any part of the United Kingdom, and, therefore, service in Scotland was good. The decision in *Reg. v. Lightfoot* (6 E. & B. 822) is relied upon for the respondents, but that decision (from which Lord Campbell, C.J. dissented) is not binding on the Court of Appeal. Thirdly, assuming that case to have been correctly decided, the decision is no longer applicable, for the effect of the Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24), s. 4 (a) is to give power to serve a bastardy summons in Scotland. The summons here is "process issued under the Summary Jurisdiction Act," within the meaning of that section. See the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) ss. 51, 54. Moreover jurisdiction is given by 44 & 45 Vict. c. 24, s. 6.

*Poland*, for the respondents, was not called upon to argue.

BRETT, M.R.—It is clear to my mind that this case does not come within any of the Acts of Parliament which have been referred to. A woman who is resident in England makes a claim against a man who is resident in Scotland, alleging that he is the father of her bastard child. Now, the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) gives jurisdiction over the subject-matter of the complaint to the justices of the place where the woman resides; but that is not enough, for they must also have jurisdiction over the person against whom they issue a summons. By the same Act that jurisdiction is given to the same magistrates, and they have jurisdiction to issue a summons against a man wherever he may be, provided he is in England or Wales, and, if the summons is served, and the defendant does not appear, the magistrates have power to hear the summons in his absence, and make an order against him. But under that Act a woman could not bring a man within the jurisdiction of the court unless she could serve him with a summons in England or Wales; so that if the man was resident in Scotland

(a) By 44 & 45 Vict. c. 24, s. 4: Subject to the provisions of this Act, any process issued under the Summary Jurisdiction Acts may, if issued by a court of summary jurisdiction in England, and indorsed by a court of summary jurisdiction in Scotland, or issued by a court of summary jurisdiction in Scotland, and indorsed by a court of summary jurisdiction in England, be served, and executed within the jurisdiction of the indorsing court in like manner as it may be served and executed within the jurisdiction of the issuing court, and that by an officer either of the issuing or of the indorsing court.

[The other material sections are set out in the judgment of the Master of the Rolls.]

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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the woman had no remedy. This is clear from the decision of the Court of Queen's Bench in *Reg. v. Lightfoot* (6 E. & B. 822). Then the Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24), s. 6, gives a further remedy. It deals with the case of a woman resident in England wishing to charge a man with being the father of her child, and the man being resident in Scotland. It provides that "A court of summary jurisdiction in England and a sheriff court in Scotland shall respectively have jurisdiction by order or decree to adjudge a person within the jurisdiction of the court to pay for the maintenance and education of a bastard child of which he is the putative father, and for the expenses incidental to the birth of such child, and for the funeral expenses of such child, notwithstanding that such person ordinarily resides, or the child has been born, or the mother of it ordinarily resides, where the court is English, in Scotland, or where the court is Scotch, in England, in like manner as the court has jurisdiction in any other case. Any process issued in England or Scotland to enforce obedience to such order or decree may be indorsed and executed in Scotland and England respectively in manner provided by this Act with respect to process of a court of summary jurisdiction." This section gives jurisdiction to magistrates who are not the magistrates of the place where the woman resides, for it expressly provides that a sheriff court in Scotland shall have jurisdiction to make a bastardy order, notwithstanding that the mother ordinarily resides in England. In such a case, therefore, a Scotch court may make an order against the father if he is resident in Scotland, and thus the Act gives a mother resident in England a larger remedy than she had before; but at the same time it negatives the idea that an English court can make an order in such a case against a man resident in Scotland, expressly providing that the Scotch court may make the order; therefore that section does not reach the present case. Then it is said that the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), s. 54, enables the magistrates to deal with the case. I think the words of that section show conclusively that it was not intended to have any such effect. They are as follows: "This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for nonpayment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information, and shall apply to the proof of the service of any summons, notice, process, or document in any matter of bastardy, and of any handwriting or seal in any such matter, and to an appeal from an order in any matter of bastardy." This applies the provisions of the Act to the proof of the service of the summons, but the Act carefully leaves out any provision as to where the summons is to be served, and it does not enable a woman to issue a summons against a man against whom no summons could have issued before the Act came into operation. If an order is properly made in England, sect. 6 of the Act of 1881—to which I have already referred—enables the woman to follow the man, if he has removed into Scotland, and obtain execution of the order; but the clause containing this provision gives no new jurisdiction to

make an order or issue a summons. For these reasons I am of opinion that there is no Act which covers the present case. No doubt the policy of the Legislature is, where the charge has been made good, to assist the complainant to enforce her remedy, but not to give a woman the power to bring a man and his witnesses from Scotland on a charge which has not been proved, and which may eventually turn out to be unfounded. For these reasons I am of opinion that the decision of the Divisional Court ought to be affirmed.

BOWEN, L.J.—I am of the same opinion. It is not necessary to decide to what extent 44 & 45 Vict. c. 24, s. 6, increases jurisdiction. There might be some doubt as to how far the jurisdiction may be increased, but the section does not touch the present case, nor enable a summons issued in England to be served in Scotland.

*Appeal dismissed.*

Solicitors for the appellant, *Scott and Co.*

Solicitors for the respondents, *Rooke and Sons.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Saturday, Feb. 23, 1884.*

(Before CAVE and SMITH, JJ.)

POINTON AND ANOTHER v. HILL. (a)

*Vagrancy Act (5 Geo. 4, c. 83)—Idle and disorderly persons—Men on strike collecting alms for their fellow-workmen—Begging in the streets.*

*The appellants were colliers, who lived at Silverdale, near Burslem, in Staffordshire, and were at the time in question on strike. They had homes and families at Silverdale, and were at the time referred to in a street in Burslem, some of them drawing a waggon on which was inscribed "The children's bread waggon." One of them went into a shop and asked the shopkeeper for assistance for the miners, and then went into a private house and asked for bread for the children, and got a cabbage. The men were not disorderly, and their demeanour was not improper, but it was stated that this mode of going about was of constant occurrence, and caused annoyance to householders. Upon these facts the appellants were summoned before the stipendiary magistrate at Burslem, and charged under the 5 Geo. 4, c. 83 (an Act for the punishment of idle and disorderly persons, rogues, and vagabonds). The 3rd section of the Act provides, amongst other things, that "every person wandering abroad or placing himself or herself in any public place, street, highway, court or passage, to beg or gather alms, or, &c., shall be deemed an idle and disorderly person within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (on conviction of any such offence) to the House of Correction to be kept to hard labour for any term not exceeding one calendar month."*

*The learned magistrate held that the appellants had committed an offence under the above statute, and convicted them, fining them 5s. each.*

*The appellants now appealed, and upon a case stated for the opinion of the court, the Court held*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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*that the conviction ought to be quashed, as the statute only applied to those who made it a regular habit and mode of life to wander about and put themselves in the public streets for the purpose of asking alms, and not to those who (as in this case) asked for alms, not as a habit and mode of life, nor as seeking any advantage for themselves, but for the specific purpose of assisting their fellow-workmen.*

CASE stated under 20 & 21 Vict. c. 43, by the stipendiary magistrate of Stoke-on-Trent as follows:—

1. By 5 Geo. 4, c. 83, intituled "An Act for the punishment of idle and disorderly persons, and rogues and vagabonds, in that part of Great Britain called England," sect. 3, it is enacted that "every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing, or procuring, or encouraging any child or children so to do, shall be deemed an idle and disorderly person within the true intent and meaning of this Act, and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by his own view, or by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the House of Correction, there to be kept to hard labour for any time not exceeding one calendar month."

2. On the 6th Oct. 1883 informations were laid and complaints made by the respondent, who is the chief superintendent of police stationed at Burslem, against the appellants, for that the appellants did, on the 5th Oct. 1883, at the parish of Burslem in the said county, unlawfully wander abroad in a public thoroughfare at Burslem, begging and gathering alms contrary to the provisions of the statute in that case made and provided, whereupon a summons was issued commanding the appellants to be and appear on the 9th Oct. 1883 before the court of summary jurisdiction sitting at the police court, Burslem, in the said county, to answer the said information and complaint, and to be further dealt with according to law.

3. The appellants in obedience thereto appeared before the stipendiary magistrate aforesaid, and complaints were heard, and the following facts were proved on oath or admitted:

4. On the 5th Oct. 1883 a number of men, who reside at Silverdale, a colliery district in the parish of Wolstanton, and distant four miles from the town of Burslem, which is a district parish, were at Burslem in a public street, called Newcastle-street. The appellants were two men of the number. The men were colliers on strike, and had wives and mothers and families and fixed places of abode at Silverdale, and were householders. Some of the men were drawing a waggon on which was inscribed "Children's Bread Waggon," whilst others called from house to house with the collecting-book, and begged for assistance in money or kind.

5. The appellant Boot went into a shop and asked the shopkeeper therein to assist the miners. He had a collecting-book with him.

6. The appellant Pointon went into a private house and asked the woman there for bread for the children. She gave him a cabbage, which he

took from her and put into the waggon. He had a similar book with him.

7. It was admitted that the appellants were not disorderly, and that their demeanour was not improper.

8. It was stated by the respondent that the going about the streets by men in the manner described was of constant occurrence, and complaints had frequently been made to the police of the annoyance caused to householders by their actions.

9. The solicitor who appeared for the appellants contended that they had not been guilty of the offences charged, inasmuch as (1) the request for contributions was not made by the appellants in any public place, street, highway, court, or passage, but on private premises, namely, a shop and a private house; (2) the object of the request was lawful, and truly stated by the appellants, and that persons collecting or gathering alms in the manner aforesaid were not liable to be convicted under sect. 3; (3) the statute 5 Geo. 4, c. 83, was not meant to apply, and did not apply, to this case, which he contended was analogous to the case of a hospital, orphanage, and other charitable institutions for which contributions of money, clothing, food, books, &c., are asked of the public, but that the Act was designed for the discouragement of a class of people who wandered about the country with no fixed place of abode, no desire to enter upon honest labour, and no legitimate means of protracting their idle and apparently useless existence.

10. I was of opinion that the appellants by their actions were to be deemed persons wandering about to beg or gather alms, within the meaning of the statute 5 Geo. 4, c. 83, s. 3. That the contention of the solicitor for the appellants that their status, and whether or not they had a fixed place of abode, was the true criterion by which to judge whether they had committed an act of vagrancy or not, was erroneous, because, as it seemed to me, the offence may be committed by any person, irrespective of his status and whether or not he had a fixed place of abode, the act committed bringing him within the purview of the statute. The words used in the section being "every person who, &c."

I therefore convicted the appellants of the offences charged against them and imposed a fine of 5s. each and costs upon them.

The question for the consideration of the court is, whether my decision is or not correct in point of law. If it be correct, then the conviction is to stand; and if not, then the conviction is to be quashed.

*Jelf, Q.C.* (with him *John Rose*) for the appellants.—There has been a long series of decisions leading up to the statute 5 Geo. 4, c. 83, under which the appellants have been convicted; but, as the respondent is not now represented, I do not think it necessary to refer to them. This Act is clearly aimed against disorderly persons, and persons who gain their living by begging or asking alms in the streets, but persons who have acted as the appellants have done here are wholly outside the purview of the Act. The words of the Act are "every person wandering abroad or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, &c., shall be deemed an idle and disorderly

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HARRISON (app.) v. McL'MEEL (resp.).

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person within the meaning of the Act." These words are much more applicable to ladies who stand at the corners of streets on Hospital Saturday, collecting subscriptions for hospitals, than to the present appellants. If a master can go round in his brougham to his fellow-masters for subscriptions for masters' associations, it would be very hard that these men, where they do the same thing in a cart, should be placed in the same category as prostitutes. Here the mere bare fact of the appellants having acted as they have done is against them, but there is nothing otherwise objectionable in their conduct.

No one appeared for the respondent.

CAVE, J.—I have come to the conclusion that this conviction ought to be quashed. When we come to look at the statute itself, we find it headed, "An Act for the punishment of idle and disorderly persons, and rogues and vagabonds." The 3rd section, the others being merely repealing sections, deals with classes who are variously described, and then we come to the clause in question, providing that "every person wandering abroad, or placing himself or herself in a public place, street, highway, court, or passage, to beg or gather alms, &c., shall be deemed an idle and disorderly person within the meaning of this Act, &c." This means persons of a certain character and course of life, and it seems to me that the proper conclusion to be drawn from these words is, that the Act was directed against a certain class of persons of a peculiar habit and mode of life, namely, those persons who make it their habit and mode of life to wander about and put themselves in streets and highways, there to beg and gather alms, and such persons come within the statute. But if any particular person, for any specific purpose, and not as a regular mode of gaining a living, or for the general object of maintaining himself, but for some particular object, not in itself unlawful, went from house to house to solicit subscriptions, that would not be within the meaning of the statute. Persons, on what is called Hospital Saturday, placed themselves at the corners of public streets, to solicit subscriptions for hospitals, and it had never occurred to anyone that the persons who did so, not seeking anything for their own advantage, and not doing so as a regular habit and mode of life, but for a specific and charitable object, were within the purview of the Act. In the case before us, the case finds that the appellants were working men, having their homes and families, but who, in consequence of some disagreements with their masters, were, as it is said, out on strike. There was nothing unlawful in that, and we know that, unfortunately, there are many such disputes between employers and their workmen. Whether the workmen were right or wrong in this instance we have no means of judging, nor is it material to know. But it seems to me, that these men were not infringing the Act when they went about in an orderly way, for the purpose of representing their case to the public, and trying to induce the public to assist them on that particular occasion, and with reference to the position of their families at that time, while they themselves were on strike. There would be a difficulty in distinguishing this case from the case of a poor man, who had, say, lost his cow, his sole means of

support, and went about the country, with the approval of his neighbours, who had perhaps signed papers in his favour, which he took from house to house, soliciting assistance to enable him to buy another cow. In one sense he may be said to go round to ask for alms, but not in the sense that is meant to be dealt with in this Act. When a man placed himself in the public streets to ask for alms, not for any particular object, this would be evidence from which it might be inferred that he did so as a mode of getting a living, and that might be an offence within the Act. But it is clear that if, as in this case, on some particular occasion, men, who are ordinarily hard-working and industrious, went about from house to house to ask assistance for some specific object, which was not intended to provide them with the ordinary means of living, this was not what was aimed at in the Act. This was what was done in the present case, and therefore I have come to the conclusion that the case did not come within the Act, and that the conviction ought to be quashed.

SMITH, J.—I agree with everything that has been said by my brother Cave, and I have nothing further to add.

*Conviction quashed.*

Solicitors for the appellants, Robinson, Preston, and Stow, agents for Hollinshead and Moody, Tunstall.

Monday, Feb. 25, 1884.

(Before Lord COLERIDGE, C.J. and POLLOCK, B.)

HARRISON (app.) v. McL'MEEL (resp.). (a)

*Licensed premises—Constable's demand to enter—Excise licences only—Right to refuse entry—23 & 24 Vict. c. 114, s. 195; 24 & 25 Vict. c. 21, s. 2, 35 & 36 Vict. c. 94, s. 74, 37 & 38 Vict. c. 49, s. 16.*

*The respondent being a person duly licensed as a dealer in spirits in England under 23 & 24 Vict. c. 114, s. 195, and holding an additional Excise licence authorising him to sell by retail, in any quantity not less than one reputed quart bottle, at a shop, spirits not to be drunk or consumed on the premises, under 24 & 25 Vict. c. 21, s. 2; refused to admit the respondent, a constable, who demanded to enter the appellant's premises in pursuance of sect. 16 of the Licensing Act 1874. Upon complaint by the appellant, justices refused to convict the respondent.*

*Held, upon a case stated, that sect. 16 of the Act of 1874 applies only to premises in respect of which a licence, as defined by the Licensing Act 1872, s. 74, has been granted and is in force, and not to the respondent's premises, which were required to be licensed by the Excise only, and that the justices were right.*

THIS was a special case stated for the opinion of the court by two of Her Majesty's justices for the county of Durham, in pursuance of the statute 20 & 21 Vict. c. 43. The following are the material portions:—

The respondent is a person duly licensed, in pursuance of the statute 23 & 24 Vict. c. 114, s. 195 by the Commissioners of Inland Revenue as a dealer in spirits in England, and in pursuance of 24 & 25 Vict. c. 21, s. 2, had taken out and holds an additional Excise licence authorising him to

(a) Reported by THOMAS DALE, Esq., Barrister-at-Law.

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sell by retail, in any quantity not less than one reputed quart bottle, at a shop situated in Caledonian-street, at Stebburn, in the parish of Jarrow, in the county of Durham, spirits not to be drunk or consumed upon the premises.

The respondent does not hold any licence granted by the licensing justices of the district, within which his licensed premises are situated, for the sale of spirits or any intoxicating liquors under or in pursuance of the Intoxicating Liquor Licensing Act 1828 (9 Geo. 4, c. 61), or the Licensing Act 1872 (35 & 36 Vict. c. 94), or the Licensing Act 1874 (37 & 38 Vict. c. 49), or any other Act empowering justices of the peace to grant licences for the sale of intoxicating liquors, but holds only the Excise licences mentioned above.

The appellant is an inspector of police of the district within which the respondent's licensed premises are situated, and is a constable for the county of Durham. About two o'clock on the afternoon of the 22nd Sept. 1883, the appellant suspecting and believing that the respondent was committing upon his licensed premises a violation of sect. 5 of the Licensing Act 1872 (35 & 36 Vict. c. 94), which it was the appellant's duty to enforce; for the purpose of detecting or preventing any such violation, endeavoured to enter the licensed premises of the respondent. And the appellant suspected, and believed that the respondent was privy and consenting to purchasers of intoxicating liquors from the respondent drinking on the licensed premises of the respondent, who is not licensed to sell the same to be drunk on the premises.

Upon the appellant endeavouring to enter, the door was locked against him, although he had only a few minutes previously seen other people admitted. He thereupon knocked and demanded admission, stating that he was a constable in the execution of his duty, but the respondent refused to admit him.

A summons was issued against the respondent for contravening sect. 16 of the Licensing Act 1874, and on the 2nd Oct. 1883 the complaint was heard before Henry Cooper Abbs and Alfred Molyneux Palmer, Esqrs., two of Her Majesty's justices of the peace for the county of Durham, at the justice-room, Waterloo Vale, South Shields. Upon the hearing of the said complaint, the facts before stated were proved by the appellant or admitted by the respondent. The appellant relied upon the Licensing Acts 1872 and 1874, and more particularly sect. 16 of the Licensing Act 1874, to justify a conviction. It was contended, upon behalf of the respondent, that sect. 16 of the Licensing Act 1874 did not apply to his licensed premises, because (1) the words "licensed premises" used in that section are defined by sect. 74 of the Licensing Act 1872 (which Act is incorporated in the Act of 1874) to mean premises in respect of which a licence, as defined by the 1872 Act has been granted, and is in force: and (2) that a licence, as defined by the Licensing Act 1872, is one for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act 1828, including a certificate of justices granted under the Wine and Beerhouse Acts, and including a licence for the sale of sweets, and including a licence for the retail of spirits granted to a wholesale spirit dealer by the

justices in pursuance of the Act of 1872. The justices at the hearing dismissed the complaint.

Sect. 5 of the Licensing Act 1872 is as follows:

If any purchaser of any intoxicating liquor from a person who is not licensed to sell the same to be drunk on the premises drinks such liquor on the premises where the same is sold, or on any highway adjoining or near such premises, the seller of such liquor shall, if it shall appear that such drinking was with his privy or consent, be subject to the following penalties; for the first offence he shall be liable to a penalty not exceeding 10*l.*; for the second, and any subsequent offence, to a penalty not exceeding 20*l.*

Sect. 16 of the Licensing Act 1874 is as follows:

Any constable may, for the purpose of preventing or detecting the violation of any of the provisions of the principal Act, or this Act, which it is his duty to enforce, at all times enter on any licensed premises, or any premises in respect of which an occasional licence is in force. Every person who, by himself or by any person in his employ, or acting by his directions or with his consent, refuses or fails to admit any constable in the execution of his duty demanding to enter in pursuance of this section, shall be liable to a penalty not exceeding, for the first offence, 5*l.*, and not exceeding for the second and every subsequent offence 10*l.*

By sect. 73 of the Licensing Act 1872:

A licence as defined by this Act shall not be required for the sale of liquors or spirits by retail, not to be consumed on the premises, by a wholesale spirit dealer whose premises are exclusively used for the sale of intoxicating liquors in pursuance of a retail licence granted by the Commissioners of Inland Revenue, under the provisions of 24 & 25 Vict. c. 21.

*W. A. Meek* for the appellant.—I contend that the Act of 1874 has a wider scope than the Act of 1872. The Act of 1872 deals only with licences which are granted by justices. The words "licensed premises" in sect. 16 of the 1874 Act must be construed generally, and cannot be limited by the definition given in sect. 74 of the 1872 Act.

*Walton*, for the respondent, was not called upon.

*LORD COLERIDGE, C.J.*—I am of opinion that this appeal must be dismissed. The appellant, the police inspector, saw some persons going into the respondent's premises, which were only licensed to sell spirits to be drunk off the premises, under licences from the Commissioners of the Inland Revenue. The appellant believed that these people were drinking on the premises and he went to the door and demanded admission, under sect. 16 of the Licensing Act 1874, which was refused. The question in this case is, What is the meaning of the words "licensed premises" in that section? I am of opinion that the Act of 1872 must be read with the Act of 1874, but that the definition of "licensed premises" given in sect. 74 of the Act of 1872 must be assigned as the meaning of licensed premises in the 1874 Act. That being so, the appellant was wrong in assuming he had authority to enter the respondent's premises, which were licensed by the Commissioners of Inland Revenue and not by the justices. *Mr. Meek* contended that the 1874 Act had a larger scope than the 1872 Act, but this is only as to occasional licences, and they are expressly provided for.

*POLLOCK, B.*—I am of the same opinion.

*Appeal dismissed with costs.*

Solicitors for the appellant, *John Scaife*, for *Duncan and Duncan*, South Shields.

Solicitors for the respondent, *J. Cray*, for *Dis* and *Warlow*, Newcastle-on-Tyne.



Q.B. Div.]

GUARDIANS OF LIVERPOOL v. GUARDIANS OF PORTSEA UNION.

[Q.B. Div.]

Tuesday, Feb. 26, 1884.

(Before Lord COLERIDGE, C.J. and POLLOCK, B.)

GUARDIANS OF LIVERPOOL (apps.) v. GUARDIANS OF PORTSEA UNION (resps.). (a)

*Poor law—Children under sixteen—Birth settlement of father—Derivative settlement—Divided Parishes Act 1876 (39 & 40 Vict. c. 61), s. 35.**M. was born in Liverpool, and died, leaving his widow and five children surviving him. M. never acquired a settlement for himself, and there was no evidence of his having derived a settlement from his father. The widow, who was the mother of the five children, had no other settlement than that acquired by her marriage with M., and had acquired none since. None of the children were born in Liverpool. The children were all under the age of sixteen.**Held, that the mother and the children took M.'s birth settlement under sect. 35 of the Divided Parishes Act 1876, and therefore were settled in Liverpool.*

This was a case stated under 12 & 13 Vict. c. 45, s. 11, by way of appeal from an order of removal made by certain justices for the borough of Portsmouth.

On the 20th Feb. 1883 the justices for the borough of Portsmouth, upon the complaint of the respondents, ordered that Verena Ada Meredith, thirty-two years of age, and her children, William George, aged nine, George, aged seven, Ada, aged five, Minnie Amelia, aged two-and-a-half, and Thereza Louisa, aged one, should be removed from the respondents' union to the appellants' parish, having adjudged them to be settled in the appellants' parish.

The pauper Verena Ada Meredith was on the 21st Dec. 1871 married to George Meredith, late of the 46th Regiment.

None of the children were born within the appellants' parish. George Meredith died at Derby on the 9th March 1882, and his widow and children came to reside in the respondents' union on the 18th Nov. 1882.

George Meredith was born on the 3rd March 1842, in Titchfield-street, Liverpool, in the appellants' parish, and was the lawful issue of Peter Meredith and Mary Ann his wife. George Meredith never acquired a settlement for himself, as he left Liverpool as a drummer boy in Her Majesty's army, at the age of thirteen, and remained in Her Majesty's service until the 13th July 1880.

Peter Meredith survived the completion of George Meredith's sixteenth year. Verena Ada Meredith had no other settlement than that, if any, acquired by marriage at the time of her husband's death, and had acquired none since.

The question for the opinion of the court was whether the order was rightly made.

39 & 40 Vict. c. 61, s. 35:

No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

If any child in this section mentioned shall not have

acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

*W. R. Kennedy* for the appellants.—This case turns upon sect. 35 of the Divided Parishes Act 1876. The father of the paupers had only a birth settlement in Liverpool, and never acquired a settlement for himself. A birth settlement is only a *prima facie* settlement, that is, when all the other modes of settlement are exhausted. Hence, before deciding that the birth settlement is the proper settlement of the father, an inquiry would have to be directed as to whether he had a derivative settlement, as the birth settlement might be defeated by a derivative settlement from his father. In the present case, therefore, the children cannot take the settlement of their father, as an inquiry would have to be gone into to find out whether the father's birth settlement had not been ousted by a derivative settlement from his father, which is prohibited by the 3rd clause of sect. 35. [Lord COLERIDGE, C.J.—There was no evidence of any other settlement than the father's birth settlement. Why should we enter upon an argument on the supposition that the father had a derivative settlement?] Such an inquiry would have to be gone into, in order to show that his birth settlement was his proper settlement. Again, by the 1st clause of sect. 35, the child is to take the settlement of its father or of its widowed mother, as the case may be. The father is dead, so the children here would *prima facie* take the settlement of their mother; but this settlement is a derivative one from her husband, and so any inquiry into it comes within the prohibition contained in the 3rd clause. He cited

*Reg. v. Bridgnorth*, 48 L. T. Rep. N. S. 600; 11 Q. B. Div. 814;

*Reg. v. Murylebone*, 49 L. T. Rep. N. S. 59.

*Charles, Q.C.* and *W. G. Barnes*, for the respondents, were not called on.

Lord COLERIDGE, C.J.—Personally, I entertain no doubt in this case. The words of the Act of Parliament are reasonably clear. Here is a case in which the father had a birth settlement in Liverpool. The widow had no settlement of her own, and consequently took her husband's settlement by her marriage. These children are their legitimate children, and consequently they took their father's settlement, unless a better settlement can be found for them. It is said, however, that there is a difficulty in the words of the first clause of sect. 35 of 39 & 40 Vict. c. 61. That clause says that a child under sixteen is to take the settlement of its father or of its widowed mother, as the case may be, &c. The meaning of these words, I should say, are that the child is to take the settlement of its father, or, if that cannot be found, of its widowed mother. In this case the settlement of the father and the widowed mother is the same. But it is further said that these otherwise clear and plain words are made doubtful and unclear by the 3rd clause of this section. Now does it do so? It is a distinct enactment, and I admit that it is not so very easy to construe; but, after all, the words are not so very difficult. The enactment seems to me to mean that if there is a child without a settle-



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ment and unmarried, or married without having acquired a settlement through her husband, because he never had one, and the settlement of the child cannot be found out without inquiring into the derivative settlement of the father—that is, without going back a step in the pedigree beyond the father—the Legislature cuts it short and says, you shall not go back that step and inquire into the derivative settlement of the father. But when the father has acquired a settlement in any of the well-known modes, such for instance as apprenticeship, or has acquired it by birth, then an inquiry need not be directed into the derivative settlement of the father. In this case, therefore, the inquiry is not thrown back into the derivative settlement of the parent. These children, therefore, take the settlement of their father, which is his birth settlement in Liverpool.

POLLOCK, B.—I agree. The question seems to me to be, Is this a case in which it is necessary to inquire into the derivative settlement of the father? I think not. Sect. 35 means that the child shall take the settlement of the father, or, if the father has none, that of the widowed mother. Here the father's settlement is that of his birth, and so is not a derivative one. *Order affirmed.*

Solicitors for the appellants, *Field, Roscoe, and Co., for Bellringer and Cunliffe, Liverpool.*

Solicitors for the respondents, *Sole, Turner, and Knight.*

*Tuesday, March 4, 1884.*

(Before DAY and SMITH, JJ.)

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF ROTHERHAM (apps.) v. FULLERTON (resp.) (a)

*Highway—Liability to fence—Lands abutting on the highway—Rotherham Borough Extension and Sewerage Act 1879, s. 81.*

By the 81st section of the Rotherham Borough Extension and Sewerage Act 1879, "If the corporation are of opinion that danger to the public is likely to ensue by reason of lands abutting on streets not being fenced, the owner of any such land shall, when required by the corporation, and to their satisfaction, sufficiently fence off the land from the street, and shall afterwards keep such fence in good repair to the satisfaction of the corporation, and if he fails so to fence or repair as aforesaid within fourteen days after notice for that purpose given to him by the corporation, the corporation may fence or repair, as the case may be, and charge him with the expenses of so doing, and recover the same as expenses under the Public Health Act 1875."

Held, that this Act did not apply to fences by the side of a road which had been a turnpike highway, but applies only to new streets, where there are no fences and which in the opinion of the corporation are dangerous to the public.

SPECIAL CASE, stated by a court of summary jurisdiction, under 42 & 43 Vict. c. 49:

1. Before a court of summary jurisdiction, holden in and for the borough of Rotherham, on the 11th Oct. 1883, a complaint was preferred by Samuel Brown, as clerk to the appellants, under

the 81st section of the Rotherham Borough Extension and Sewerage Act 1879, charging for that the appellants, being of opinion that danger to the public was likely to ensue by reason of lands belonging to the respondent, abutting on a certain street called Ickles-road in the said borough, not being fenced, required the respondent to sufficiently fence off the said lands from the said street, and that, the respondent having failed so to do after having due notice, the appellants had fenced off the same at the expense of 50*l.*, and that the respondent had failed to pay the said sum after due demand made upon him.

2. The court of summary jurisdiction made an order dismissing the said complaint.

3 and 4. The appellants being aggrieved, and desiring to question such order on the ground that it was erroneous in point of law, applied to the court of summary jurisdiction to state a case for the opinion of the High Court.

5. On the hearing of the complaint the facts of the case were admitted to be as follows:

The respondent is tenant for life or in tail of considerable property at Brinsworth, through which the road from Tinsley to Doncaster passes.

The road was formerly a turnpike road, and was made under the authority of an Act of Parliament of the 7 Geo. 4, and afterwards repaired and continued under an Act of the 4 & 5 Vict. It is now disturnpiked.

The portion of the road with which this case is concerned is now a highway within the borough of Rotherham, and the appellants are surveyors of the highway.

The road abuts on both sides thereof on lands of the respondent which are divided from it throughout the whole extent that they are conterminous by substantial stone walls, which are alike in character throughout their entire length. At some parts of its length the road and the adjoining lands of the respondent are on the same level, and at other portions the road to a greater or less extent is at a higher level than the respondent's lands on the one side, and at a lower level than the respondent's lands on the other side.

That portion of the road with which this case is concerned is from eight to nine feet above the level of the adjoining land of the respondent on one side, and at the other side the respondent's land is at a higher level than the road. At those points the walls on either side are necessary for the support of the road itself, or for the support of the adjacent soil, and to prevent it falling on the road. The walls are in fact at these points retaining walls, and were erected by the turnpike trustees.

In Feb. 1880 a portion of the wall on that side of the road where the adjoining land of the respondent is on a lower level (the difference in the level being eight or nine feet) became ruinous and fell into the adjoining field. The wall was not destroyed by the active agency of either the appellants' or the respondent's predecessor in title.

The fall of the wall left one side of the road unprotected, and a portion of the roadway fell with it. There was danger of accidents to passengers using it, and the appellants' borough surveyor therefore, by the appellants' direction, erected a temporary fence for the protection of passengers.

The then town clerk of Rotherham wrote to the then owner of the property, the late Thomas

(a) Reported by H. D. BONEBY, Esq., Barrister-at-Law.

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Grey Fullerton, Esq., requesting him to repair the fence, and subsequently served him with a formal notice, but Mr. Fullerton refused to repair, and denied his liability.

The late Thomas Grey Fullerton, Esq. died in the month of June 1881, and the Rev. Charles Garth Fullerton, the respondent, succeeded to the property.

On the 17th Aug. 1882 the appellants' town clerk served upon the respondent a notice, of which the following is a copy (omitting formal parts):

The corporation being of opinion that danger to the public is likely to ensue by reason of lands abutting on a certain street in the said borough, known as the Sheffield-road, not being fenced, hereby require you, as the owner of such lands to sufficiently fence off the said lands from the said street to the satisfaction of the said corporation, and the said corporation also require you afterwards to keep such fence in good repair to the satisfaction of the said corporation. And take notice that if you fail so to fence the said lands within fourteen days after this notice shall have been served on you, the said corporation will fence the said lands, and charge you with the expense of so doing, and will seek to recover the same as expenses under the 150th section of the Public Health Act 1875.

The respondent did not comply with the notice, and in February and March 1883 the appellants caused the present wall to be erected, which is similar to the wall which formerly was there.

6. The 81st section of the Rotherham Borough Extension and Sewerage Act 1879 enacts:

If the corporation are of opinion that danger to the public is likely to ensue by reason of lands abutting on streets not being fenced, the owner of any such land shall, when required by the corporation, and to their satisfaction, sufficiently fence off the land from the street, and shall afterwards keep such fence in good repair to the satisfaction of the corporation, and if he fails so to fence or repair as aforesaid within fourteen days after notice for that purpose given to him by the corporation, the corporation may fence or repair, as the case may be, and charge him with the expenses of so doing, and recover the same as expenses under the 150th section of the Public Health Act 1875.

The 5th section of the same Act provides:

The word "owner" shall mean the person for the time being receiving the rack-rent of the lands and premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent. The word "street" shall have the same meaning as in sect. 4 of the Public Health Act 1875.

Sect. 4 of the Public Health Act 1875 provides:

"Street" includes any highway (not being a turnpike road) and any public bridge (not being a county bridge), and any road, lane, footpath, square, alley, or passage, whether a thoroughfare or not.

7. On these facts it was contended on behalf of the appellants, who relied on the 81st section of the Rotherham Borough Extension and Sewerage Act 1879, that the respondent was liable for the cost of rebuilding the said wall or fence, or for the cost of so much thereof as extended above the level of the roadway.

8. On the part of the respondent it was contended that he was not liable to pay any part of the cost of rebuilding the same.

9. The summary court dismissed the summons, being of opinion that the wall below the level of the road was a supporting wall, and an integral part of the structure or fabric of the road, and not a fence within the meaning of the Rotherham Act. And that the wall or fence above the level of the road had fallen and required rebuilding in

consequence of the falling in and giving way of the road, for which the respondent was not in any way responsible or liable.

10. The question of law for the opinion of the High Court is whether appellants are entitled, on the facts stated, and under sect. 81 of the Rotherham Act, to charge respondent with the whole or any part of the costs of rebuilding the wall.

11. If the court should hold that the appellants are entitled to recover the whole of such costs, then the decision of the summary court is to be reversed.

12. If the court should hold that the appellants are not entitled to recover any part of such costs, then the decision of the summary court is to stand.

*Waddy*, Q.C. for the appellants.—The justices were wrong in dismissing the summons. The respondent's land abutted on the highway, and by the Act he is bound to fence it off. The fact that respondent did not erect the wall makes no difference. It is his duty to keep the wall in repair and to protect the public from danger.

*Forbes*, Q.C. and *C. E. Ellis*, for the respondent, were not called upon.

*DAY*, J.—I am clearly of opinion that the magistrates were right in dismissing this summons, and on the ground they assigned. The upper part of the road was not land belonging to the adjoining owner, and he would have had no right to build a wall upon it. In my opinion, this Act does not apply at all to fences on a highway, but only to fences out on the landowner's own soil. I go further and say that the Act does not apply to any such ancient fences as these, and applies only to new streets where there are no fences, and where the corporation is of opinion that there should be fences to protect the public from danger. The landowner may then be called upon to put up fences, and thereafter to maintain them. It is not intended to transfer a burden from the public to a private individual. I think this appeal should be dismissed.

*SMITH*, J.—I am of the same opinion, and for the same reasons.

Solicitors for the appellants, *Leaoyd and Co.*, for *S. Brown*, Rotherham.

Solicitors for the respondent, *Bell, Broderick, and Gray*, for *Parker Rhodes*, Rotherham.

### CROWN CASES RESERVED.

*Saturday, March 1, 1884.*

(Before Lord COLERIDGE, C.J., HAWKINS, LOPES, STEPHEN, and MATHEW, JJ.)

REG. v. BRITTLETON AND BATE. (a)

*Criminal law—Husband and wife—Wife indicted for stealing husband's property—Admissibility of husband's evidence.*

*The evidence of a husband is inadmissible in proceedings by way of indictment against the wife for stealing the property of the husband, notwithstanding sect. 16 of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75).*

THIS was a case reserved by the chairman of the bench of magistrates sitting at the General

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

CR. CAS. RES.]

REG. v. BRITTLETON AND BATE.

[CR. CAS. RES.]

Quarter Sessions of the Peace for the county of Lancaster, held, by adjournment, at Liverpool, on the 16th Jan. 1884.

The case was stated as follows :—

"These prisoners were tried before me and other justices at the Quarter Sessions for the county of Lancaster, held, by adjournment, at Liverpool, on the 15th Jan. 1884. The prisoners were tried under one indictment, charging them with stealing certain wearing apparel, household goods, and money, the property of Thomas James Brittleton. The indictment also contained a count for receiving. Thomas James Brittleton was called and sworn as a witness for the prosecution, and stated in evidence that the prisoner, Maria Jane Brittleton, was married to him on the 3rd July 1880. It was then objected by counsel, who at my request appeared for the prisoners, that Thomas James Brittleton was an incompetent witness against the prisoner Maria Jane Brittleton, on the ground that sect. 16 of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75) did not directly render the evidence of a husband admissible against his wife in the cases in which she was subjected to criminal proceedings by the same section, and that the words 'in like manner' did not operate to make the husband a competent witness against his wife. Without expressing any opinion as to the validity of the objection, I decided to admit the evidence in order that the point might be reserved for the consideration of the Court of Criminal Appeal. The evidence of Thomas James Brittleton was then admitted, and the case proved was, in substance, that the prisoner Maria Jane Brittleton and the prisoner George Bate together left the house of the witness Thomas James Brittleton on the 29th Dec. 1882, taking with them the property and money mentioned in the indictment. I left the case to the jury, directing them that, if they were satisfied that the prisoners feloniously took and carried away the property mentioned in the indictment, they were both guilty of larceny. The jury convicted both prisoners of larceny, and the Court sentenced each of them to nine months' imprisonment with hard labour. The questions for the consideration of the court are—(1) Was the evidence of Thomas James Brittleton admissible against his wife the prisoner Maria Jane Brittleton? (2) If the evidence of Thomas James Brittleton was improperly admitted as against his wife, can the conviction of the prisoner George Bate be supported, the two prisoners being jointly indicted? If the first question be answered in the negative, the conviction of the prisoner Maria Jane Brittleton is to be quashed. If the second question be also answered in the negative, the conviction of the prisoner George Bate is also to be quashed.

"RICHARD ASSHETON CROSS, Chairman."

No counsel appeared on either side.

The 12th and 16th sections of the Married Women's Property Act provide :

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but except as aforesaid, no husband or wife shall be entitled to sue the other for tort. In an indictment or other proceeding under this section, it shall be sufficient to allege such

property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding. Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act, while they are living together, as to or concerning any property claimed by her, nor while they were living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall, in like manner be liable to criminal proceedings by her husband.

LORD COLERIDGE, C.J.—It is to be regretted that no one has been instructed to argue this case, as the point involved is one of some importance, and one upon which it cannot be said that the statute is at all clear. The wife was indicted with another person for stealing the property of her husband, and the question reserved for our consideration is, whether the husband was a competent witness against her. This depends upon the construction of two sections of the Married Women's Property Act 1882, viz., the 12th and 16th. The former section in effect provides that married women shall have in their own names against all persons, including their husbands, the same remedies and redress by way of criminal proceedings for the protection of their separate property, as if such property belonged to them as *femes sole*. It further provides that, in any indictment or other proceeding under this section, it shall be sufficient to allege such property to be their separate property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding. It is to be observed that the section does not in terms say that a wife shall be competent to give evidence against her husband upon her preferring an indictment against him. Can it then be inferred that the Legislature intended to alter the law by rendering her evidence admissible upon such proceedings being taken? In my opinion, if the Legislature had so intended, it would have expressed that intention in plain terms. Again, by the 16th section it is enacted that a wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, she shall in like manner be liable to criminal proceedings by the husband. Does that make the husband a receivable witness against his wife upon his preferring an indictment against her for stealing his goods? The section does not say so—it only says she is to be "liable to prosecution in like manner." Inasmuch as the 12th section seems to show that a wife could not give evidence against her husband if she indicted him for stealing her goods, it is difficult to see how the husband could be a receivable witness against his wife under the 16th section. What then is the meaning of the words "in like manner liable to criminal proceedings?" The words are not free from doubt; but it is always best to adhere to the rule of construing the words in an Act of Parliament in their plain and natural meaning. If Parliament had intended that in such a case the

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husband should be a competent witness against his wife, it would have been easy to have said so. The section which it might be supposed would have given the power does not give it. It appears to me that the evidence of the husband should not have been admitted, and that the conviction must therefore be set aside.

HAWKINS, J.—I am of the same opinion. If the Legislature had intended to render a husband a competent witness in proceedings against the wife for stealing the husband's property, it would have expressed itself in clear and unmistakable terms. This it has not done, and I therefore answer the first question submitted to us in the negative. With regard to the second question, as to whether the conviction of the prisoner George Bate can be supported, I am of opinion that, the prisoners having been jointly indicted, the evidence of Thomas James Brittleton was improperly received. I may refer to *Reg. v. Thompson* (26 L. T. Rep. N. S. 667; L. Rep. 1 C. C. R.), *Reg. v. Smith* (1 Moo. C. C. 289).

LOPES, J.—I am of the same opinion.

STEPHEN, J.—I regret I am unable to take the same view of this question as the other members of the court; but although I do not desire to press my own view, even so far as to desire the case to be re-argued before all the judges, I feel bound to express it. It is not denied, and indeed it could not be said, that under the 12th section a wife could not give evidence against her husband in any proceedings for the protection of her separate property. And upon a fair construction of the words of the section it seems to me that proceedings may be extended so as to include proceedings by way of indictment. The words "any statute or rule of law to the contrary notwithstanding" seem to me to show that it was intended that such proceedings should be included. If this is so, I fail to see why a similar construction should not admit the husband under the 16th section as a witness against the wife. Such a construction may be said to go beyond the express and explicit sense of the words used. At the same time, I cannot help thinking that in using the words "shall in like manner" the Legislature intended that the husband should be a competent witness, as it had intended in the previous section that a wife should be a competent witness. However, as I have said, I do not desire to press my own view to the length of dissenting from the views taken by the other members of the court.

MATHEW, J.—I agree in thinking that the evidence of the husband was inadmissible, and that this conviction must therefore be quashed.

*Conviction quashed.*

*Saturday, May 10, 1884.*

(Before Lord COLERIDGE, C.J., GROVE, FIELD, STEPHEN, and SMITH, JJ.)

REG. v. DE BANKS. (a)

*Embezzlement—Larceny—Sale by a person authorised to sell, and fraudulent appropriation by him of the price.*

*On an indictment which charged that the prisoner, as servant of the prosecutor, received a sum of*

*money and fraudulently embezzled and appropriated it, and so did steal the money; the evidence being that the prisoner, not being otherwise in the service of the prosecutor, was employed by him merely to take care of a horse for a few days and afterwards to sell it, and having sold it, had absconded with the money and dishonestly appropriated it:*

*Held, it having been ruled at the trial that he was not a servant, that he was bailee of the money, and might be convicted of stealing the money.*

*Stephen, J. dissenting, on the ground that the prisoner was not a bailee of the money.*

CASE reserved by the Deputy Chairman at the Easter Quarter Sessions for the county of Salop, held upon the 8th April 1884. The case was thus stated:

The prisoner, Mark De Banks, was indicted before me for embezzlement.

1. The indictment states:

Shropshire to wit.—The jurors for our Lady the Queen upon their oath present that Mark de Banks, late of the parish of Whitchurch in the county of Salop, on the sixteenth day of January, in the year of our Lord one thousand eight hundred and eighty-four, being then employed as servant to Joseph Suker, did, by virtue of his said employment, then and whilst he was so employed as aforesaid, receive and take into his possession certain money (to wit), to the amount of fifteen pounds for and in the name and on the account of the said Joseph Suker his master as aforesaid, and did then fraudulently and feloniously embezzle the said money; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Mark de Banks then in manner and form aforesaid, feloniously did steal, take, and carry away the said money, the property of the said Joseph Suker from the said Joseph Suker his master as aforesaid; against the form of the statute in such case made and provided.

2. The evidence so far as it is material to the point reserved was as follows:—

Joseph Suker, the prosecutor, proved: On the 11th Jan. I drove a chestnut mare into Chester with prisoner. I left her at Mr. Wild's, a butcher, I engaged the prisoner to look after her. I said to him, "Do the mare well, and I will be here on Wednesday morning and will pay you for your work." He was to have charge of her till I came. I told him to pay for the keep till I came. I meant him to look after her altogether. I should not have objected to his doing anything else. On Saturday, 12th Jan., I saw prisoner, I asked him how the mare looked, and he said she was as lame as a cat; he said he had removed her to his father's house. I said I should be at Chester by the first train. I told him the mare should be sold on the Wednesday morning when I went, as she would not do for me. I sent my wife on that morning. I have never received a farthing from the prisoner on account of the mare.

Annie Suker, wife of prosecutor, proved: I went to Whitchurch on 16th Jan. I saw prisoner in the street. I asked him if he had sold the mare; he said he had not. I went with him to Wild's stables. Saw mare taken out of the stables into the street. Prisoner was riding the mare about the fair. Mr. Foster bought her. Prisoner, Mr. Foster, and Arthan went to the Queen's Head together. I was outside the door and watched. I saw Foster give prisoner some money. Prisoner came out and showed me a cheque. He did not give it me. He said he would go to the bank and get it cashed. I asked him for it several times but he would not part. He told me he had sold the mare for 13l. He came out of the bank and

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

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said they would not cash him the cheque. I asked him to give it to me and said I would pay his expenses. He would not do so. I said he must come with me to Whitchurch, and I must have either the money or the mare. I had great difficulty in getting him to the station. At Whitchurch, when we got to the gasworks, he bolted down a little alley which leads to the canal. I ran after him and called but he did not answer. I have never received any money for the mare.

Joseph Arthan proved sale of chestnut mare by prisoner to Foster and payment of 15*l.* to prisoner.

Robert Thomas, sergeant of police, proved that prisoner absconded from Whitchurch on 18th Jan. Prisoner was arrested at Chester on the 31st Jan.

3. I held there was no evidence to go to the jury of the defendant's employment as a servant so as to make him guilty of embezzlement. It was then contended on behalf of the defendant that there was no evidence of the larceny of 15*l.* I left the case to the jury, who found "that the prisoner had authority to sell the mare and converted the money to his own use," and a verdict of "guilty of larceny" was recorded.

I reserved sentence and offered to release prisoner on bail, but he was unable to find the requisite sureties.

The question reserved for the opinion of the court is, whether there was any evidence of larceny which could properly be left to the jury.

No counsel appeared.

The learned Judges conferred together, and then

LORD COLERIDGE, C.J. said:—The case undoubtedly presents some difficulties, and raises some nice questions which we should have been glad to hear argued, but upon which, after full consideration, I have come to the conclusion that the conviction may be supported. It is a case in which the prisoner is indicted (and this is the only part of the indictment to which it is necessary to advert) for stealing the price of the mare. The prosecutor intrusted the prisoner with the care of the mare for some days; afterwards the mare was to be sold, and the prosecutor was to come in a day or two for the money. There may be considerable doubt whether under the circumstances his intrusting the prisoner with the mare to take care of—it being in a day or two to be sold—would make him the prosecutor's servant, so as to create the offence of embezzlement. But the judge held otherwise, and the statute only justifies a conviction under it when the prisoner is found guilty, and here he was not found guilty upon that charge; so that it is too late to consider whether he could be convicted of embezzlement; and the only question is whether he was guilty of larceny. The mare was originally intrusted to the prisoner to take care of, afterwards to sell; and as the prosecutor could not go himself he sent his wife to receive the money from the prisoner. The wife was called, and her evidence was, that she saw the prisoner sell the horse and receive the price; and that he showed a cheque which he said he would take to the bank and get it cashed, but he said they would not cash it. She pressed him for the money or the cheque, and followed him for some time, but he got away

from her, and ran off with the money. The question is whether, under those circumstances, he took the money, and was guilty of larceny. It is not, as I have said, a question free from difficulty, but I am of opinion that he was guilty of larceny. I think the effect of the evidence is, that he was to sell the mare, and receive the money for the prosecutor; that is, he was to hand over the money, when he received it, to the prosecutor or his agent as and when he received it. The prosecutor was not able to go himself and sent his wife, and she actually saw him receive the money, and saw him immediately after his receipt of it, and asked him for it. It appears to me that at that moment she ought to have received the money, and he held it for her (that is, for her husband, represented by her). She demanded it, and he appropriated it to his own use; and it appears to me that, under these circumstances, the case came directly within the statute, that the prisoner fraudulently converted the money to his own use, and that therefore he was properly convicted.

GROVE, J.—I am of the same opinion, though not without some doubt—indeed, considerable doubt—on one point, my doubt being whether the prisoner was a "bailee" of the money within the statute. The money was not given to him by the prosecutor for custody, but he received it under an authority to sell the mare and receive the price. There is ample evidence that he took the money and carried it away. The wife proves that he received the money for the mare, for she says that Mr. Foster bought the mare, and that she saw him give the prisoner money, and the prisoner told her he had sold the mare, and said he would go to the bank to cash the cheque (which may be true or false), and the money was retained by him: Was he bailee of the money for the prosecutor? I think he was, and not the less so because the prosecutor had not himself given him the money. That was the point on which I had a doubt, whether these facts made the prisoner bailee of the money, and I regret the case was not argued by counsel. But I am not aware of any case which makes a man any the less a bailee because he had not received the money or the goods directly from the hands of the owner. Assuming the prisoner to have been a bailee, I have no further doubt, for there is evidence that the prisoner, having the money, took it away and appropriated it to his own use. There was ample evidence, therefore, on which the jury could find him guilty of larceny. They have found him guilty of that offence, and I think that the conviction must be affirmed.

FIELD, J.—I also think that the judgment must be affirmed, though I confess that I entertained at one time considerable doubt upon it, and that doubt is not diminished by the fact that one of my brethren (Stephen, J.) will not, I believe, be able to concur in our judgment. It seems to me, however, that there is evidence that the prisoner was a bailee of the money. What is the evidence? On the Wednesday, the day of Chester fair, when the horse was sold, the prisoner acted as agent in selling the horse. The prosecutor had put the horse in his hands, and sent his wife, who said she saw the prisoner sell the horse to Mr. Foster and receive the money for it. Was he not a bailee of the money for the

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prosecutor? I think he was. I have a recollection of a case of *Reg. v. Tatlock* (13 Cox C. C. 328), the case of a broker to whom a customer had intrusted policies, the proceeds of which he had received; and he was held not a bailee of the money, as he had a right to mix it with his own moneys and to deduct his commission and pay his customer the balance. But that case does not apply to the present, for the evidence shows that the prosecutor never intended to intrust the prisoner with the money, but intended him to hand it over to him at once and sent his wife for it. Was he not then a bailee of the money within the statute? I think he was; and that being so, there was ample evidence that he converted the money to his own use, and did so with felonious intent to appropriate it, for he kept the money and went away with it. I think, therefore, that the conviction may be well supported.

STEPHEN, J.—I am sorry to be under the necessity of differing from my brethren, but the difference turns rather upon the interpretation of the facts than upon any principle of law. I think that the prisoner was not a bailee of the money and that when the evidence is fully considered it shows that he was not so. There is a case I would refer to as in point (*Reg. v. Hassall*, L. & C. 58; 8 Cox C. C. 491), where the prisoner was indicted for larceny as a bailee, having had money deposited with him under an obligation to return the amount, but not to return specific coins; and he made away with the money and never returned the amount. Upon argument the judges unanimously gave judgment in favour of the prisoner. Cockburn, C. J. said: "The conviction cannot be sustained. The prisoner is indicted for larceny as a bailee. The word bailee must be understood here in its legal acceptance of a deposit of something to be returned in specie, and does not apply to the receipt of money with an obligation to return the amount, where there is no obligation to return the identical coin. That is not a bailment in the ordinary sense, and is not within the statute." Now was the prisoner in the present case under an obligation to return the particular coins which had been given to him as the price of the horse? As I understand the evidence, it seems to me that he was not, and that it was not understood by the parties at the time that he was to do so, but that the evidence positively negatives such a supposition. Whether or not, upon the evidence, the judge was right in directing the jury that the prisoner was not the servant of the prosecutor I do not say; but he did so direct them, and they accordingly acquitted the prisoner of embezzlement. The state of things was this: that the prisoner had possession of the mare, and the wife came to see after it and asked him whether he had sold it, which implied an authority to him to sell it. She was present when the mare was sold, and did not interpose when the money was given to him, and he told her he had a cheque, and would go to the bank to get it cashed. Now it seems clear that, if he had got the cheque cashed, she would not have objected, and that shows he was not bailee, or the mare hand to pass over to her whatever he received; but that it was considered at the time by all parties that it would be the same thing whether he gave her the cheque or the proceeds,

and if he paid over the proceeds it is obvious that he was not bound to deliver the specific coins. He went off, however, with the money, and no doubt he committed a moral fraud, and was as bad as a thief, and I am sorry that in the view I take of the law he could not be punished. But, as the intention was that he should sell the mare and pay over the amount, and not pass over the specific coins received, I think he could not be properly convicted under this statute.

SMITH, J.—I am of the opinion of the majority of the court, that this conviction should be supported. The question left to us is whether, on the evidence, the prisoner was guilty of larceny, and I think there was reasonable evidence. There clearly was evidence that the prisoner was bailee of the money. The horse was delivered to him to sell, and give the money to the prosecutor; he had authority to sell, and the evidence showed that he was bailee of the money. The point is, whether there was reasonable evidence that the prisoner's duty was to hand over the money he received as the proceeds of the horse to the prosecutor or his agent, and I think the evidence showed that it was so, and for this reason, that the wife of the prosecutor, immediately after the sale, demanded the money from the prisoner, and he told her he had a cheque for 13*l*. (which probably was a falsehood, for she saw money pass, and the price was 15*l*.), and she asked again and again for the money, and he went away with it, and was not seen until apprehended. Upon the evidence I think it was the duty of the prisoner to hand over the money at once, and, as he absconded with it, I think that he was rightly convicted under this statute.

*Conviction affirmed.*

Saturday, May 10, 1884.

(Before Lord COLERIDGE, C.J., GROVE, FIELD, STEPHEN, and SMITH, JJ.)

REG. v. MALLORY. (a)

*Indictment for receiving goods, knowing them to be stolen—Evidence of guilty knowledge—Statement of price of articles produced by wife as in prisoner's presence, as made out at his direction.*

*The prisoner was indicted for receiving stolen goods, knowing them to have been stolen. To prove his guilty knowledge, evidence was given that, being asked by the police as to the prices he had given, he said he did not then know, but his wife would make out a list of them, and next day she, in his presence produced a list, which was received in evidence against him.*

*Held, that it was admissible.*

CASE reserved by the Chairman of the East Riding of Yorkshire Quarter Sessions, held at Beverley, April 9, 1884. It was stated in these terms:—

The prisoner, George Mallory, was tried before me for receiving certain articles, the property of Agnes Fitzpatrick, knowing the same to have been stolen. The following is a copy of the indictment:

East Riding of Yorkshire to wit.—The jurors for our Lady the Queen, upon their oath present, that George Mallory between the seventeenth and thirtieth day of

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

January in the year of Lord one thousand eight hundred and eighty-four, nineteen brass stair rods, seventeen pounds in weight of brass and bronze gas fittings, one brass pan, six black mantel vases, one ink-stand, two framed pictures, two bedroom toilet covers, fifteen yards of oil stair canvas, three feather beds, eight feather pillows, six blankets nine sheets, one pink and white counterpane, five table covers, one electro-plated teapot, one coffee pot, one sugar basin, one cream jug, one toast rack, two cruet stands, two looking glasses and other articles of the goods and chattels of one Agnes Fitzpatrick, before then feloniously stolen, taken, and carried away, feloniously did receive and have, he the said George Mallory then well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

The prisoner was a marine-store dealer, and it appeared from the evidence that the stolen articles were such as he might have bought in the lawful exercise of his business. It was not disputed by the prisoner (who was represented by counsel) that the goods had been actually stolen by the man who brought them to his shop, and the price given by the prisoner for the articles thus became a material question in the case. With the object of showing that the amount so paid was much less than the real value of the stolen goods, the counsel for the prosecution proposed to put in evidence a list of the articles bought by the prisoner with the amount paid by him for each of the several articles, a copy of which was attached to the case, and is as follows :

This is the paper or list produced to us, the undersigned three of Her Majesty's justices of the peace for the East Riding of the county of York, on the examination of George Mallory, charged with felony, and referred to in the examination of William Winterbottom touching the said charge taken before us this sixteenth day of February one thousand eight hundred and eighty-four.

THOS. RICKETT.  
C. W. HUDSON.  
HENRY DARLEY.

1884.		£	s.	d.
22 Jan.	Brass rods...	0	1	6
23 "	Sheets, table cloths, towels...	0	6	0
24 "	Blankets, canvas, knives, forks, spoons, 3 pillows	0	13	0
25 "	Tea service, 2 cruet, 5 pillows, piece carpet...	0	13	0
26 "	Feather bed	0	14	0
28 "	2 feather beds, small looking-glass	1	12	0
29 "	1 looking-glass ornaments	0	6	0

The circumstances under which the list was tendered sufficiently appear from the following notes taken by me at the trial :

John Duke, police constable (after explaining the tracing, &c., of the stolen property), says : " I asked Mallory when he bought them. He was much put out and said he could not say, and I asked him to consider, and he said he would, and his wife would make out a list." This was on the 30th.

William Winterbottom, superintendent of police, said : " I went to the prisoner's house on the 31st, prisoner and his wife was there, when I called next day the wife, in her husband's (Mallory's) presence, handed me a list of goods, with dates and prices, she said, ' This is the list of what we bought and what we gave for them.' The prisoner did not speak, but he heard what she said, and saw the list handed to me. I believe the whole of it is in the wife's handwriting." This witness then produced the paper, and the counsel for the prosecution tendered it in evidence.

The counsel for the prisoner objected to its

admission on the grounds, first, that the wife would be the proper person to prove its contents, and the evidence of a wife is not admissible against or for the husband ; secondly, the paper is neither more nor less than the evidence of the wife against the husband, and is therefore inadmissible ; thirdly, there is no evidence that the husband knew or saw the contents before it was handed to the superintendent, nor that it was made by his direction, and in a criminal case the wife cannot be the agent of her husband.

I admitted the paper (which was read to the jury by the clerk of the peace), reserving for the consideration of the Court of Crown Cases Reserved the question as to whether or not I was right in doing so.

It was proved that the value of the stolen property was greater than the sum shown by the paper to have been paid by the prisoner. There was no other evidence of the price he paid.

The jury convicted the prisoner, and I sentenced him to four months' imprisonment with hard labour, but respited execution of the sentence until the Midsummer Quarter Sessions, and admitted the prisoner to bail.

The question for the court is whether the paper above mentioned was rightly admitted in evidence. If so, the conviction is to stand ; otherwise to be quashed.

*Silvester* for the prisoner.—The paper was not admissible in evidence against the prisoner. It was not made out at the time the things were bought, so it was no part of the *res gesta*. It was a mere statement in writing by the prisoner's wife. That it was handed to the policeman in his presence was no evidence that he had seen and read it and knew of its contents, or that he had any opportunity of correcting any error in it. The wife could not give evidence against her husband, and *a fortiori* her statement against him could not be evidence. Even if it had been shown that he had told his wife the prices he had given for the things, and she had written them down, that would not be evidence against him, unless shown to have been adopted by him, for it would still be only her statement. If her evidence could not be given directly, it could not be given indirectly. The admission of the agent is never evidence against the principal in criminal cases, as it may be in a civil case. In the case of *Lord Melville* (29 State Trials, 750), who was charged with embezzling public money he had received, a receipt for money given by his agent was offered in evidence, but the Lord Chancellor held that it could not be given in evidence as a step towards proving the embezzlement. The Lord Chancellor said : " The evidence is offered to support articles of charge that he had taken and received from the moneys issued to him out of the Treasury large sums of money, and that he misappropriated these sums ; but, before it is possible to impeach him for the misapplication of the moneys issued to him, it must first be proved that the money was issued to him ; and the fact offered to be proved shows no more than that his paymaster did, in the ordinary course of business, give a certificate of his receipt of money, but whether it ever reached the noble lord does not appear. The receipt, therefore, could not be evidence against him." In the present case it must be assumed for the prosecution that the



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wife was the agent of the husband, and here it is proposed to give in evidence an admission by the agent against the principal, and in a criminal case. [FIELD, J.—It is a general rule that a statement made in the presence of the prisoner, and which he might have contradicted if untrue, is evidence against him.] That is the rule if the statement is made to the prisoner; it is contended that it does not apply to statements merely made in the presence of the prisoner. Letters of the wife would not be evidence against her husband. [FIELD, J.—Surely they would if found in his possession and proved to have been received by him; they would be evidence.] [STEPHEN, J.—There is a case like this (*Williams v. Innes*, Campbell's Nisi Prius Cases, 364), where it was proved that, if C. would say that he delivered the goods, he would pay for them, and a witness was called to prove that C., who was dead, had stated that he had delivered the goods, and Lord Ellenborough admitted the evidence, and said that, when a person referred to a statement made by another, he was bound by it.] That was a civil case, and here the case is criminal; and, moreover, it does not appear that the husband had seen the list. [Lord COLERIDGE.—If it is meant that the prisoner's having referred a witness to a certain person makes whatever that person may have said behind the back of the prisoner evidence against him, I must not be taken to assent to that, unless it has been so decided.] It is believed that it has never been so decided, and that the present contention comes in effect to that. [GROVE, J.—The present case goes beyond that, for the prisoner said his wife should make out a list of the things; and next day the wife produced a list in her husband's presence, and said that it was the list: is not that evidence against him?] It is submitted that it is not, as it is merely her statement. [GROVE, J.—It may be presumed that it is the list he had directed to be made out, and if so it would be his statement, not hers.] It was a list made out by her. [Lord COLERIDGE.—He heard what she said, and saw the list she produced.] Not the contents of it. [STEPHEN, J.—That would be a matter for the consideration of the jury.] If the wife had said in her husband's presence, These are the things we bought and these are the prices we gave, and she had stated them in his hearing, that might have been evidence, but would not make the list evidence, for it had been made out by her, and it does not appear that he had read it. If it had been read out in his hearing it might have been evidence. [STEPHEN, J.—It is an admission made by the prisoner's authority, and is therefore an admission by him. It was a statement made in his presence which he did not contradict.] It was not a statement made in his presence, because it was not read out nor read by him. [Lord COLERIDGE.—There is evidence that he had authorised her to make out a list, for he said she should make out such a list, and next day in his presence she produces the list. Surely that was evidence against him.] No, for there is no evidence that he had previously seen it or read it. [Lord COLERIDGE.—That would be for the jury to consider; and they would have to couple with what the wife said in her husband's presence what he had said before.] Still, it is only a statement by the wife. [Lord COLERIDGE.—Made in his presence, and hearing; a conversation in the prisoner's pre-

sence, in which the wife took part, may be evidence against the prisoner.] No doubt, but here the statement had been written by the wife, and does not appear to have been read by the prisoner.

No counsel appeared for the prosecution.

Lord COLERIDGE, C.J.—If the case had been one in which the wife had made a statement to the police in the absence of the prisoner, even although he had referred them to her, I should have desired very considerable time to reflect before I should have allowed such evidence to be given. But that is not this case; and it is not necessary in this case to determine whether that would have been good evidence or not, and whether, if a prisoner refers a witness to anyone, that makes everything the other says evidence against him. That is not the case. And it appears to me that in this case the conviction ought to be upheld upon the ground that the prisoner, being asked as to certain matters, said, "I have not the means of answering, but my wife has, and she shall make out a list which will be an answer to the question;" and next day a policeman went to the house and the wife handed the list over to him—in the presence of the husband—as the statement of the husband. The husband was present, and he allowed the paper to be handed to the police as containing the information he had been asked for. The question is, whether it was receivable as evidence against him *quantum valeat*; and it appears to me that it was so, as a statement authorised by the prisoner to be made, and handed over, in his presence, to the police. According to all rules of evidence the statement was receivable in evidence against the prisoner, and therefore I am of opinion that the conviction ought to be upheld.

GROVE, J.—I am of the same opinion. The prisoner being asked as to the things he had bought, said his wife should make out a list, and next day she in his presence handed to the police a list as that which he had directed her to furnish. She said, in his presence and hearing, "This is the list," and he did not say he had seen it, or desire to look at it; he had already said that she should make out a list, and he allowed the list produced to be treated and taken as the list he had directed to be made out. I think that would be evidence either in a civil or criminal case, and I never heard that there was any difference in the rules of evidence as to the admissibility of evidence, though there may be a difference in their application; and it may be that a piece of evidence admissible in either class of cases may not be sufficient in a criminal case, that is, without further evidence. But the evidence is not the less admissible, and here I think the list produced and handed over in the prisoner's presence as that which he had directed to be made out was evidence, and evidence on which the jury were entitled to convict.

FIELD, STEPHEN, and SMITH, JJ., concurred.

*Conviction affirmed.*

CR. CAS. RES.]

REG. v. CARTER.

[CR. CAS. RES.]

*Saturday, April 5, 1884.*

(Before Lord COLERIDGE, C.J., HAWKINS, STEPHEN, WATKIN WILLIAMS, and MATHEW, J.J.)

REG. v. CARTER. (a)

*Evidence—Receiving stolen property—Guilty knowledge—Possession of other property stolen within preceding twelve months—Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112), s. 19.**Upon an indictment for stealing and receiving certain property, in order to show guilty knowledge evidence was admitted that the prisoner within the preceding twelve months had been in possession of certain other property, which was proved to have been stolen, but of which he had parted with the possession before the date of the larceny alleged in the indictment.**Held, that the words of the statute 34 & 35 Vict. c. 112, s. 19, did not extend to such evidence, which was therefore inadmissible.**This was a case stated by the learned Chairman of Quarter Sessions for the county of Essex.**At the adjourned quarter sessions held at Chelmsford, on the 26th Feb. 1884, the prisoner was indicted for stealing a mare, the property of Alfred Smith, on the 20th May 1883, and the indictment contained a second count in the usual form for receiving the same animal, well knowing it to have been stolen.**It was proved that Carter was in possession of the mare almost immediately after it was stolen, he having sold it on or about the 26th May 1883.**Evidence on behalf of the prosecution to the effect that another mare, the property of Harry Broyd, which had been stolen on the 22nd Oct. 1882, and for which a man named John Tolson had been convicted, was in the possession of Carter, and sold by him on the 9th May 1883, was tendered on the second count of the indictment under sect. 19 of the Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112). That section provides as follows:**Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.**It was contended on the part of the prisoner that this evidence was inadmissible, inasmuch as Broyd's mare was not found in the possession of the prisoner at the time of his possession of Smith's mare, he having previously disposed of it.**Counsel for the prosecution contended that, if such other property stolen within the preceding twelve months was found in the prisoner's possession at any time during the said twelve months, the evidence of such fact was admissible, and the Court decided to admit it and to reserve the question for the consideration of this court.**The prisoner was convicted of stealing and not of receiving the mare, and was sentenced to seven years' penal servitude and was committed to Chelmsford prison.**The question for the consideration of the court**(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.**is, was the evidence as to Broyd's mare having been in possession of the prisoner admissible under the above section.**H. SELWIN IBBETSON, Chairman.**Wedderburn for the prisoner.—The question is one of importance by reason of its frequent occurrence. The words in the section "there was found in the possession of such person other property stolen" must be read "was found at the time of apprehension," and ought not to be extended to property found "at any time." The point has been already decided by Lord (then Lord Justice) Bramwell on circuit in *Reg. v. Drage* (14 Cox C. C. 85). His Lordship is reported to have held that, in order to show guilty knowledge, under the 34 & 35 Vict. c. 112, s. 19, it is not sufficient merely to prove that "other property stolen within the preceding period of twelve months" had at some time previously been dealt with by the prisoner; it must be proved that such other property was found in the possession of the prisoner at the time when he is found in possession of the property which is the subject of the indictment.**Grubbe for the prosecution.—The evidence was properly admitted. It is not necessary that the "other property" should be found upon the prisoner at the time of his apprehension. It is sufficient if the property should have been found in the prisoner's possession at any time during the preceding twelve months. There is nothing in the statute to limit the time within which the stolen goods must have been found, and no other time is mentioned than the twelve months. It is submitted that *Reg. v. Drage* was wrongly decided, and is inconsistent with an expression of opinion by Sir Henry Keating in *Reg. v. Harwood* (11 Cox, 388), tried at Maidstone in 1870. The question before his Lordship was similar to that under consideration, but, as the prisoner was acquitted, the point was not reserved. The verdict was a general one, although the case states that the prisoner was not convicted of receiving. [MATHEW, J.—The case must be taken as stated. If the evidence was wrongly admitted, and the jury acquitted on the only count in support of which the evidence would be received, then *à fortiori* the conviction ought to be quashed on the first count, because its reception must have tended to prejudice the prisoner, and ought not to have been received at all.]**Lord COLERIDGE, C.J.—I am of opinion that the evidence was wrongly received. The ruling of Lord Bramwell in *Reg. v. Drage* seems directly in point, and to be quite right. With regard to the argument on behalf of the Crown that *Reg. v. Drage* is inconsistent with the opinion of Sir Henry Keating in *Reg. v. Harwood*, it is to be observed that the learned judge in the latter case merely said that in the event of a conviction he would reserve the question. I am of opinion *Reg. v. Drage* was a perfectly correct decision, and that this conviction must therefore be quashed.**HAWKINS, STEPHEN, WATKIN WILLIAMS, and MATHEW, J.J. concurred.**Conviction quashed.**Solicitors for prosecution, Haynes and Clifton, Romford, Essex.**Solicitor for the prisoner, John W. Atkinson, Stratford.*

## Supreme Court of Judicature.

## COURT OF APPEAL.

Friday, May 2, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

REG. on the prosecution of THE GUARDIANS OF WYCOMBE UNION v. THE GUARDIANS OF THE PARISH OF ST. MARYLEBONE. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor law—Settlement—Illegitimate child under sixteen—Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 35.

By 39 & 40 Vict. c. 61, s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

Held (affirming the judgment of Watkin Williams and Smith, JJ.), that an illegitimate child, whose mother acquired a settlement from her father when she was under the age of sixteen, does not take such derivative settlement from the mother, nor the mother's original birth settlement, but is settled in the parish where it was born.

APPEAL by the defendants from the judgment of Watkin Williams and Smith, JJ. (reported 49 L. T. Rep. N. S. 59), discharging a rule calling upon the prosecutors to show cause why an order of sessions confirming an order for the removal of two pauper children from the Wycombe Union to the parish of St. Marylebone should not be quashed.

The paupers were illegitimate children, and were born in the parish of St. Marylebone in the years 1877 and 1879 respectively.

Their mother was born in 1857 at Hoxton, in the parish of Shoreditch, and had never done anything to acquire any other settlement for herself.

Her father, after her birth, and while she was under the age of sixteen, acquired a settlement by occupation and payment of rates in the parish of Bermondsey.

The Divisional Court held that, under the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 35, the settlement of the paupers was in the parish of St. Marylebone.

Poland and Vesey Fitzgerald for the appellants.—On the true construction of the statute, these

children had a settlement in Shoreditch, where their mother was born. When it is once shown that her birth settlement was there, then by the words of the second clause of the section the children take and retain that settlement, for by the third clause there can be no inquiry as to the derivative settlement which the mother is stated to have acquired. Therefore, for the purposes of this inquiry, her settlement must be taken to have been in the parish of Shoreditch, and the children have acquired and retain a settlement there. The decisions bear out this view:

*Reg. on the prosecution of The Guardians of the Poor of Madeley Union v. The Guardians of the Poor of Bridgnorth Union*, 48 L. T. Rep. N. S. 600; 11 Q. B. Div. 314;

*Guardians of the Woodstock Poor Law Union v. Churchwardens of the Parish of St. Pancras*, 39 L. T. Rep. N. S. 256; 4 Q. B. Div. 1;

*The Guardians of the Poor of the Hereford Union v. The Guardians of the Poor of the Warwick Union*, 40 L. T. Rep. N. S. 588; 48 L. J. 111, M. C.

Bompas, Q.C. and Lumley, for the respondents, were not called on.

BRETT, M.R.—The section on which this case turns (39 & 40 Vict. c. 61, s. 35), to my mind, is not wholly intelligible, but I think I can understand enough to decide this point. I do not think it necessary to determine the meaning of the second part of the section, for it seems to me that the solution of the question raised before us depends entirely and solely on the third part. If the section were not in existence the children would have the settlement of their mother, which, in the present case, is the settlement which she derived from her father; that is, a derivative settlement. Then does the third part of the section forbid an inquiry into what that settlement was; and if so, does it state what the consequence is to be? It is clear that the third part of the section does apply to illegitimate children, for it begins with the words "if any child in this section mentioned," and the previous sentence in terms mentions an illegitimate child. Then it goes on to provide that if the child has not acquired a settlement for itself, "and it cannot be shown what settlement such child . . . derived from the parent without inquiring into the derivative settlement of such parent, such child . . . shall be deemed to be settled in the parish in which he or she was born." How can one tell whether the mother has a derivative settlement or not until one knows what her settlement is? There is therefore this absurdity in the position; it is necessary to go to the expense and trouble of finding out what the derivative settlement of the parent is in order to find out that such settlement cannot be inquired into. I think, however, that this is the true construction of the section. It follows that when it is once shown that the mother has a derivative settlement the inquiry as to her settlement must be abandoned, and the result is that the child is deemed to be settled in the parish in which it was born. I am therefore of opinion that these children are settled in the parish of St. Marylebone, and that the order of removal was right, and the judgment of the Divisional Court must be affirmed.

BOWEN, L.J.—I am of the same opinion. I think I can understand enough of the section to see that Mr. Poland's argument cannot prevail.

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The second clause of the section provides that an illegitimate child shall take the settlement of its mother, but Mr. Poland wants to give these children a settlement which would be the settlement of the mother if something had not happened which has happened; that is, he tries to show that the children have a settlement in Shoreditch, where the mother's settlement would have been if she had not acquired a derivative settlement in Bermondsey. There are three clauses in the section. The first destroys derivative settlements with certain exceptions. The second deals with illegitimate children. It is not necessary to decide as to the true construction of that clause, for it is clear that if the section stopped short there it would be necessary to find the settlement of the mother. The third clause provides that if a child has not acquired a settlement for itself, "and it cannot be shown what settlement such child . . . derived from the parent without inquiry into the derivative settlement of such parent," the child is settled in the parish where it was born; in other words, if the child has not acquired a settlement, and the mother's settlement cannot be shown without inquiring as to her derivative settlement, then the child's settlement is where it was born. I agree with the Master of the Rolls as to the difficulty in having to incur the trouble and expense of inquiry as to the parent's settlement, but I also agree that this is the true construction of the section.

FRY, L.J.—I am of the same opinion. I am unable to put any other construction on the section. The first clause abolishes derivative settlements, except in certain cases. Here the mother came within one of these exceptions, for she had a derivative settlement from her father. It is clear from the words of the second clause that the moment an inquiry arises as to the settlement of an illegitimate child, it becomes necessary to inquire as to the settlement of that child's mother, both original and derivative. The third clause appears to me clearly to apply to illegitimate children. Therefore, reading the second and third clauses of the section together, my opinion is that an illegitimate child acquires and retains the settlement of its mother if that settlement is not derivative, but, if the mother's settlement is derivative, then the child gets a settlement in the place of its birth.

*Judgment affirmed.*

Solicitors for appellants, *Clarkson, Greenwell, and Wyles.*

Solicitors for respondents, *Lovell, Son, and Pitfield*, for *T. J. Reynolds*, High Wycombe.

*Friday, May 9, 1884.*

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

REG. on the prosecution of THE GUARDIANS OF ST. OLAVE'S UNION v. THE GUARDIANS OF HEADINGTON UNION. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Poor law — Settlement — Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 35.*

*By 39 & 40 Vict. c. 61, s. 35: "No person shall be*

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

*deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. . . . If any child in this section mentioned shall not have acquired a settlement for itself, . . . and it cannot be shown what settlement such child . . . derived from the parent without inquiring into the derivative settlement of such parent, such child . . . shall be deemed to be settled in the parish in which he or she was born."*

*An appeal was brought from an order for the removal of pauper children; the children were legitimate, and it was not stated where they were born; neither their father nor their mother had done anything to acquire a settlement; their father was dead, and their mother had deserted them; their father was born in the appellants union, and while he was under sixteen years of age his father had acquired a settlement in the same union by renting a tenement.*

*Held, that by 39 & 40 Vict. c. 61, s. 35, the paupers must be deemed to be settled in the parish in which they were born, and therefore the order of removal must be quashed.*

By an order of removal dated 13th Oct. 1881, the place of the last legal settlement of Alfred Collier aged seven years, Victor Collier four years, Daisy Collier aged three years, and Henry Collier aged six years, was adjudged to be in the parish of Saint Giles in the appellant union, and the said Alfred Collier, Victor Collier, Daisy Collier, and Henry Collier were ordered to be removed from the respondent union to the appellant union. Upon an appeal against the said order of removal the same was confirmed at the quarter sessions for the county of Surrey, subject to the following case:—

1. Alfred, Victor, Daisy, and Henry Collier are the lawful children of Richard Randall Collier (who died on the 7th Nov. 1879) and Mary Collier his widow, who is still living at some place unknown.

2. All of the said children were born out of the appellant union.

3. Neither Richard Randall Collier nor Mary his wife acquired a settlement in his or her own right.

4. On behalf of the respondents it was proved or admitted that Richard Randall Collier was the lawful son of John Collier, and was born on the 6th Oct. 1884, in the parish of St. Giles in the appellant union.

5. That being the respondents' case, the appellants called evidence and proved that John Collier in the year 1850 became tenant of a house in the said parish of St. Giles, at the yearly rent of 15*l.*, and lived there during the years 1850, 1851, 1852, and 1853. He was rated in respect of this house and paid the rent and rates from 1850 to 1853, thereby acquiring a settlement in the appellant union.

6. The appellants contended that the children were to be deemed settled in the parish or parishes in which they were born, and not in the appellants union, by virtue of 39 & 40 Vict. c. 61, s. 35.

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7. The respondents contended that the case came within the first clause of sect. 35, and not within the third clause, and relied upon the authority of *The Guardians of Hollingbourn Union v. West Ham Union* (6 Q. B. Div 580; 44 L. T. Rep. N. S. 520); and that the children being under sixteen took the settlement of their widowed mother in the appellant union.

8. The Court of Quarter Sessions decided that the case came within the first clause of sect. 35, and that the children took the settlement of their widowed mother in the appellant union, and dismissed the appeal with costs subject to the opinion of the court upon a case.

The question for the opinion of the court was, whether, under the circumstances above stated, the settlement of the said four children of Richard Randall Collier and Mary Collier was or was not in the parish of St. Giles in the appellant union.

If the opinion of the court was that the decision of the Court of Quarter Sessions was right, the order dismissing the appeal with costs was to stand. If the court should be of opinion that the appeal ought to have been allowed and the order of removal quashed, judgment with costs to the appellants was to be entered accordingly at the quarter sessions.

The Divisional Court (Lord Coleridge, C.J. and Mathew, J.) declined to hear the case, on the ground that, in the event stated in the last paragraph, the judgment was to be entered at quarter sessions. The judgment of the Court of Quarter Sessions therefore stood affirmed.

The Guardians of Headington Union appealed.

It was suggested by the Court of Appeal, and assented to by counsel on both sides, that the case should be treated as if the last paragraph were struck out.

The case was therefore argued on the merits.

*Bosanquet, Q.C.* (Shortt with him) for the appellants.—The order of removal was wrong. The case shows that the settlement of Richard Randall Collier, the father of the pauper children, in the appellant union, was derived by him from his father; that is, it cannot be shown what the settlement of the paupers, derived from their father, was, without inquiring into the derivative settlement of the father; therefore, by the express words of the last clause of 39 & 40 Vict. c. 61, s. 35, the paupers are to be deemed to be settled in the parish in which they were born:

*Reg. v. The Guardians of Bridgnorth*, 48 L. T. Rep. N. S. 600; 11 Q. B. Div. 314.

The order cannot be supported, on the ground that the children take the settlement of their widowed mother, for it is not shown that she is settled in the appellant union. [He was stopped by the Court.]

*Philbrick, Q.C.* and *Mead* for the respondents.—The father of the paupers was settled in the appellant union, and his settlement must be taken to have been original, not derivative. He acquired a settlement by birth, and the fact that his father subsequently acquired a settlement in the same union is immaterial. He retained the status which he acquired at his birth. [BOWEN, L.J.—Surely evidence of a man's birthplace is only *prima facie* evidence of his settlement: *Reg. v. The Inhabitants of All Saints, Derby*, 14 Q.B. at

pages 216, 217, per Coleridge, J.] They also referred to

*The Guardians of Liverpool v. The Overseers of Portsea*, 50 L. T. Rep. N. S. 296; 12 Q. B. Div. 308.

BRETT, M.R.—The question to be decided in this case is, as to the validity of an order for the removal of four pauper children. They are legitimate children; their father is dead, and his widow, their mother, has deserted them. The order is for the removal of the children to the place of the settlement of the father. The Divisional Court decided the case on a preliminary objection, and therefore there is no appeal from any decision on the merits. By consent in this court the special case is to be treated as if the paragraph which was objected to were struck out, and therefore the point which we now have to decide is, whether the order to remove the children to the place of the settlement of their father is right. The settlement of the mother is not known; if she had not acquired a settlement, and the question were as to her removal, no doubt the proper order would be for her removal to the place of the settlement of her husband; but the question now before us is not as to the removal of the mother; it is as to the removal of the children without the mother. I still think that sect. 35 of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) is not clear. That section does away with derivative settlements, with certain exceptions. As to the case of husband and wife, it is obvious that the wife may derive a settlement from her husband, and in the case of a child under the age of sixteen the section not only provides that it may take a derivative settlement, but shows how it is to derive such settlement. One reading of the words in the section "as the case may be" would govern the present case. If those words mean that the question is to depend on whether the father is alive or dead, then this case is governed by them, for, the father being dead, the children would take the settlement of their mother; but if that were the reading, and the settlement came from the mother, it would be derivative, and we could not inquire as to her husband's settlement or as to hers, and therefore the children would take the settlement of their birth. But is it necessary to determine whether this is the correct interpretation, or not? If this is the true interpretation, and the children were between the ages of seven and sixteen, then the mother would take a settlement from her husband, and the children would have no settlement except a derivative settlement from their mother, and therefore each child would have to go to its own place of birth. This seems to be harsh legislation, but possibly it may be the right construction. The words used by Lord Coleridge, C.J., in the case of *The Guardians of Liverpool v. The Overseers of Portsea* (12 Q. B. Div. 308), tend to show that this was not his view, but rather that he thought that if the widow had acquired no settlement it would be necessary to inquire as to the settlement of the father, and so the mother and children would go together to that place of settlement, but if the mother's settlement were ascertained the children would go there too. As to the third part of the section, it obviously means that up to a certain point it may be necessary to inquire as to whether the parent's settlement is derivative or not, as we pointed out last week in the

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case of *Reg. v. The Guardians of St. Marybone* (ante, p. 442). But when one finds that the settlement is derivative, one is stopped from inquiring what it is, and cannot find out, and in that case the children must be sent to their place of birth. Now as to the present case. We may inquire what the settlement of the father was, and we find that he was born in a particular parish, and his father had acquired a settlement in that same parish while he himself was under the age of sixteen. Richard Randall Collier, the father of the paupers, had acquired no settlement for himself, so it follows that he took his father's settlement, that is, he had a derivative settlement; then by the words of the section we are stopped from inquiring further as to that settlement, and therefore the children will have to go to the place of their birth. It is not proved where this is, and we do not know, but it is shown not to be in the appellant union. Mr. Mead put forward an ingenious argument about settlement being a status, but if that is so, then, if at the moment of the child's birth its father has an acquired settlement, at the very same moment the child's status is taken away, and it takes the settlement of its father. The true view is, that evidence as to where a child is born is *prima facie* evidence of his settlement, because most probably he is born where his father and mother live and are settled. Therefore, without giving any further opinion as to the first part of the section, I think the order is wrong. If we differ from Lord Coleridge's view the point is clear, and if we agree with it, for the reasons I have stated, the respondents' case fails. I am of opinion that the order of removal ought to be quashed, and this appeal allowed.

BOWEN, L.J.—I am of the same opinion. 39 & 40 Vict. c. 61, s. 35, does away with derivative settlements as a general rule, but one excepted case is that of a child under sixteen years of age, who may derive a settlement from its father or widowed mother; therefore these children are *prima facie* within the exception. The father is dead, and the settlement of the widowed mother is unknown, so it is argued that the children are relegated to the settlement of their father. It is not necessary to construe the section so as to show the exact meaning of every expression in it, but assuming that the children would otherwise take the settlement of their father, still the case comes within the third clause of the section, because the father's settlement was derivative. Therefore, as the inquiry shows that the father had a derivative settlement, it becomes evident that the children do not follow it.

FRY, L.J.—I am of the same opinion. 39 & 40 Vict. c. 61, s. 35, abolishes derivative settlements generally; one exception is in the case of a child under the age of sixteen, which is to take the settlement of its father or of its widowed mother as the case may be. There are two interpretations which may be placed upon the expression "as the case may be." In the first place, it is said to mean that the child is to take the settlement of the father if the father is living, and is to take the settlement of the mother if the father is dead. The second interpretation is, that the words only refer to the possible contingency of the widow getting a new settlement after her husband's death. Suppose the first

interpretation to be correct; *prima facie* these children would take their mother's settlement; but it could not be shown what this settlement was without inquiring into the derivative settlement of the mother, and therefore, if this view is adopted, the children are settled in their place of birth. If the second interpretation is correct we are driven to inquire as to the settlement of the father, and it appears that his settlement was derivative. Consider the effect of the third clause of the section; we cannot inquire into a derivative settlement, but we must inquire whether the settlement is original or derivative: if it proves to be original we can act upon it; if not the children take the settlement of their birth. Therefore, either alternative leads to the same conclusion, that the paupers in the present case take the settlement of their birth.

*Appeal allowed.*

Solicitors for appellants, *Philpot and Son*, for *Ward*, Oxford.

Solicitors for respondents, *Saw and Son*.

*Saturday, May 17, 1884.*

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

DINNING v. SOUTH SHIELDS GUARDIANS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Poor law—Wife chargeable—Maintenance by husband—Payment towards cost of relief—Amount to be ordered—31 & 32 Vict. c. 122, s. 33.*

*By the Poor Law Amendment Act 1868 (31 & 32 Vict. c. 122), s. 33, when a married woman requires relief without her husband, guardians or overseers may apply to justices, who may summon such husband to appear before them to show cause why an order should not be made upon him to maintain his wife, and make an order upon him to pay such sum weekly or otherwise towards the cost of the relief of the wife as after consideration of all the circumstances of the case shall appear to them to be proper, and shall determine in such order how and to whom the payments shall from time to time be made.*

*The guardians proved upon an application under this section that they had granted relief to the wife to the amount of 3s. a week, and that the husband was able to maintain her at 15s. a week, and the magistrates made an order for payment by the husband of 15s. a week.*

*Held, that the amount which the husband might be ordered to pay was not limited to the amount of the relief actually granted, and therefore the order of the magistrates was valid.*

*Judgment of Stephen and Mathew, JJ. (from which Lord Coleridge, C.J. dissented) reversed.*

APPEAL by the guardians of the South Shields Poor Law Union from the judgment of the majority of the Divisional Court, reported 49 L. T. Rep. N. S. 679, where the special case is set out.

The wife of the respondent (appellant in the court below) having become chargeable to the South Shields Poor Law Union, the respondent was summoned under 31 & 32 Vict. c. 122, s. 33, to show cause why an order should not be made upon him to maintain his wife. It was proved that the wife had received relief to the amount of

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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3s. a week, and that the respondent was possessed of considerable property.

The magistrates made an order that the respondent should pay to the relieving officer of the union a sum of 15s. a week towards the relief and maintenance of his wife.

The special case raised the question whether this order was valid or not.

Stephen and Mathew, JJ. were of opinion that the magistrates had no power to order payment beyond the actual relief granted, and therefore held that the order was invalid, Lord Coleridge, C.J. being of the contrary opinion.

Leave to appeal was given.

*A. Wills, Q.C.* (*Cock* with him) for the guardians in support of the appeal.—The judgment of the majority of the Divisional Court proceeded on a mistake, in considering that the amount of relief previously allowed by the guardians was material. The provision empowering the magistrates to make an order is prospective, and the amount which they can order to be paid is in no way dependent on the amount of the relief previously granted. They could make an order if no relief had been granted before. The clause empowering the magistrates to direct to whom payment is to be made is material.

*Charles Q.C.* and *A. M. B. Bremner* for the respondent.—It is a condition precedent to the power to make an order that the guardians should have declared what amount ought to be paid for relief; here they have declared that amount to be 3s. a week. The order is expressly limited to payment "towards the cost of the relief of the wife;" that means the cost to the guardians, which is 3s. a week. The Act is only intended to enable the guardians to get back the cost of relief by way of indemnity.

*Brett, M.R.*—I am of opinion that, under this Act of Parliament, the magistrates are not entitled to grant an allowance in the shape of alimony, or anything in the nature of alimony. Their duty is to consider what is the proper amount of relief for the wife, considered as a pauper. They are to consider all the circumstances of the case, and may make an order on the husband to pay the whole of what would be the proper amount of relief for the wife, considered as a pauper, or a part of such amount. If it were clear that the magistrates made the order as an order for alimony, I think they would be exceeding their jurisdiction, and there would be some remedy. But that is not the point here; the case does not raise any such point. The sum ordered to be paid is not such as to show that it is treated as alimony, and the objection is not taken. It is said that either the magistrates had no authority to make the order because the guardians had not previously fixed the sum to be allowed, or that as to the past weeks the guardians had only allowed three shillings, and therefore the order should be confined to that amount. But the order is asked for with regard to future relief, and it is impossible to say that the magistrates are bound by the amount of the relief which has been given in the past. The question is whether it is a condition precedent to the jurisdiction of the magistrates to make an order that the guardians should have fixed the amount of relief. There are no express words which say so, and therefore the only way in

which we can say it is a condition precedent is if it is so by necessary implication; I cannot say that it is. Consider the substance of what is done: the husband, who can pay for the maintenance of his wife, does not, and the burden is thrown on the union; the union say that the husband ought to pay instead of them, and that he should pay what otherwise they ought to pay. I am therefore of opinion that the fixing of the amount by the guardians was not a condition precedent, and that the magistrates were entitled to make the order which they have made, and this appeal ought to be allowed.

*Bowen, L.J.*—I am of the same opinion. I agree that it is not a condition precedent to the jurisdiction of the magistrates to make an order that the sum to be allowed shall have been fixed by the guardians. Mr. Charles tries to extract this meaning from the terms of the legislation on the subject, and especially from the words "towards the cost of the relief of the wife;" he construes these words as if they were equivalent to "in subvention of the cost of the relief." The section deals with the power of making the husband pay for the maintenance of his wife instead of supporting her by means of parochial relief. I think the words "towards the cost of the relief of the wife" mean towards what it would cost to relieve the wife, within proper limits, not by awarding alimony, but on the assumption that she is a pauper.

*Fry, J.*—I am of the same opinion. The husband may be summoned to show cause why an order should not be made upon him to maintain his wife, and the order may be to pay to such persons as the magistrates may direct. Hence it is evident that the Legislature had not in view a payment in aid of a sum already fixed, and it is not a condition precedent that the guardians should have fixed the amount.

*Judgment reversed.*

Solicitors for the guardians, *Iliffe, Russell, Iliffe, and Cardale*, for *Mabane* and *Graham*, South Shields.

Solicitor for the respondent, *J. S. Coleman*, for *J. J. Bentham*, Sunderland.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

Tuesday, Dec. 18, 1883.

(Before DAY and SMITH, JJ.)

REG. v. THOMPSON. (a)

*Bastardy—Service of summons—Jurisdiction of justices—The Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65), ss. 3 and 4—The Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24), ss. 1, 4, 6.*

*The 4th and 5th sections of the Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24) give no jurisdiction to serve a bastardy summons issued by justices in England on the application of the mother of a bastard child residing in England on a putative father residing in Scotland.*

THIS was a rule nisi calling upon the justices of

(a) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.



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the borough of Sunderland to show cause why a *mandamus* should not issue to compel them to hear and determine the application of a woman resident in Sunderland, who, having been delivered of a bastard child, had applied for and obtained from a justice of the said borough a summons calling upon one Duncan, whom the woman alleged to be the father of the child, to appear at a petty sessions to be holden for the said borough.

The summons was served upon the putative father in Scotland, where he resided, and upon the return of the summons it was objected on his behalf that he, being a domiciled Scotchman, was not within the jurisdiction of the court, within the meaning of the 6th section of the Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24), nor in any way amenable to the bastardy law of England.

The justices allowed the objection, and dismissed the application on the ground that they had no jurisdiction to entertain it. The applicant thereupon obtained a rule *nisi* calling upon the justices to hear and determine her application, and this was the rule which now came on for argument.

There was no evidence to show where the child was begotten or born.

The following statutes or parts thereof became material in the course of the argument:—

The Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65.):

3. Any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child, the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty sessions to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts.

4. After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child.

11. This Act shall not extend to Scotland or Ireland.

The Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24):

1. This Act shall be deemed to be included in the expressions "Summary Jurisdiction Acts" and "Summary Jurisdiction (English) Acts."

4. Subject to the provisions of this Act any process issued under the Summary Jurisdiction Acts may, if issued by a court of summary jurisdiction in England and indorsed by a court of summary jurisdiction in Scotland,

or issued by a court of summary jurisdiction in Scotland and indorsed by a court of summary jurisdiction in England, be served and executed within the jurisdiction of the indorsing court in like manner as it may be served and executed within the jurisdiction of the issuing court, and that by an officer either of the issuing or of the indorsing court.

6. A court of summary jurisdiction in England and a sheriff court in Scotland shall respectively have jurisdiction by order or decree to adjudge a person within the jurisdiction of the court to pay for the maintenance and education of a bastard child of which he is the putative father, and for the expenses incidental to the birth of such child, and for the funeral expenses of such child, notwithstanding that such person ordinarily resides, or the child has been born, or the mother of it ordinarily resides, where the court is English in Scotland, or where the court is Scotch in England, in like manner as the court has jurisdiction in any other case.

Any process issued in England or Scotland to enforce obedience to such order or decree may be indorsed and executed in Scotland and England respectively in manner provided by this Act with respect to process of a court of summary jurisdiction.

Any bastardy order of a court of summary jurisdiction in England may be registered in the books of a sheriff court in Scotland, and thereupon a warrant of arrestment may be issued in like manner as if such order were a decree of the said sheriff court.

7. This Act shall be in addition to, and not in derogation of, any power existing under any other Act relating to the execution of any warrant or other process in England and Scotland respectively.

8. In this Act, unless the context otherwise requires, the expression "process" includes any summons or warrant of citation to appear either to answer any information or complaint, or as a witness; also any warrant of commitment, any warrant of imprisonment, any warrant of distress, any warrant of poinding and sale; also any order or minute of a court of summary jurisdiction, or copy of such order or minute, also an extract decree, and any other document or process, other than a warrant of arrestment, required for any purpose connected with a court of summary jurisdiction to be served and executed.

*Poland*, for the putative father, showed cause against the rule.—The justices were right in dismissing this application. The service of this summons on the putative father in Scotland, where he is residing, does not give the justices jurisdiction to hear this application in his absence. In *Reg. v. Lightfoot* (6 E. & B. 822; 25 L. J. 115, M. C.), which was decided in 1856, a summons duly issued by a justice against the putative father of an English bastard child was served on the putative father in Scotland, where he had gone to reside, and it was there held that service out of England and Wales was not due service under 7 & 8 Vict. c. 101, ss. 2 and 3, and an order which had been made by justices in petty sessions in the absence of the putative father, was quashed. It will be admitted, therefore, that up to 1856 persons residing in Scotland were not within the jurisdiction of the English courts acting under the English Bastardy Acts. Since 1856 other Bastardy Acts have been passed, but the case of *Reg. v. Lightfoot* remains unaffected by them, because they all contain an express provision that they shall not apply to Scotland: see the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65), s. 11, and the Bastardy Laws Amendment Act 1873 (36 & 37 Vict. c. 9), s. 10. The applicant relies upon the 6th section of the Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24), which contains a provision that a court of summary jurisdiction in England and a sheriff court in Scotland shall respectively have jurisdiction by order or decree to adjudge a person within the jurisdiction of the court to pay for the maintenance

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nance and education of a bastard child of which he is the putative father, notwithstanding that such person ordinarily resides, or the mother of it ordinarily resides, where the court is English, in Scotland, or, where the court is Scotch, in England, in like manner as the court has jurisdiction in any other case. But the object of that section is that England and Scotland having different codes the jurisdiction may be that of the place where the father is. It expressly says, "A person within the jurisdiction," and does not apply at all until the person against whom it is proposed to enforce process has been found within the jurisdiction, when it operates to prevent him from pleading, if he is found in England, his residence in Scotland, or *vice versa*, as a bar to the proceedings, as was successfully done by the putative father in *Reg. v. Blane* (13 Q. B. 769; 18 L. J. 216, M. C.). In *Hampton v. Rikard* (43 L. J. 133, M. C.) the appellant was summoned before justices and adjudged to be the putative father of a bastard child, and ordered to provide for its maintenance according to the 3rd section of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65). The child was born in Cornwall. The appellant was an Irishman, and the respondent an Englishwoman, and the connection which resulted in the birth of the child took place in Ireland, and it was held that the justices had jurisdiction, and the order was good; but it is to be observed that in that case the summons was duly served on the appellant, and Cockburn, C.J. expressly says, "Here the material fact is the father's presence in this country." That was the law under the Act of 1872, and the 6th section of the Summary Jurisdiction (Process) Act 1881 makes no alteration in it. First, the words, "A person within the jurisdiction," expressly show that it was the intention of the Legislature that this should continue to be the law. Secondly, the Bastardy Acts have always been separate from the Summary Jurisdiction Acts, as appears from the express provisions contained in them that they shall not apply to Scotland or Ireland, and it could not have been the intention of the Legislature to radically alter the whole law of bastardy, and make the English law applicable to persons residing in Scotland and *vice versa* by this short section. Thirdly, if that were the intention of the Legislature, it would have been sufficient to have included "process issued under the Bastardy Acts," in the 4th section, and a separate section dealing with bastardy, as this 6th section does, would have been quite unnecessary. Lastly, the mother having a remedy in Scotland, it could not been the intention of the Legislature to give her the power to compel the putative father of her child to come from Scotland to any place in England where she may choose to reside.

*Hans Hamilton* for the applicant.—This summons was served under the powers given by the 4th section of the Summary Jurisdiction (Process) Act 1881, and, having been "duly served" in accordance with that section, the justices had, according to the decision in *Reg. v. Lightfoot* (*ubi sup.*), jurisdiction to hear the case. [SMITH, J.—Must not a bastardy summons be issued under the Bastardy Acts, and under them alone?] No; the 7th section of the Act provides that the Act shall be in addition to, and not in derogation of, any power existing under any other

Act. The 6th section confers jurisdiction on a court of summary jurisdiction in England to adjudge a person by order to pay for the maintenance of his bastard child. By the 1st section the Act is to be deemed to be included in the expression "Summary Jurisdiction Acts." Process, therefore, issued in exercise of the jurisdiction conferred by the 6th section, is process under a Summary Jurisdiction Act, and comes within the meaning of the 4th section. By the 8th section "process" includes a summons to appear to answer a complaint. This summons, being indorsed and served in Scotland, was "duly served," and the justices thereupon had jurisdiction. [SMITH, J.—Does not the expression "under the Summary Jurisdiction Acts" in the 4th section mean under the Summary Jurisdiction Acts 1848 to 1879; and, besides, do not the words "subject to the provisions of this Act" in the same section mean subject to the different provisions as to bastardy in the 6th section? DAY, J.—Is your reading consistent with the existence of the 6th section? If it was the intention of the Legislature that the 4th section should apply to bastardy process, how do you account for the insertion of a section specially dealing with bastardy?] The 6th section provides specially for bastardy matters, because previous Summary Jurisdiction Acts had specially excluded bastardy from their operation (11 & 12 Vict. c. 43, s. 35), and therefore a special section was considered desirable to bring them within their scope.

DAY, J.—I am of opinion that this rule must be discharged. It seems to me perfectly clear that summonses in bastardy have always been issued under the Bastardy Acts, and not under the Summary Jurisdiction Acts, the two sets of Acts having been carefully kept distinct. A contention, however, has now been raised before us—and this, I think, is the only point we have to decide in this case—to the effect that under the Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24) the course of procedure has been altered, that Act applying to bastardy proceedings. Now this Act becomes by the operation of its 1st section one of the Summary Jurisdiction Acts, and what the learned counsel has to prove is that it gives a primary jurisdiction in bastardy to courts of summary jurisdiction in England, bringing within their powers persons residing in Scotland. No such jurisdiction was given under the old Summary Jurisdiction Acts, and there is nothing, in my opinion, in this Act to give this jurisdiction. The sections of the Act on which the applicant chiefly relies are the 4th and the 6th, the former of which says that "Subject to the provisions of this Act, any process issued under the Summary Jurisdiction Acts may, if issued by a court of summary jurisdiction in England and indorsed by a court of summary jurisdiction in Scotland, or issued by a court of summary jurisdiction in Scotland and indorsed by a court of summary jurisdiction in England, be served and executed within the jurisdiction of the indorsing court in like manner as it may be served and executed within the jurisdiction of the issuing court, and that by an officer either of the issuing or of the indorsing court," while the 6th section enacts that "A court of summary jurisdiction in England and a sheriff's court in Scotland shall respectively have jurisdiction by order or decree to adjudge a person within the

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jurisdiction of the court to pay for the maintenance and education of a bastard child of which he is the putative father, and for the expenses incidental to the birth of such child, and for the funeral expenses of such child, notwithstanding that such person ordinarily resides, or the child has been born, or the mother of it ordinarily resides, where the court is English in Scotland, or where the court is Scotch in England, in like manner as the court has jurisdiction in any other case;" and further, that "any process issued in England or Scotland to enforce obedience to such order or decree may be indorsed and executed in Scotland and England respectively in manner provided by this Act with respect to process of a court of summary jurisdiction." These sections do not, in my opinion, give any new jurisdiction. The 4th section simply says that, whatever process courts of summary jurisdiction in England may have power to issue under the Summary Jurisdiction Acts may be served and executed in Scotland. To my mind it is quite clear that that section does not apply to bastardy proceedings. By the 8th section the term "process" includes "any summons or warrant of citation to appear either to answer any information or complaint, or as a witness," and also "any order or minute of a court of summary jurisdiction," so that, if the 4th section applied to bastardy proceedings, both summonses to appear on applications for bastardy orders, and process issued to enforce such orders might, under that section, be served and executed in Scotland, and yet we find afterwards in the 6th section, which deals with bastardy matters, an express provision that "process issued in England or Scotland to enforce obedience to such order or decree may be indorsed and executed in Scotland and England respectively." If the 4th section applied to proceedings in bastardy, this provision would be wholly unnecessary. I think that this 6th section strictly limits, in the case of bastardy process, the power conferred on courts of summary jurisdiction in England, by the 4th section, of getting their process served and executed in Scotland to the execution of process issued in England to enforce obedience to orders already made in the ordinary course against persons within their ordinary bastardy jurisdiction. The expression "process issued in England and Scotland to enforce obedience to such order or decree," appears to me to be purposely limited so as to exclude all process prior to the order being obtained. I entertain, therefore, no doubt that the jurisdiction of the courts of summary jurisdiction as to summonses in bastardy is just where it was before this Act was passed, and I think that, as the Bastardy Acts are, in respect of process at any rate, quite separate from the Summary Jurisdiction Acts, there is no way in which bastardy summonses of courts of summary jurisdiction in England can be served in Scotland, any more than there was when the Court of Queen's Bench decided the case of *Reg. v. Lightfoot*. For these reasons I think that the justices were right and that this appeal must be dismissed.

SMITH, J.—The point for our consideration is, whether a woman residing in Sunderland can compel the putative father of her bastard child, who is residing in Scotland, to come from Scotland to Sunderland to answer an application made by her against him to the justices of

Sunderland for a bastardy order. On the facts before us it is not stated whether the child was begotten in England or in Scotland. Now, as long ago as 1856, the Court of Queen's Bench, in the case of *Reg. v. Lightfoot* (6 E. & B. 822; 25 L. J. 115, M. C.), decided that service in Scotland of a summons duly issued by a justice in England against the putative father of an English bastard child was not due service under 7 & 8 Vict. c. 101, ss. 2 and 3. That being the state of the law at that time, different Bastardy Acts have since been passed, but they have in no way altered the law in this respect, bastardy summonses being issued at the present time under the 3rd section of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65), which is a Bastardy Act, and not a Summary Jurisdiction Act. On the other hand, several Summary Jurisdiction Acts have been passed, but none of them have included within their operation bastardy summonses or the obtaining of bastardy orders. But it is said that the Summary Jurisdiction (Process) Act 1881 (45 & 46 Vict. c. 24) has altered the law, and that thereby a summons in bastardy can now issue to compel a domiciled Scotchman to come to a court of summary jurisdiction in this country and have the application on which it is issued adjudicated upon there. The learned counsel who argued the case on behalf of the applicant has not satisfied me that this statute has conferred the jurisdiction for which he contends; on the contrary, I am satisfied by Mr. Poland's argument that it has not done so. What it does is to enact by its 1st section that the Act shall be deemed to be included in the expression "Summary Jurisdiction Acts." It is not to be included in the Bastardy Acts, and there is nothing there to lead us to suppose that the provisions of the Act generally were to be applicable to bastardy. Then the 4th section says that, "Subject to the provisions of this Act, any process issued under the Summary Jurisdiction Acts may, if issued by a court of summary jurisdiction in England and indorsed by a court of summary jurisdiction in Scotland, or *vice versa*, be served and executed within the jurisdiction of the indorsing court in like manner as it may be served and executed within the jurisdiction of the issuing court." Where, in these words, is the authority to issue a summons in bastardy? The process spoken of is "process under the Summary Jurisdiction Acts," but this summons is issued under the 3rd section of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65.) Besides, the whole section is "subject to the provisions of this Act." What are the provisions of the Act as to bastardy? They are contained in the 6th section, but that section says nothing about serving in Scotland summonses issued in England. It simply gives a court of summary jurisdiction in England jurisdiction in bastardy matters over persons who are already within their jurisdiction, notwithstanding certain things which might prior thereto have been pleaded in bar. But, what is more important, it goes on to provide expressly that process issued in England or Scotland to enforce obedience to a bastardy order or decree may be indorsed and executed in Scotland and England respectively in manner provided by the Act with respect to process of a court of summary jurisdiction. It is manifest, therefore, that no jurisdiction in bastardy is given by the 4th section, because, if it were, this

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provision of the 6th section would be wholly superfluous. The section, by expressly dealing with bastardy matters, shows that it was not intended that the 4th section should apply to them; and, besides the 4th section is entirely subject to the provisions of the 6th section, which expressly says that if a court of summary jurisdiction can find a man within its jurisdiction it can make an order against him, but not till then. I am of opinion, therefore, that the justices were right, and that this rule should be discharged, but without costs.

*Rule discharged.*

Solicitors for the applicant, *J. E. and H. Scott*, for *Graham and Shepherd*, Sunderland.

Solicitors for the putative father, *Booke and Sons*.

Monday, Dec. 3, 1883.

(Before Lord COLERIDGE, C.J., STEPHEN and MATHEW, JJ.)

REG. v. THE JUSTICES OF CHESHIRE. (a)

*Highways—Highway authority—Jurisdiction of justices—The Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 10.*

By the 10th section of the *Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77)* it is provided that "where complaint is made to the county authority that the highway authority of any highway area within their jurisdiction has made default in maintaining or repairing all or any of the highways within their jurisdiction, the county authority, if satisfied after due inquiry and report by their surveyor that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of the duty of the highway authority in the matter of such complaint."

Complaint having been made under this section to a county authority that the highway authority of a highway area within their jurisdiction had made default in repairing certain highways within their jurisdiction, the county authority were, after due inquiry and report by their surveyor, of opinion that it was *bonâ fide* denied by the highway authority that the ways were highways, and thereupon held that under the authority of *Reg. v. Farrer (14 L. T. Rep. N. S. 515; L. Rep. 1 Q.B. 588)* they had no jurisdiction to make an order.

Held, on an application for a *mandamus* to the county authority to make an order under the section, that by the terms of the section it was the duty of the justices to make an order, and that a *mandamus* must issue ordering them so to do.

*Reg. v. Farrer (14 L. T. Rep. N. S. 515; L. Rep. 1 Q.B. 588)* discussed.

This was an application for a *mandamus* to the justices of Cheshire to make an order under the 10th section of the *Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77)* under the following circumstances:—

The ratepayers of the township of West Kirby in the county of Chester appeared before the justices of that county in quarter sessions assembled and made complaint under the 10th section of the *Highways and Locomotives (Amendment) Act 1878* that the highway board for the

district of the hundred of Wirral in the county of Chester had made default in repairing certain highways situate in the township of West Kirby, within the jurisdiction of the board. The justices thereupon ordered their surveyor to survey the ways alleged to be out of repair, and to make a report to them at their adjourned sessions.

At the adjourned sessions the surveyor reported that all the ways in question were out of repair, and that certain of them were set out as private ways by an award of Inclosure Commissioners, and had never been formed, and the report of the surveyor and certain correspondence produced by him having been read, the justices held that it was obvious that there was a *bonâ fide* dispute as to the ways being highways at all, and that under those circumstances they had no jurisdiction to make the order.

A rule *nisi* for a *mandamus* to the justices to make the order was thereupon obtained, and this was the rule which now came on for argument.

The 10th section of the *Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77)* is, so far as material, as follows:

Where complaint is made to the county authority that the highway authority of any highway area within their jurisdiction has made default in maintaining or repairing all or any of the highways within their jurisdiction, the county authority, if satisfied, after due inquiry and report by their surveyor, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of the duty of the highway authority in the matter of such complaint.

If such duty is not performed by the time limited in the order, and the highway authority fail to show to the county authority sufficient cause why the order has not been complied with, the county authority may appoint some person to perform such duty, and shall, by order, direct that the expenses of performing the same, together with a reasonable remuneration of the person appointed for superintending such performance, shall be paid by the authority in default, and any order made for payment of such expenses and costs may be removed into the High Court of Justice, and be enforced in the same manner as if the same were an order of such court.

Any person appointed under this section to perform the duty of a defaulting highway authority shall, in the performance, and for the purpose of such duty, be invested with all the powers of such authority other than the powers of making rates or levying contributions by precept, and the county authority may from time to time, by order, change any person so appointed.

Where an order has been made by a county authority for the repair of a highway on a highway authority alleged to be in default, if such authority, within ten days after service on them of the order of the county authority, give notice to the clerk of the peace that they decline to comply with the requisitions of such order until their liability to repair the highway, in respect of which they are alleged to have made default, has been determined by a jury, it shall be the duty of the county authority either to satisfy the defaulting authority by cancelling or modifying in such manner as the authority may desire the order of the county authority, or else to submit to a jury the question of the liability of the defaulting authority to repair the highway.

If the county authority decide to submit the question to a jury, they shall direct a bill of indictment to be preferred to the next practicable assizes to be holden in and for their county, with a view to try the liability of the defaulting authority to repair the highway. Until the trial of the indictment is concluded the order of the county authority shall be suspended. On the conclusion of the trial, if the jury find the defendants guilty, the order of the county authority shall forthwith be deemed to come into force; but if the jury acquit the defendants the order of the county authority shall forthwith become void.

*F. Marshall* showed cause against the rule.—

The justices were right in refusing to make an order, as, according to the decision in *Reg. v. Farrer* (*ubi sup.*) they clearly had no jurisdiction to do so. That case was decided under the 18th and 19th sections of Highways the Act 1862 (25 & 26 Vict. c. 61) (a), the words of which are nearly similar to the words of the Act of 1878. It was there held that the jurisdiction of justices under that section was limited to admitted highways, and that justices had no jurisdiction under it to order an indictment to be preferred where it was *bonâ fide* denied by the parties charged that the road was a highway, and the liability to repair the road, if a highway, was not denied. The decision in that case holds good with respect to the similar provisions of the Act of 1878, the function of the justices being merely to decide whether a highway authority has or has not been guilty of default. The reason for this, which still holds good, is given by Cockburn, C.J. in his judgment in *Reg. v. Farrer*, where he says: "I think that the return to the *mandamus* is sufficient. I own I am of opinion that the legislation which we are called upon to consider is

(a) The 18th and 19th sections of the Highways Act 1862 (25 & 26 Vict. c. 61) are: Sect. 18. Where complaint is made to any justice of the peace that any highway within the jurisdiction of the highway board is out of repair, the justice shall issue two summonses, the one addressed to the highway board, and the other to the waywarden of the parish liable to the repair of such highway, requiring such board and waywarden to appear before the justices at some petty sessions in the summons mentioned to be held in the division where such highway is situate; and at such petty sessions, unless the board undertake to repair the road to the satisfaction of the justices, or unless the waywarden deny the liability of the parish to repair, the justices shall direct the board to appear at some subsequent petty sessions to be then named, and shall either appoint some competent person to view the highway and report to them on its state at such other petty sessions, or fix a day previous to such petty sessions at which two or more of such justices will themselves attend to view the highway. At such last-mentioned petty sessions, if the justices are satisfied, either by the report of the person so appointed, or by such view as aforesaid, that the highway complained of is not in a state of complete repair, it shall be their duty to make an order on the board, limiting a time for the repair of the highway complained of; and if such highway is not put into complete and effectual repair by the time limited in the order, the justices in petty sessions shall appoint some person to put the highway into repair, and shall by order direct that the expenses of making such repairs, together with a reasonable remuneration to the person appointed for superintending such repairs, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the board; and any order made for the payment of such costs and expenses may be removed into the Court of Queen's Bench in the same manner as if it were an order of general or quarter sessions and to be enforced accordingly.

Sect. 19. When on the hearing of any summons respecting the repair of any highway the liability to repair is denied by the waywarden on behalf of his parish, or by any person charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway is situate, against the inhabitants of the parish, or the party charged therewith, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be paid by such party to the proceedings as the court before whom the case is tried shall direct, and if directed to be paid by the parish, shall be deemed to be expenses incurred by such parish in keeping its highways in repair, and shall be paid accordingly.

not intended to apply to the case of a disputed highway. I cannot think that the Legislature, in giving justices a summary jurisdiction to compel the proper parties to put a highway into repair when it is out of repair, intended to substitute this summary jurisdiction for that of a jury to try the question whether the road was a highway or not. I cannot but think that the summary jurisdiction created by the statute was intended to be confined to cases in which there is no dispute as to the fact of the road being a highway, but the only question is, whether the highway needs repair." In this case it was unquestionably admitted that there was a *bonâ fide* dispute, and therefore the justices acted rightly in making no order. It is contended on the other side that the justices ought to have made an *ex parte* order, and so have brought the highway board before them, as under the old practice, and heard whether they really disputed that the ways were highways; but this was not necessary under the Act of 1878. [Lord COLERIDGE, C.J.—Does not the Act of 1878 contain an entirely different set of provisions from the Act of 1862?] The 10th section of the Act of 1878 merely adapts procedure of the Act of 1862 to the new county authority, which is merely the quarter instead of the petty sessions; it does not alter the jurisdiction of the justices.

*Clement Higgins*, in support of the rule, was not called upon.

Lord COLERIDGE, C.J.—I am of opinion that this rule for a *mandamus* must be made absolute. I think that it is clear that the 10th section of the Act of 1878 (41 & 42 Vict. c. 77), reading that section in conjunction with the 18th and 19th sections of the earlier Act (25 & 26 Vict. c. 61), was passed not merely to make a change in the authority having the care of the highways, but for the express purpose of giving a code of procedure to be followed in cases such as the present, where roads have been suffered to get out of repair. If this case had been a case under the earlier Act, I need not say that, the case of *Reg. v. Farrer* (L. Rep. 1 Q. B. 558) having declared that an admission that the ways which were the subject of complaint were highways was a condition precedent to the application of the 18th and 19th sections of that Act, the accident of my having come to the same or a different conclusion on the argument would have made no difference, because *Reg. v. Farrer* would have been binding on me. But this is not a case under the earlier Act, but under the subsequent Act of 1878, the words of the 10th section of which appear to me to place it beyond reasonable doubt that the justices are bound to act according to the provisions of that section where there is a dispute whether the ways in question are highways or not. This section may be said to be an elaborate section, and provides a very sensible code of procedure. It enacts that where complaint is made to the quarter sessions—I use that phrase because it seems to me to be simpler than the phrase "county authority"—that the highway authority of any highway area within their jurisdiction has made default in maintaining or repairing all or any of the highways within their jurisdiction, the quarter sessions, if satisfied, after due inquiry and report by their surveyor, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of the

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duty of the highway authority in the matter of such complaint—that is, where they are satisfied that a duty has been neglected, and nothing further occurs, and no notice is brought to their attention, they are, according to the section, to make an order for the highway authority to perform their duty within a certain time. If that order is not complied with, a remedy is by the same 10th section placed in the hands of the quarter sessions, for, if the highway authority do not obey their order, then the quarter sessions are to appoint somebody to execute the order, and charge the expenses on the highway authority. That is substantially the effect of the next two clauses. Those three clauses then contemplate a case in which a highway is alleged to be out of repair, and a highway authority is found, as a matter of fact, in default, and says nothing about disputing its liability to repair, but simply stands by and does nothing. Then comes the 4th clause, providing that "Where an order has been made by the Court of Quarter Sessions for the repair of a highway on a highway authority alleged to be in default, if such authority, within ten days after service on them of the order of the quarter sessions, give notice to the clerk of the peace that they decline to comply with the requisitions of such order until their liability to repair the highway in respect of which they are alleged to have made default has been determined by a jury, it shall be the duty of the quarter sessions either to satisfy the defaulting authority by cancelling or modifying their order, in such manner as the authority may desire, or else to submit to a jury the question of the liability of the defaulting authority to repair the highway—that is to say, if the quarter sessions are affected through their officer with notice. The section does not indeed say that it is disputed that the highway in respect of which they are alleged to have made default is not a highway at all, but that they dispute their liability to repair it (*inter alia*), it seems to me, upon the ground that it is not a highway; then the quarter sessions has two courses open: they must then go into the case, and either entirely cancel their order or modify it; or, if they are, on inquiry, satisfied that the highway authority is in the wrong in declining to comply with the requisitions of their order, submit to a jury the question of the liability of the defaulting authority, and then, if they decide to do this, they must proceed in a certain way, and that way is indicated in strong terms: "They shall," the section says, "direct a bill of indictment to be preferred to the next practicable assizes to be holden in and for the county, with a view to try the liability of the defaulting authority to repair the highway," and until the trial is concluded the order of quarter sessions is to be suspended, and on the conclusion of the trial, if the highway authority is found guilty it comes into force, but if otherwise it becomes void. In this case no notice was given and no appeal was made to quarter sessions to stay their hands. The surveyor, it seems, has reported to them that the ways in question are out of repair, but that the highway authority does not consider itself liable to repair them. I suppose that they informed him so; but, however that may be, it is clear that they have not taken the proper steps to inform the clerk of the peace. It seems to me reasonably clear that, where a highway is alleged to be out of

repair, and where the surveyor reports that it is out of repair, the quarter sessions must do one of two things. If they have no notice they must proceed under the first three clauses of the section, and must order the authority to repair it, and, if the order is not complied with, repair it themselves and charge the expenses on the highway authority. But if the highway authority disputes its liability, then the quarter sessions ought to proceed under the 4th and 5th clauses of the section, and inquire by their surveyor into the case, and either cancel or modify the order, or direct an indictment to be preferred against the authority. This is a case in which they have not been affected by notice, and yet have not performed the duties imposed upon them by the first three clauses of the section, and a *mandamus* must therefore be issued to them to perform the duties cast on them by the plain terms of the Act of Parliament. If the case had been under the earlier statute it would doubtless have come within the terms of *Reg. v. Farrer*, but I should say that the later Act of Parliament was passed for the express purpose of getting rid of the decision in that case.

STEPHEN, J.—I am of the same opinion.

MATHEW, J.—I am of the same opinion. It seems to me that, when you look at this case by the light of *Reg. v. Farrer*, where the quarter sessions have a complaint made to them under the 10th section of this Act, "that the highway authority of any highway area within their jurisdiction has made default in maintaining or repairing all or any of the highways within their jurisdiction," the county authority, if satisfied after due inquiry and report by their surveyor that the authority has been guilty of the alleged default, shall make an order on the highway authority for the repair of the highway. What is the surveyor to inquire into? Surely not the question of the liability to repair, but into the condition of the road in question, and, upon his report that the highway authority have been guilty of neglect, and on their being satisfied thereof, then they are to make an order, and, that order being made, the highway authority are to have an opportunity of showing cause, so as to enable the quarter sessions, after hearing both sides, either to revoke or alter their order or send the matter to be decided by a jury at the assizes. It is clear that the quarter sessions must take up these duties imposed on them by this statute, and that in this case they have refused to do so. A *mandamus* must therefore issue to compel them to perform their duty.

*Rule absolute.*

Solicitors for the applicants, *Cunliffe and Co.*, for *W. H. Churton*, Chester.

Solicitors for the Wirral Highway Board, *J. Neal*, for *Clare and McMaster*, Liverpool.

Tuesday, March 4, 1884.

(Before Lord COLERIDGE, C.J. and LOPES, J.)

REG. v. SHEIL AND ANOTHER. (a)

*Mandamus* to a metropolitan police magistrate to state a case—Meaning of "street"—Question of fact—Question of law—Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120)—Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102).

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.



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THE SOLICITORS OF THE METROPOLITAN BOARD OF WORKS v. EATON.

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The G. road was a lane 340 feet long; there were no buildings on either side of it, except four houses at one part of it, and the lane was bounded on the north and south by back gardens and the backs and sides of houses.

In proceedings taken by the Fulham Board of Works for the paving of the lane as a "new street" within the meaning of the Metropolis Management Acts, the learned magistrate held that the lane was not a "street" within the meaning of the above Acts, and refused to state a case under 20 & 21 Vict. c. 43, as he considered the question one of fact.

Held (discharging a rule for a mandamus to compel the magistrate to state a case), that the question whether the lane was a "street" or not was a question of fact and not of law, and that the magistrate could not be compelled to state a case.

THIS was an application, on behalf of the Fulham Board of Works, for a *mandamus* directed to James Sheil, Esq., metropolitan police magistrate, directing him to state a case for the opinion of the court, as to whether a lane called Goodwin-road was a "new street" within the meaning of the 105th section of the Metropolis Local Management Act 1855, and the 77th section of the Metropolis Management Amendment Act 1862. Many similar cases having arisen, the Fulham Board of Works were anxious to obtain a decision of the High Court upon the question. There was no dispute as to the facts, from which it appeared that the road in question, Goodwin-road, was a lane 340 feet long; there were no buildings on either side of it, except four houses at one part of it, and the lane was bounded on the north and south by back gardens, and the backs and sides of houses. It was assumed in the case that, if the lane was a "street," it was a "new street," within the meaning of the above Acts.

The learned magistrate considered that the lane in question was not a "street," that there never was any intention on the part of anyone to make it into a street, that it was a mere back lane, in which about two years ago four houses were built, and he decided that the question whether the lane was a "street" or not was one of fact to be decided by him, and he decided as a fact that it was not a "street," refusing to state a case for the opinion of the court under 20 & 21 Vict. c. 43.

A rule for a *mandamus* was obtained on the 21st Dec. 1883.

*Bazalgette* showed cause.—In *Reg. v. Fullford* (10 L. T. Rep. N. S. 346; L. & C. Cr. Cas. Res. 403—9; Cox Cr. Cas. 453; 10 Jur. N. S. 522; 33 L. J. 122, M. C.; 12 W. R. 715), on the trial of an indictment under sect. 28 of the Local Government Amendment Act 1861, for bringing forward a house in a street, without the consent of the Local Government Board, it was held that the question whether the houses formed a street was a question of fact for the jury; and *Reg. v. Dayman* (7 E. & P. 672; 26 L. J. 128, M. C.) is to the same effect. [LOPES, J. referred to *Maude and others v. Baildon Local Board*, 48 L. T. Rep. N. S. 847; 10 Q. B. Div. 394.] [He was then stopped.]

*Lockwood, Q.C.* and *Walton (Besley with them)* in support of the rule.—The board consider it very important to get a decision of this court on this particular case, as many similar cases have come before the magistrates, and this is taken as a

test case. The question whether any particular road is a street within the meaning of the Metropolis Management Acts is a question of law, and the magistrate is bound to state a case under 20 & 21 Vict. c. 43. *Reg. v. Dayman (ubi sup.)* cannot be considered an authority in this case, as that was an application to hear and determine the case.

LORD COLERIDGE, C.J.—I think it is clear that in this case we have no power to grant a *mandamus*. The cases of *Reg. v. Fullford (ubi sup.)* and *Reg. v. Dayman (ubi sup.)* are in point, and they have decided that the question whether a road is a "street" or not, is a question of fact for a jury, if there be a jury. The learned magistrate has here found as a fact that the road in question is not a "street." It is clear that a lane may come within the meaning of a "street," but it does not follow that each lane is a street, though it may be so. I am of opinion that we ought not to grant a *mandamus* to compel the magistrate to state a case.

LOPES, J.—I am of the same opinion.

Rule discharged.

Solicitors for the Fulham Board of Works, *Watson, Sons, and Room.*

Solicitor for the defendants, *Belfrage.*

Friday, March 7, 1884.

(Before Lord COLERIDGE, C.J. and CAVE, J.)

THE SOLICITORS OF THE METROPOLITAN BOARD OF WORKS v. EATON.

COOKE v. THE SOLICITORS OF THE METROPOLITAN BOARD OF WORKS. (a)

*Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120)—Sect. 205—"Soil, rubbish, or filth"—Sweeping mud into sewer.*

By sect. 205 of the Metropolis Local Management Act 1855, it is provided, no scavenger or other person shall sweep, rake or place any soil, rubbish, or filth, or any other thing into or in any sewer or drain, or use any grate communicating with any sewer or drain; . . . and every scavenger who shall so offend shall . . . forfeit and pay any sum not exceeding five pounds.

Scavengers having swept mud to the side of a street and forced it by means of water through a grating into a sewer, were convicted of an offence against the Act.

Held, that "mud" came within the meaning of the words in the above section, and that the conviction was right.

THESE were appeals by way of special case stated by two magistrates for the City of London, for the opinion of the court. The respondent Eaton, and the appellant Cook were persons in the employment of the Commissioners of Sewers of the City of London, and had been summoned at the Mansion House upon complaints being made by the Metropolitan Board of Works for having contravened the provisions of sect. 205 of the 18 & 19 Vict. c. 120, in pushing mud in a state of "batter" to the side of a street by means of "squeegees," which mud was subsequently forced down a grating and flushed into the main sewer by the

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.



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use of a hose. The sewer was vested in the Board.

The 205th section of the 18 & 19 Vict. c. 120, provides:

No scavenger or other person shall sweep, rake or place any soil, rubbish, or filth, or any other thing into or in any sewer or drain, or over any grate communicating with any sewer or drain or into any dook or inlet communicating with the mouth of any sewer or drain or into which any sewer or drain may discharge its contents, or into the river Thames contiguous thereto, and every scavenger or other person who shall so offend, shall for every such offence forfeit and pay any sum not exceeding five pounds.

The two complaints had come before different aldermen who had arrived at different conclusions, whereupon a case was stated for the opinion of the court.

The question raised was whether "mud" as above described came within the meaning of the words "soil, rubbish or filth," or any other thing in the above section.

Sir Henry James, A.G. and Besley for the Metropolitan Board of Works. — Although the grating and drain which communicated with the main sewer are not vested in the Board, it is contended that the grating was not constructed for the purpose of carrying off such solid matter as mud. The sewer was in danger of becoming choked in consequence of the solidity of the matter forced down through the grating. "Mud" comes within the meaning of the section.

Sir H. Giffard, Q.C. and Ticker for the Commissioners of Sewers for the City of London. — The sole power of cleansing the streets in the City was vested in the commissioners by the 11 & 12 Vict. c. 163, s. 55; and by that Act the water companies were bound to supply water to the Commissioners for the purpose. The water companies were bound to furnish a sufficient supply of water for watering the streets, and for cleansing and washing the pavements. The 69th section of that Act is similar in terms to the section under consideration. It is to be observed that neither of these contains the words "slop," "mud," . . . or "soil," used in the 57 Geo. 3, c. 29, s. 62. They have no doubt been advisedly omitted. It is contended that the Commissioners have not exceeded their powers in cleaning the streets of mud in the manner described in the cases.

Lord COLERIDGE, C.J. — These two cases have been taken together, since they raise the same point for our determination. The two magistrates have arrived at different conclusions, so that one must be wrong. I am of opinion that the decision of Sir R. Carden in the case in which Cook is the appellant is right, and must be upheld. Summonses were taken out by the Metropolitan Board of Works against the persons in the employ of the Commissioners of Sewers for having contravened the provisions of the 205th section of the Metropolis Local Management Act 1855. It appears that they had swept mud in a state of batter to the side of a road by means of "squeegees," and had then applied water for the purpose of forcing it through a grating into a drain which communicated with the main sewer. It was admitted that the grating and drain were not vested in the Board. The question is, were those acts lawful or not? The 205th section prohibits any scavenger or other person from sweeping, raking, or placing any soil, rubbish, or filth,

or any other thing into or in any sewer or drain, or over any grate communicating with any sewer or drain, &c. The general words "or other thing" refer of course to things *ejusdem generis* with the specific kinds before-mentioned. Can mud be said to come within the definition of filth or other thing? *Primâ facie* one would say that it does, and that the scavengers have, therefore, done that which they ought not to have done. But it was contended by Sir Harding Giffard, that it was the intention of the Legislature to exclude mud from the operation of the section, because it was expressly mentioned, in the 57 Geo. 3, c. 29, but omitted from the 205th section of the 18 & 19 Vict. c. 120. It is to be observed, however, that the same words are used in the 205th section as in the 69th section of the 11 & 12 Vict. c. 163, and in this earlier Act the words "slop and mud" were for the first time left out since power was then given to the Commissioners of Sewers to cleanse the streets by the aid of water. But the Act contains elaborate provisions as to what scavengers are to do; and, from a consideration of the general scope of the Act, and especially of sects. 82 and 83, it seems to me that the mud should have been carried away, and not forced down the drain in the way complained of.

CAVE, J. — I am of the same opinion.

Cooke's case — *Appeal dismissed.*

Eaton's case — *Appeal allowed.*

Solicitor for the Metropolitan Board of Works, *Fry.*

Solicitor for the Commissioners of Sewers, *Baylis.*

Tuesday, March 11, 1884.

(Before Lord COLERIDGE, C.J., STEPHEN and MATHEW, JJ.)

THE PLUMSTEAD DISTRICT LOCAL BOARD (apps.) v. SPACKMAN (resp.). (a)

*Local government — Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), s. 75 — "General line of buildings" — "Decided by the superintending architect of the Metropolitan Board of Works" — Jurisdiction of magistrate — Street — Row of houses.*

By the 75th section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) it is provided that "no building, structure, or erection, shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens, or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being," and in case any building, &c., be erected without the consent of the board, complaint is to be made to a justice, and, "if the said complaint shall be proved to the satisfaction of the justice," he shall make an order directing the demolition of any

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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such building, "or so much thereof as may be beyond the said general line so fixed as aforesaid."

*S., the owner of a house in the High-road, Lee, Kent, the frontage of which did not exceed fifty feet in distance from the said road, without obtaining the consent of the Metropolitan Board of Works, commenced to erect a building extending the frontage of the house to the road. Subsequently, the superintending architect of the Metropolitan Board of Works for the time being fixed the general line of buildings, of which S.'s house formed part, in such a position that S.'s new building projected beyond it, although it did not extend beyond the line of a stable, chapel, and shops abutting on the same road, east and west of the ends of the general line of buildings fixed as aforesaid.*

*Held, on a case stated by a metropolitan police magistrate, that, on the hearing of a summons for a breach of the 75th section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), the magistrate is bound by the architect's certificate as conclusive, and has no jurisdiction to consider for himself what is the general line of buildings.*

*The Vestry of St. George's, Hanover Square, v. Sparrow (10 L. T. Rep. N. S. 504; 16 C. B. N. S. 209) and Simpson v. Smith (24 L. T. Rep. N. S. 100; L. Rep. 6 C. P. 87) disapproved.*

*Bauman v. The Vestry of St. Pancras (L. Rep. 2 Q. B. 528) approved.*

THIS was a case stated for the opinion of the High Court of Justice by Robert Henry Bullock Marsham, Esq., one of the magistrates of the police courts of the metropolis sitting for the district of Greenwich, in the county of Kent, in accordance with the statute 20 & 21 Vict. c. 43 and the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), s. 33, the facts thereof being, so far as material, as follows:

On the 9th March 1883 a summons was issued in the Greenwich police court on the prosecution of Francis Freeman Thorne, a surveyor and officer of the Plumstead District Board of Works, against Arthur John Spackman, of 8, Newton-terrace, High-road, Lee, in the County of Kent, for that on the 15th Jan. 1883, and on divers other days he unlawfully did erect or raise a building, structure, or erection in or on the north side of a certain street, place, or row of houses, called Newton-terrace, High-road, Lee, aforesaid, and adjoining or forming part of the premises known as No. 7, Newton-terrace aforesaid, of which he was the owner, without the consent in writing of the Metropolitan Board of Works, and beyond the general line of buildings in such street, place, or row of houses as decided by the superintending architect to the Metropolitan Board of Works for the time being, contrary to the 75th section of the Metropolis Management Act 1862 (25 & 26 Vict. c. 102.)

On the hearing of the summons on the 30th March 1883, the following facts were either proved or admitted:

The defendant was the owner of the house and premises, No. 7, Newton-terrace, mentioned in the said summons. The said house forms one of a terrace of nine houses, seven of which belong to the defendant, in the High-road, Lee, known as Newton-terrace. The frontage of the said house mentioned in the said summons, as well as the

line of frontage of the other houses of the terrace, does not exceed fifty feet in distance from the said High-road.

The defendant had, on or about the date mentioned in the said summons, without obtaining the consent of the Metropolitan Board of Works (which consent had in fact been refused), commenced to erect, and had proceeded with the erection of, a building upon the forecourt of No. 7, Newton-terrace, aforesaid, thereby extending the frontage of that house to the High-road. The complainant thereupon wrote a letter to the defendant requiring him to desist from the said erection. The defendant replied declining to do so, and on the 22nd Feb. 1883 the complainant again wrote, threatening proceedings against the defendant as soon as his board should have obtained the certificate of the superintending architect of the Metropolitan Board of Works, deciding the position of the general line of buildings of which the said premises formed part, in accordance with the 75th section of the Metropolis Management Act 1862.

On the 15th Feb. 1883, the complainant, representing his said board, and the defendant both attended by appointment before Mr. George Vulliamy, the superintending architect of the Metropolitan Board of Works, and were both heard by him with reference to the position of the said line of buildings, and afterwards the said Mr. George Vulliamy published his certificate with a plan thereto attached. [The certificate and plan were annexed to the case.]

Upon the south-east corner of the ground, abutting on the High-road at the west of the said plan, but not indicated thereon, is a wooden structure upon brick foundations, consisting of a stable with coachhouse and dwelling-rooms above, and used by the occupiers of Hurst Lodge. This stable is at the spot at which the general line of building laid down by the said certificate ends, and is the only building between that spot and the grounds of Hurst Lodge, which extend for a considerable distance along the High-road, and the building, which is an old building, projects as much as the defendant's new building does. To the east of the spot for which the superintending architect has proposed to lay down a general line there is a chapel, shown on the plan, which abuts on the High-road and projects in front of the building line laid down as much as the defendant's new building does, and immediately to the east of the chapel is a row of twenty houses and shops, all of which abut on the High-road.

The erection put up by the defendant in front of No. 7, Newton-terrace aforesaid, extended considerably beyond the general line of buildings as fixed by the said architect in his certificate, but not beyond the line of the stable, chapel, and shops before mentioned.

It was contended by the counsel who appeared for the complainant: 1. That the position of the general line of buildings, within the meaning of the 75th section of the Metropolis Management Act 1862, was the line fixed and decided to be such by the superintending architect, and that it was not open to the magistrate, for the purpose of deciding the question raised by the said summons, and by way of reviewing the said architect's decision, to draw any new line of buildings, or to alter or redefine the line fixed by him. 2. That,

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in the event of the magistrate deciding that it was open to him to review, and determining to review, the said architect's decision, the "general line of buildings," within the meaning of the said section, did not mean the general line of buildings of all the houses on the north side of the High-road, Lee, but meant the line of the buildings forming Newton-terrace, or of the houses between Brandram-road and Belgrave-villas, or, at most, of the houses between Brandram-road and the boundary of Hurst Lodge, indicated on the said plan; and that he was bound, as a matter of law, to confine his attention to the said limited portions of the high road, and could not take into consideration the buildings east and west of the said portions.

It was argued upon the part of the defendant by the counsel representing him that the magistrate was bound, before deciding the said summons adversely to the defendant, to determine for himself the said general line of buildings, and to find, as a fact, what was the position of the general line of buildings of the said high road at and about the part where the defendant's building was, and that he ought not to convict the defendant or order the demolition of his building unless it was, in his opinion, as well as in that of the superintending architect, beyond the general line of building, and he referred to the case of *Simpson v. Smith* (24 L. T. Rep. N. S. 100; L. Rep. 6 C. P. 87) on the point.

The defendant further contended that the buildings to the east and west of the particular part to which the certificate of the architect applied ought to be taken into consideration in deciding on the general line, and that the line as laid down by the architect was not a general line, but a particular line arrived at by selecting just that portion of the road at which the buildings for the time being happened to stand back, and that the magistrate was not bound, as a matter of law, to confine his attention to the limited portion of the road suggested by the complainant, and that, on the contrary, if it was a question of law and not one of fact, he was bound, as a matter of law, to take into consideration the buildings east and west.

The magistrate decided against the complainant and in favour of the defendant's contention upon both points of law, thinking the case of *Simpson v. Smith* applicable and the other question to be one of fact, and that he was not bound, as a matter of law, to confine his attention to the portions of the road suggested by the complainant, and he adjourned the hearing to allow of his visiting the premises and deciding for himself the true position of the general line of buildings, and whether it was necessary to take into consideration the other buildings in order to arrive at a general line.

After personally visiting the locality of the said premises the magistrate gave his decision that the general line of buildings, as defined by the said architect, was not the true general line of buildings in the street, place, or row of buildings in which the defendant's building was situate, and held that it was necessary, as contended by the defendant, in order to arrive at a general line, to take into consideration the position of the said stable, or of the other buildings to the east of Brandram-road, above mentioned, or of all of them, and after full consideration of all the facts

decided that the defendant had not built beyond the true general line of buildings, but stated that had he confined himself to the houses forming Newton-terrace, or to the houses between Brandram-road and Belgrave-villas, or between Brandram-road and the boundary of Hurst Lodge, his decision would have been the same as that of the said architect, there being no question whatever that in that particular position no building projects beyond the line laid down by the architect, but in his opinion, after viewing the spot, there was no ground in fact for selecting that portion of the road, and laying down a special line for it, and he therefore dismissed the said summons, subject, however, to the opinion of the High Court upon the case.

The magistrate also found, as a fact, that if the true position of the general line was a question of fact for him, the defendant's building did not project beyond it.

The questions for the opinion of the court were:—

1. Whether the magistrate was bound by the architect's certificate as conclusive, or ought, as he did, to have considered for himself what the true general line of building was.

2. Whether he was bound, as a matter of law, in considering the general line of buildings, to confine his attention to the portions of the road suggested by the complainant, and if on either question his decision was in the opinion of the court wrong, the defendant was to stand convicted, and the magistrate was, on the case being remitted to him for the purpose, to make all further necessary orders on the application of the complainants for the demolition of the said building; but if the court, on the contrary, was of opinion that on both the points of law his decision was correct, the order dismissing the summons was to be confirmed.

The statute 25 & 26 Vict. c. 102, s. 75, after repealing 18 & 19 Vict. c. 120, s. 143, and 7 Geo. 4, c. 142, s. 140, proceeds to enact in lieu thereof:

That no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the Board of Works for the district in which such building or erection is situate to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to their enactment, to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up

to the time of hearing; and in default of the building or erection complained of being demolished within the time limited by the said order, the said vestry or board shall forthwith enter the premises to which the order relates and demolish the building or erection complained of, and do whatever may be necessary to execute the said order, and may also remove the materials to a convenient place, and subsequently sell the same as they think fit; and all expenses incurred by the said vestry or board in carrying out the said order and in disposal of the said materials, may be recovered by the said vestry or board from the owner or occupier of the said premises, or the builder, or person engaged in the work, either by action at law or in a summary manner before a justice of the peace at the option of the said vestry or board, in manner provided by the two hundred and twenty-seventh section of the firstly-recited Act (18 & 19 Vict. c. 120), as to the recovery of penalties.

*Willis, Q.C.* (with him *Walton*) for the appellants.—The object of the section, the meaning of which is in dispute in this case, is not to give jurisdiction to the magistrate to decide the general line of buildings in a street, but to fix by a competent person, to wit, the superintending architect to the Metropolitan Board of Works, a line on which the magistrate is to proceed when the case is brought before him. There are at present conflicting decisions of the Court of Queen's Bench and of the Court of Common Pleas as to the construction of this section, the Court of Common Pleas having decided in the cases of *The Vestry of St. George's, Hanover-square, v. Sparrow* (10 L. T. Rep. N. S. 504; 16 C. B. N. S. 209) and *Simpson v. Smith* (24 L. T. Rep. N. S. 100; L. Rep. 6 C. P. 87), that the architect's certificate is only evidence, and that the magistrate has power to depart from it and decide for himself what is the general line of buildings, whereas in the case of *Bauman v. The Vestry of St. Pancras* (L. Rep. 2 Q. B. 528) the Court of Queen's Bench decided that the architect's certificate was binding. I rely upon the words of the statute "such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being," and afterwards "such justice shall make an order in writing on such owner or occupier, builder, or person directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid." These words can only mean that the line is to be fixed by the architect and not by the magistrate, there being no mention of the magistrate's fixing or altering the line, although if the Legislature had intended the magistrate to have any voice in fixing it, words expressing this might easily and would undoubtedly have been introduced into the section. [Lord COLERIDGE, C.J.—On what ground did the Court of Common Pleas come to the conclusion that the magistrate was to decide for himself the position of the true general line?] The court said that there was nothing in the section to show that the decision of the architect was to be final, and that it was only intended to be *prima facie* evidence; but I submit that the meaning of the words "such general line to be decided" can only be "to be fixed and finally determined." [Lord COLERIDGE, C.J.—At any rate, it is clear that what the architect does is to "decide," and I must say that I do not know what is the meaning of a *prima facie* "decision." It appears to me to be a contradiction in terms. Besides, how can such a question be decided by any one but a man who

understands building?] It is difficult to imagine that it could have been intended that a magistrate should decide such a technical question. Moreover, in the case of *The Vestry of St. George's, Hanover-square, v. Sparrow* it was not necessary, to decide this point. Erle, C.J. says clearly: "The matter referred to us by the first question, is 'whether, in point of law, the thing of glass and iron in question, placed as above described, must be held to be an erection within sect. 75 of 25 & 26 Vict. c. 102.' For the reasons he has stated, the magistrate was of opinion that it was not; and I think it is impossible to lay down that in point of law he was bound to hold that it was;" and Keating, J. says: "He (the magistrate) dismissed the summons; the only proper question for us is whether he was right in so doing. In the first place he found that the thing described in the case was not an erection within the statute; that was a sufficient ground for dismissing the summons." Under these circumstances it was clearly irrelevant to proceed to discuss the second question put by the magistrate, viz., whether the line certified and decided by the superintending architect of the Metropolitan Board of Works as the general line of buildings did in point of law preclude all further inquiry whether it is the true general line in each particular street or row or not. Byles, J. recognises this, and refuses to give any opinion on the point. He says: "As to the hypothetical question put to us, it is unnecessary for the court to express any opinion upon it." And all that Willes, J., who alone does not ground his decision on the first point, says is that, "It seems, upon the face of it, to be highly improbable that the Legislature should have intended to make the superintending architect the absolute judge." [STEPHEN, J.—It is all very well for an unprofessional man to decide on the general line of buildings, when he has a red line ruled on a plan before him, but it seems to me that it must be highly improbable that the Legislature should have intended the magistrate to go and look at the buildings and decide on the general line with them before him.] It does not follow that, because the magistrate has not to decide what is the general line of buildings, he has nothing to do. He has, for instance, to decide what is a building, structure, or erection, and what is a street, place, or row of houses. Then the decision of *The Vestry of St. George's, Hanover-square, v. Sparrow* (*ubi sup.*) being merely a dictum—it not being necessary in that case to decide this point—the next case of *Bauman v. The Vestry of St. Pancras* (L. Rep. 2 Q. B. 528) is in favour of the appellants. There Cockburn, C.J. feels himself bound by the express words of the section. "The magistrate," he says, "is to make an order directing the demolition of such building or so much thereof as may be beyond 'the general line so fixed as aforesaid.' The latter part of the sentence is referable only to the certificate of the superintending architect; no other line or mode of determining the line is mentioned." Mellor, J. says, "The magistrate would have difficulty in saying what is the general line, not having the requisite technical knowledge, whereas the architect has this knowledge." Then came the case of *Simpson v. Smith* (L. Rep. 6 C. P. 87), in which the Court of Common Pleas decided that the architect's certificate was not conclusive, solely on the authority of the previous case of *The Vestry of St. George's,*

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*Hanover-square, v. Sparrow (ubi sup.)*. The court in that case recognise that either view of the case presents difficulties, and, after recapitulating the difficulties arising from the certificate of the architect being final, and the possibility of different architects at different times laying down varying lines, repudiate the case of *Bauman v. The Vestry of St. Pancras* and rely on the decision of the Common Pleas in *The Vestry of St. George's, Hanover-square, v. Sparrow*. It is contended that, on the express words of the section, the decision of the architect is conclusive, and that, further, the court is bound by the decision in *Bauman v. The Vestry of St. Pancras*, the case of *Simpson v. Smith* falling with *The Vestry of St. George's, Hanover-square, v. Sparrow*, on which it is wholly founded, and in which it was, as above stated, quite unnecessary to decide the point at all.

Channell for the respondent.—The case of *Simpson v. Smith (ubi sup.)* has been accepted for thirteen years as the law on the subject, and in the 9th and 10th sections of the Metropolis Management and Building Acts (Amendment) Act 1882 (45 Vict. c. 14) the Legislature substantially accepted the construction placed upon this section by the Court of Common Pleas, no mention being made in those sections of the architect's certificate. [Lord COLERIDGE, C.J.—The opinion of the court is strongly in favour of the appellants, but in view of the conflicting decisions on the point we should think it right not only to give leave to appeal, but to encourage an appeal in order that the point may be settled by a decision which would be binding on these courts.] That being so, it being understood that the respondent is to be at liberty, if he should think fit to appeal, to avail himself of all the arguments which may, on the case stated, be urged in his favour—as, for instance, that the architect is bound to lay down the general line of the whole street, and cannot at will take a small section of a street by itself—I will not, as the court are in full possession of all the argument and cases upon the point, and has come to a decision upon them, weary the court by further insisting on those in the respondent's favour.

Lord COLERIDGE, C.J.—In this case it appears to me that we ought not only to grant leave but to encourage an appeal, because it is in vain to deny that the decisions at present existing on this point are conflicting. There can be no doubt that the judgment of the Court of Queen's Bench in the case of *Bauman v. The Vestry of St. Pancras* directly conflicts with the opinion of the Court of Common Pleas in the case of *The Vestry of St. George's, Hanover-square, v. Sparrow*; and it is, moreover, intended so to conflict, because the Lord Chief Justice goes into the arguments put forward by the Court of Common Pleas in *The Vestry of St. George's, Hanover-square, v. Sparrow*, and concludes his judgment by saying that he cannot consent to be bound by that case, showing thereby not only that he differed from the conclusion arrived at by the Court of Common Pleas, but that he differed intentionally. At that time there was no appeal except in particular cases, of which this was not one, and so there was nothing else for it but for the two courts to continue to differ. Next came the case of *Simpson v. Smith*, in which the Court of Common Pleas maintained the opinion

it had originally arrived at, and held once more that the magistrate was not bound by the certificate of the superintending architect of the Metropolitan Board of Works, whereas the Court of Queen's Bench held that he was so bound. It may be said that the point on which the conflict arises was not necessarily before the Court of Common Pleas in the early case of *The Vestry of St. George's, Hanover-square, v. Sparrow*, the point before them being as to whether a certain thing was an erection within the meaning of the section or not. It is true they might have abstained from deciding it, but they did not, and after the contrary decision of the Court of Queen's Bench they reaffirmed, in *Simpson v. Smith*, their original view. Then after that there was, if I remember right, a case in the Queen's Bench, which does not appear to have been reported, in the argument of which I took part, and in which, the attention of the court having been called by me to the conflicting decisions of the Court of Common Pleas, they adhered to the view originally taken by the Court of Queen's Bench in *Bauman v. The Vestry of St. Pancras*. This being a case then in which two great courts are distinctly in conflict I confess that I am not satisfied with the decisions of the Court of Common Pleas. My reading of the statute coincides with the reading which commended itself to the Court of Queen's Bench, and I think that the judgment of Cockburn, C.J. in the case of *Bauman v. The Vestry of St. Pancras (ubi sup.)* interprets the statute quite rightly and unanswerably, and the view of the law contained therein is my view. I confess that I do not understand the meaning of the judgment of the Court of Common Pleas in the case of *The Vestry of St. George's, Hanover-square, v. Sparrow (ubi sup.)*, as reported in the Common Bench Reports (16 C. B. N. S. 209); but, in the present state of the facts, it is enough for me to say, without going into the reasons given, that I agree with the view taken by the Queen's Bench, and not with that taken by the Common Pleas, for with one or the other I must differ. The second point appears to me to fail Mr. Channell also, namely, that the architect is not entitled to settle the general line of a row of houses, but only of a street, and that, however long the street may be, yet he must lay down the whole street. I think that that fails him on the words of the Act of Parliament, which are "in any street, place, or row of houses." I think that, beyond all doubt, that means any row of houses the general line of which the architect has settled. I think, therefore, that the magistrate was bound by the architect's certificate as conclusive, and ought not to have considered for himself what the general line of building was, and that the respondent has committed a breach of this section.

STEPHEN, J.—I am of the same opinion. It is, I think, quite obvious that the decisions of the Courts of Queen's Bench and Common Pleas conflict, and, under those circumstances, we are bound to look at the words of the Act and see what, in our opinion, is their meaning. I do not wish to say more of the other cases than that they conflict. In the meantime, my own judgment upon the words of the section agrees with that of my Lord on the ground that the view he takes is in accord with their plain meaning. The words, it is true, are somewhat obscure, because

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the framer of the section puts in five lines of qualifying matter before he goes on to say, "such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being." But, if the arrangement of the clauses be slightly altered so as to bring out the true sense of the section, it clearly reads that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being. Then the words omitted mean, that in case the distance of such line of buildings from the highway does not exceed fifty feet, then in every case the consent of the board is necessary to build beyond the line; but in case it amounts to or exceeds fifty feet, then you may build beyond the line, so long as you are more than fifty feet from the highway, without the consent of the board, but, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, no building must be erected within fifty feet of the highway without the consent of the board. The first thing to be done then clearly is to say what is the general line, and in my opinion that is what has to be decided by the superintending architect for the time being of the Metropolitan Board of Works. Then, if the distance of the general line from the highway is less than fifty feet, there is one provision for that case, and if fifty feet or more than fifty feet then there is another provision for that case. Then the section provides for a building being erected contrary to these provisions, enacting that if any building be so erected, complaint is to be made to a justice of the peace, and what he has to decide is whether the building is beyond the general line, and if the complaint is proved to his satisfaction he is to make an order for the demolition of such building or so much thereof as may be beyond the said general line so fixed as aforesaid. That seems to me to be the meaning and the whole of the meaning of the section. There is a little clumsiness in the way in which it is framed, but the meaning is, to my mind, as plain as it can be. As to the contention that it must be the general line of the street, this is clearly to my mind a case in which a building has been erected beyond the general line of buildings in a row of houses, and so within the section. I think, therefore, that in this case the magistrate has no option but to make the order asked for in accordance with the terms of the section.

MATHEW, J.—I am of the same opinion. The effect of the decision of the Court of Common Pleas is to strike out of the section the words "the said general line so fixed as aforesaid," and I think these words ought to have effect given to them.

Solicitor for the appellants, *G. Whale*.

Solicitors for the respondent, *Shaw and Sons*.

## CROWN CASES RESERVED.

Saturday, June 28, 1884.

(Before GROVE, HAWKINS, STEPHEN, WATKIN WILLIAMS, and MATHEW, JJ.)

REG. v. CATHERINE JONES. (a)

*Obtaining goods by false pretences—Necessity for proof that the goods were delivered on the faith of the false pretence.*

*On an indictment for obtaining goods by false pretences, the false pretence charged and proved being that the prisoner was daughter of a lady of the same name, residing at a certain place, there being no evidence that the goods were not delivered to the prisoner before her name and address were asked for:*

*Held, that there was no sufficient evidence to sustain the indictment, it being essential on a prosecution for obtaining goods by false pretences to prove that the goods were delivered on the faith of the false pretence charged.*

CASE reserved by the Chairman of the Carnarvonshire Sessions.

The case stated:—

The prisoner was tried at the quarter sessions for the county of Denbigh, holden on the 12th April 1884, upon an indictment of which the following is a copy:

County of Denbigh, to wit.—The jurors for our Lady the Queen upon their oath present that Catherine Ellen Jones, on the twenty-third day of November, in the year of our Lord one thousand eight hundred and eighty-three, unlawfully, knowingly, and designedly did falsely pretend to one Catherine Mary Williams (shop assistant to one William Simon Williams) that she, the said Catherine Ellen Jones, was Miss Jones, Cefn Shroam, Carnarvonshire, and that she, the said Catherine Ellen Jones, wanted to have a dolman, a jacket, a cape, and a pair of gloves, to show to her the said Catherine Ellen Jones's mother, by means of which false pretences the said Catherine Ellen Jones then unlawfully did obtain from the said Catherine Mary Williams, one dolman, one jacket, and one fur cape and one pair of gloves, of the goods and chattels of the said William Simon Williams, with intent to defraud, whereas in truth and in fact the said Catherine Ellen Jones was not Miss Jones, Cefn Shroam, Carnarvonshire, and whereas in fact and in truth the said Catherine Ellen Jones did not want a dolman, a jacket, a cape, and a pair of gloves to show to her the said Catherine Ellen Jones's mother, as she the said Catherine Ellen Jones, did then so falsely pretend to the said Catherine Mary Williams, and the said Catherine Ellen Jones at the time she so falsely pretended as aforesaid well knew the said pretences to be false.

The following was the evidence:—

Catherine Mary Williams sworn:

Live at London House, Llanrwst. On the 23rd Nov. last was assistant to Mr. Williams. Prisoner came to our shop. I attended her. She asked me for a jacket, a fur cape, and a dolman. She went downstairs and asked for a pair of gloves. I put these things into a parcel. She said her name was Miss Jones, Cefn Shroam, Carnarvon. She said she would return the goods on the following Tuesday. She said she wanted to show them to her mother. I made an entry in the book—the approbation book. She saw me writing it.

Cross-examined:

This was the only entry I wrote on that day. There were eleven assistants in the shop. No one was in the room except Mrs. Williams. Prisoner only mentioned a jacket and a cape at first, and then asked for the dolman. Am sure I served her with the cape. I identify jacket and dolman (produced). Am not sure of the cape.

William Simon Williams sworn:

Keep shop at Llanrwst. Last witness is an assistant.

(a) Reported by W. F. FINLASON, Esq. Barrister-at-Law.



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These articles (jacket and dolman produced) are my property. Cannot swear to the cape. We have some like it. Wrote to Miss Jones. The envelope (produced) is in the handwriting of my clerk. The envelope was returned addressed to me with twopence to pay; Miss Jones, Cefn Shroam, Talybont, vid Conway, is on the envelope. I read a letter, and in consequence took out a warrant to apprehend prisoner.

Cross-examined:

Made a charge once against a person for stealing goods. Saw a letter stamped going to the post.

Jane Jones sworn:

Live at Cefn Shroam, Carnarvonshire. Do not know prisoner. Never told her to go to London House, Llanrwst. Never ordered goods. Remember getting that letter. I sent it back. A girl wrote for me.

Cross-examined:

My place is known as Plas Llychan or Cefn Llychan.

Thomas Hammond sworn:

Am superintendent of police at Llanrwst. Went to prisoner's house Tanyfron, Eglwysfach, Denbighshire. Found her in the kitchen. Told her I had a warrant to apprehend her for obtaining goods from London House, Llanrwst by false pretences. She said, "I was not there." I cautioned her and said I would search the house. Told her to sit down as I expected another constable. She went upstairs. I followed her. She went to a box and took the articles (now produced) out of it, and handed them to me and said "these are them." There was a warrant issued before this one. I heard the evidence of Catherine Mary Williams.

Cross-examined:

Had no search warrant. Saw prisoner's mother. She was ill.

The prisoner's statement on the deposition was put in and read, as follows:

I did not give the name of Miriam Jones, but I gave my own name, Miss Jones. I said the same thing to Mrs. Williams at the shop door. I do not know the people or the place at Cefn Shroam.

CATHERINE ELLEN JONES.

At the close of the case for the prosecution, counsel for the prisoner objected that there was no evidence to go to the jury that any of the goods charged were obtained from Catherine Mary Williams by means of the pretences alleged in the indictment, or any of them.

I declined to withdraw the case from the jury because I thought that on the whole there was evidence to go to them that the prisoner obtained the jacket and dolman from Catherine Mary Williams by means of one of the false pretences alleged in the indictment, namely, that she was Miss Jones, Cefn Shroam, Carnarvonshire (the prisoner really living at Eglwysfach in Denbighshire) and also that there was evidence of an intent to defraud, namely, a false address given, the goods not returned as promised, and a denial to the police superintendent that she had been at London House, Llanrwst, when she was first charged by him.

The jury found the prisoner guilty, and she was sentenced to one month's imprisonment, subject to the conviction being sustained by this court, and admitted to bail in the meantime.

The opinion of the court for the consideration of Crown Cases Reserved is requested whether there was any evidence which ought to have been left to the jury that any of the goods mentioned in the indictment were obtained from Catherine Mary Williams by means of the pretences alleged therein.

If the court should be of opinion that there was any such evidence for the jury, conviction is to stand; if of a contrary opinion, to be quashed.

B. T. GREIFFER-BOSCAWEN, Chairman.

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No counsel appeared for the prosecution.

Malcolm Douglas, for the prisoner.—There was no evidence that the goods were delivered to the prisoner on the faith of her being the daughter of the lady named. For anything that appears, the goods may have been delivered to her on the faith of her appearance and address, or on the faith of some other statement. [GROVE, J.—She got the goods under the pretence that they would be submitted to her mother.] That is not the pretence charged, nor would it have been a false pretence of an existing fact. [MATHEW, J.—Was there any evidence that the prosecutors knew Miss Jones of Cefn.] None; and therefore there was nothing to show that the goods being for her would have been any inducement to entrust her with them. [MATHEW, J.—There is no evidence that the goods were not delivered before the address was asked for.] There is not. [MATHEW, J.—They may have been handed to her before she gave the address.] That is so.

GROVE, J.—We think the evidence in this case was insufficient. It must always appear on an indictment for obtaining goods by false pretences that the prosecutor parted with the goods upon the faith of the false pretence alleged, and here that does not appear, for there is no evidence that the prosecutors had not parted with their goods before the prisoner was asked her name and address. And there is nothing to show that they would not equally have sent the goods, which were only to be sent on approval, whoever had ordered them.

HAWKINS, J. concurred. There was, he said, no evidence to show that the goods were parted with on the false pretence alleged.

STEPHEN, J. concurred. The case, he said, cannot be distinguished from one of merely giving a wrong address, which may be a falsehood but not a false pretence on which the goods were obtained.

MATHEW, J.—The evidence in such a case must be such as clearly to show that the goods were parted with on the false pretence alleged; here there was no such evidence. It is not enough to show that a false address was given if it does not appear that the goods were parted with on the faith of it. There was no evidence here that the goods were obtained by the prisoner on the faith that she was the daughter of the lady named.

WATKIN WILLIAMS, J. concurred.

*Conviction accordingly set aside.*

Saturday, June 28, 1884.

(Before GROVE, HAWKINS, STEPHEN, WATKIN WILLIAMS, and MATHEW, JJ.)

REG. v. RITSON. (a)

*Receiving goods knowing them to have been stolen—  
Evidence—Account given by the prisoner—  
Evidence to negative it.*

*On an indictment for receiving goods knowing them to have been stolen, the prisoner's account being that he had purchased them of a tradesman in the same town, other circumstances in the case tending to negative it, though the tradesman was not called for the prosecution:*

(a) Reported by W. F. FIELSON, Esq., Barrister-at-Law.

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*Held, that it was not necessary to call him on the part of the prosecution, there being other circumstances in the case from which the jury might fairly infer the falsehood of the prisoner's story.*

CASE reserved by the Recorder of Hastings, which stated as follows:—

Alfred Miller and Charles Ritson were tried before me at the General Quarter Sessions of the Peace for the Borough of Hastings, holden on the 18th April 1884, on an indictment which charged Miller with stealing a piece of leather of the value of 3s. 6d., the property of his master, and Ritson with receiving the said leather knowing it to have been stolen.

The prisoner Miller pleaded guilty, and was called as a witness for the prosecution.

The evidence, so far as it is material to the point reserved, was as follows:—

George Henry Ash said:

I am manager to Mr. Bostock, the prosecutor, who carries on business as a bootmaker at 27, Norman-road. The prisoner Miller was an errand boy in the shop for close on two years. I identify the two pieces of leather produced by their being marked on the edge with a pencil and on the back with a blunt awl. I marked them myself. Harold Jenner was present. It was then all in one piece. The value would be 5s. when whole. It is sole leather. I marked it on Thursday, the 21st Feb. I put it back when I had marked it to where I took it from, viz., the leather shop—the back part—amongst other pieces. I went to the prisoner Ritson's shop on the 23rd, that would be the Saturday following. Love, the detective, went with me. An apprentice and the prisoner Ritson were there. Love said, "I want to see your stock of sole leather." He (the prisoner Ritson) said, "There it is" (pointing to the back part of the shop). We looked at it and found nothing there. Love then said, "I must search." Ritson said, "Have you a warrant?" Love said, "No, I don't require one." Love then said, "What have you got in that box?" Ritson said, "There are a few odd pieces in that." We asked for the key. Ritson went to his house and fetched it. He then unlocked the box. The pieces of leather produced were found in the box amongst other pieces. I took one and said, "That's the piece I want." Ritson said, "I buy my leather of Mr. Reeves." I said, "You did not buy that there." I then said I should give him in charge for receiving stolen property.

On cross-examination the witness said:

Working shoemakers have leather given out to them to cut from, they keeping the cuttings as perquisites. When my master gives out leather for a particular job it would be stamped. The soles and heels would be cut out of different pieces. Miller, the prisoner's father, works for us; he would be allowed to sell the cuttings. My own knowledge of the value of leather is not great. I said before the magistrates the value was 3s. 6d. Ritson took the leather out of the box himself. I know there is such a person as Reeves. I know the pieces of leather by the marks upon them (the witness here pointed out the marks). I put marks on one of the pieces after leaving Ritson's shop. This was to distinguish it from the other pieces. I marked the leather on the 21st. I said the 22nd before the magistrates; that was my mistake. I only took away one piece of leather from Ritson's the first time. I thought that would be sufficient. Afterwards I went back and got the other piece. I took back the piece I had taken away the first time and fitted the two pieces together.

On re-examination witness said:

When in one piece it would be worth 5s.; when cut in two, 3s. 6d.

Harold Jenner, the cutter employed by Bostock, was then called to corroborate the marking of the leather. He said:

I identify the leather by two pencil marks [points them out] and the mark on the back made with an awl. I was present when the marks were put on; we were in the back part of the shop. It was then in one piece. It would be worth from 3s. 6d. to 4s.

On cross-examination:

There would be very little difference in the value when cut in two. This sort of leather is sold by weight. It was two strokes with a pencil that were put on the edge.

On re-examination witness said:

I also recognise the leather by the mark made with the blunt awl.

James Love, the detective, gave evidence as to going with the witness Ash to Ritson's shop and finding the leather in the locked box. Witness then continued:

When I said he would be charged with receiving the leather knowing it to have been stolen, he said, "I buy my leather of Mr. Reeves." I said, "You did not buy this of Mr. Reeves." He said, "Yes, I did." There is such a person as Reeves; I know him.

On cross-examination witness said:

I saw Ash mark this piece of leather after it was found in the box [pointing to some marks]. He made a cross on one side and pencil lines on the other.

Alfred Miller (the prisoner who had pleaded guilty to stealing the leather) was then called. He said:

I live with my father Benjamin Miller. I have known Ritson about five years. Have taken him pieces of leather about once a week for the last twelve months. It was Mr. Bostock's leather. I took him the pieces produced. It was then in one piece. It was on Friday. He gave me 4d. for it. I saw Ritson last night. He asked me not to let out anything more. His brother gave me 2d. The prisoner Ritson was there at the time. He sent no message by me to my father. I took the leather from the cutting room. I recognise the piece of leather by having drawn a cross upon it with the back of a knife at Bostock's shop.

Counsel for the prisoner submitted that, as the prisoner had given the name of a real well-known person, viz., Mr. Reeves, as the person from whom he had bought the leather, it was incumbent on the prosecution to call Reeves to contradict this statement, and, as Reeves was not called, there was no case to go to the jury, and that I was bound to direct an acquittal on the authority of *Reg. v. Orovhurst* (1 C. & K. 370).

I declined to do so, but said I would, on the authority of that case, reserve the point if counsel wished it. And I then directed the jury that it was not necessary, as a matter of law, to call Reeves; and that, if they were satisfied, without his evidence, beyond all reasonable doubt, as to the identity of the leather, which was the only point on which Reeves's evidence could be important, and that the account which the prisoner gave of how he became possessed of it was false, they were at liberty to find a verdict of guilty.

The jury found the prisoner guilty, and I respite judgment.

If the court should be of opinion that my direction was right in law, the verdict is to stand. If not, then the conviction is to be quashed.

ROBT. HY. HURST, Recorder of Hastings.

No counsel appeared for the prosecution.

*Gill* for the prisoner.—Where the prisoner gives an account which is not in itself unreasonable, as to how he became possessed of the stolen articles, it is for the prosecution to offer evidence to falsify it:

*Reg. v. Orovhurst* (*ubi sup.*).

The account given by the prisoner in this case was quite reasonable, and Reeves ought to have been called for the prosecution. [HAWKINS, J.—Then, do you say that whenever the prisoner says he had the goods from C. D., the latter must be

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called for the prosecution?] It is submitted that when the account given is reasonable, and the person vouched is accessible, so that it is reasonable to call him, he ought to be called to make out the case for the prosecution. [HAWKINS, J.—Here there was other evidence in the case; the piece of leather worth 5s., purchased of a boy for 6d., and kept locked up in a box. STEPHEN, J.—It must be a question, in each case, under the particular circumstances of the case, whether it is necessary to call the third party vouched by the prisoner.]

GROVE, J.—It is clear there was sufficient evidence in this case without calling the tradesman mentioned by the prisoner. To hold otherwise would be to hold that in every case, however strong the circumstances might be against the prisoner, if he said he had received the goods from a third party, that party must be called; but that cannot be laid down as necessary.

The other Judges concurred.

*Conviction accordingly affirmed.*

(Before GROVE, HAWKINS, STEPHEN, WILLIAMS, and MATHEW, JJ.)

REG. v. ANNIE JOHNSON. (a)

*Abduction of child—24 & 25 Vict. c. 100, s. 56—Evidence.*

*The prisoner, being indicted under the 24 & 25 Vict. c. 100, s. 56, for that she did feloniously and unlawfully, by fraud, detain a child, under the age of fourteen, with intent to deprive the mother of the possession of her—the evidence being that the child had been in the service of the prisoner, and was missing and could not be discovered; and that she gave different accounts of what had become of the child, but implying that the prisoner had given her up to some third persons; and there being no evidence that the child was still in her actual custody, nor, indeed, any evidence where she was:*

*Held, that, upon the principle of Jones v. Dowle (9 M. & W. 19), the prisoner was rightly convicted; because, whether her stories were all utterly false, and the child was secreted by herself, or whether they were so far true, and the child was in the actual custody of some third parties, to whom she had wrongfully delivered her, it was equally true that she unlawfully detained the child by fraud.*

CASE stated by the Recorder of London.

At the May Session of the Central Criminal Court Annie Johnson was tried before me on an indictment containing five counts framed under sect. 56 of the 24 & 25 Vict. c. 100.

The fourth count of the indictment (on which the prisoner was convicted) charged that she did on the 8th March 1884, feloniously and unlawfully by fraud detain one Elizabeth Hearnden, a child under the age of fourteen years, viz., of the age of ten years, with intent thereby then to deprive one Caroline Hearnden, the mother of the said Elizabeth Hearnden, of the possession of her the said Elizabeth Hearnden.

The first count charged that she did on the 20th Dec. 1883, by force, lead and take away the

said child with the like intent. The second count charged that she did on the same day, by fraud, lead and take away the said child with the like intent. The third count charged that she did on the 8th March 1884, by force, detain the said child with the like intent, and the fifth count charged that she did on the 1st March 1884, by fraud, decoy and entice away the said child with the like intent.

A copy of the evidence is attached hereto, and forms part of this case.

The prisoner's counsel objected that upon the facts there was no evidence of the taking away, decoying, or enticing away of the child or of the detainer of the child either by force or fraud.

I overruled the objection to the second and fourth counts, and left the case to the jury on those counts, and they found the prisoner guilty on the fourth count.

I reserved judgment, and admitted the prisoner to bail, until this case shall have been decided by the Court for Crown Cases Reserved.

The question for the court is, whether there was any evidence to be left to the jury of the commission by the prisoner of the offence charged in the fourth count of the indictment.

If this question is answered in the negative the conviction is to be quashed, otherwise to be affirmed.

THOMAS CHAMBERS, Recorder.

The evidence was as follows:

The mother of the child stated she lived at Blandring Farm, near Folkestone, and that the child was ten years old in last October:

A little before Christmas I sent her, in consequence of something a Mrs. Marsh had said to her, to Miss Johnson (the prisoner.) I did not know her. I had heard of her through Mrs. Marsh. The prisoner came to my house on the 8th March and wanted me to put the child away, saying that she was a tiresome, dirty girl, and I told her to send her home again. She asked me for a sheet of paper and wrote something on it. I did not know what it was. I cannot read or write. She asked me to make a cross to it. She did not read it over to me nor tell me what it was. I made a cross to it and she took it away with her. She told me I might be sure the girl was all right. On the following morning (Sunday, the 9th March) I saw her again. I went to her house in Bouverie-street, Folkestone. She said, "Your little girl is gone to London with a niece of mine." She did not say what part of London, nor what for. I told her I must have her home again. She said she would try and get her home again. She sent me word on Wednesday to say that the girl was getting on all right. About a fortnight afterwards I sent to the prisoner's house and asked her to give me a direction to wire to the child. She said she could not; she did not know where she was. I told her I was determined I would have the child. She said a Sister had taken her away. She did not say what sister, nor where she came from. I said I was determined I would know where she was. She said I could not. She placed her hands on my knees and said if I made any disturbance I should never see her again. She wanted me to go to London with her. She wanted me to meet her at eight o'clock next morning at the Black Bull, at Folkestone. I went there, but she was not there. I then gave information to the police. I have never seen my child since. I have no notion where she is. In cross-examination she said that a lady had applied to her to put one of her girls into a home; but she denied that the prisoner had ever mentioned a home to her.

Mrs. Marsh, the woman referred to, stated that the prisoner had applied to her to get her a girl to help her in the housework, and at Christmas she had taken the child in question to her; that a fortnight afterwards she went to the prisoner's house and saw the girl, who seemed to be in health

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and strength and clean, and from time to time she said she had seen the prisoner, who told her that the girl got on very well. The day the prisoner went to see the mother the witness saw the prisoner, who said to her that she was going to keep the little girl because her mother was a poor woman, and that she had come up to see what sort of people they were. The witness said to her, "The girl won't be able to do your work in the season." She said, "No; I am going to get a bigger one to help her."

On Wednesday, the 12th, the witness called on the prisoner, who told her the child was gone to London with her niece "to do for" an old lady, adding that she got on very well, and witness was to tell the child's mother. Witness knew of no niece and at that time there was no servant in the house.

On the 29th March the superintendent of police served a summons on the prisoner, who was crying and very excited, and said, "What can I do?" Witness said, "The best thing you can do is to produce the child." She said, "I cannot do that; Sister Mary came here and took her away, but I don't know where to." She said, "Her mother signed a paper for her to go away for two years." The witness stated that every inquiry had been made with the view of finding the child, not only in Folkestone but in London, and all over the country, and in particular at a number of convents, but no trace of her could be found. He heard that the prisoner had gone to the Home of the Good Shepherd at Finchley.

A police sergeant stated that on the 27th March the prisoner came to him at ten o'clock at night and told him she had just returned from London and had been to the Home at Finchley. Asked where the child was, she said she did not know. She said a Sister Mary in Folkestone had taken her away. She said the mother had given her consent to that upon a piece of paper, and had put her cross to it. The witness told her the mother said she did not know what was on the paper. She said the words were, "I wish my daughter to go away to a home for two years." Witness asked her whether she knew the address of Sister Mary. She said, "No;" that the girl had made the acquaintance of Sister Mary out of the window of the house, but she gave no particulars about "Sister Mary," and no such person could be heard of.

To another witness the prisoner had said that the girl had "gone away with Sister Mary to a Home—St. Joseph's," not saying where the home was, and there was no such home at Folkestone.

A police sergeant at Scotland Yard said that about the end of March the prisoner came there and said she had made an appointment with the mother of a little girl who had been in her service to come to London, but the mother had disappointed her; and she said that the girl had been handed over by her, by the consent of the mother, to a "Sister of Mercy," but she could not give her name and address, and said she was going to a home at Finchley, where a niece of hers had been, to make inquiries about the girl. She declined to give any description of the girl, and said she was going back to Folkestone to consult with the mother.

A niece of the prisoner's who had once lived with her—up to Sept. 1882—but had then gone to

a home in Finchley, the "Good Shepherd," where she was until Sept. 1883, when she went back to her aunt's, the prisoner's, until Christmas 1883, when she went away. Said she had never seen the little girl, and her aunt had no other niece.

A letter from the prisoner to her niece was put in, written while she was in prison awaiting her trial, in which she wrote thus of what she called "her trouble:"

A Sister of Mercy got to know my servant in my absence, and she would go with her for two years to a home. I did all I could to stop her, but she would go. I said I would go and ask her mother, who gave her consent, and the girl went. The Sister has not been found as yet. I went to Finchley to find her, but she was not there.

A Sister at a home in Folkestone stated that she had occasion in October last to go to the prisoner's house about a servant, and on several occasions she had conversed with her; on the last occasion the witness went to see her at the request of a Sister Mary, from a home in Soho; but she had never seen the girl in question nor heard of her, and her home was not for removing girls.

The Superior of St. Joseph's Home, at Folkestone, was called to prove that she knew nothing about the girl. A young woman known as Sister Mary at the home in Soho, stated that about a year ago she had got the prisoner a servant girl, who was afterwards removed, but she had only seen the prisoner once, on that occasion, and knew nothing of the girl in question.

On this evidence the prisoner was convicted, and the case was reserved as to whether there was evidence to sustain the charge.

*Dickens* for the prisoner.—There was no evidence to sustain the charge. The verdict was taken on the fourth count, and that alleges that the prisoner "unlawfully and by fraud detained the child." There is no evidence that she detained the child, for there was no evidence that she had possession of her when the charge was made; and, therefore, there is no evidence that she detained her "by fraud." Taking her story to be utterly untrue, what evidence is there that she detained the child by fraud? And, if it be true, then the child is in the possession or custody of other persons. [HAWKINS, J.—Even so, she having delivered the child over unlawfully and against the will of the mother, she may be deemed unlawfully to detain the child, on the principle of *Jones v. Doule* (9 M. & W. 19), where it was held that, if the defendant had unlawfully, after demand, delivered over goods to a third party, he was, nevertheless, guilty of unlawfully detaining.] That might make her liable for unlawfully detaining the child, but not for unlawfully detaining her by fraud. What evidence was there of fraud? [HAWKINS, J.—The different accounts she gave to the mother, some of which must have been untrue; and then she got the mother to sign a paper containing a supposed consent, which she must have known the mother could not read, and which she did not read to her nor tell her the contents of, but which she afterwards said contained a consent to part with the child. There is enough evidence of fraud.]

GROVE, J. took the same view. The defence set up was that the child had got into the possession of somebody else, but that, if true, was by the fault of the prisoner, who had told falsehoods

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about it; and, if she fraudulently detained the child from the mother by placing the child in the custody of someone else, the child, for this purpose, would still be in her own custody, and she would be deemed unlawfully and fraudulently to detain her.

STEPHEN, J.—If the prisoner, having got the child, kept her with the intention of handing her over to someone else, and did so against the will of the parent, that is a detention; and, as she did it by means of falsehoods, the detention was fraudulent.

WILLIAMS, J. also agreed, observing that he should have drawn the same inferences, and given the same verdict, as the jury had done.

MATHEW, J. also concurred.

*Conviction accordingly upheld.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

May 26, 27, and June 26, 1884.

(Before HAWKINS and SMITH, JJ.)

JENKS AND OTHERS (apps.) v. TURPIN AND ANOTHER (resps.). (a)

*Common gaming-house—Unlawful gaming—Baccarat—Proprietary club—Proprietor—Committee—Players—33 Hen. 8, c. 9—8 & 9 Vict. c. 109—17 & 18 Vict. c. 38, s. 4.*

By 33 Hen. 8, c. 9, s. 11, "No manner of person or persons . . . shall for his or their gain, lucre, or living, keep, have, hold, occupy, exercise, or maintain any common house, alley, or place of bowling, coiting, cloysh-cayls, half-bowl, tennis, dicing table, or carding, or any other manner of game prohibited by any statute heretofore made, or any other unlawful new game now invented or made, or any other new unlawful game hereafter to be invented, found, had, or made, upon pain to forfeit, &c."

By 8 & 9 Vict. c. 109, s. 1, so much of the above Act, "whereby any game of mere skill, such as bowling, coiting, cloysh-cayls, half-bowl, tennis, or the like is declared an unlawful game," is repealed; and by sect. 2, "in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient in support of the allegation . . . to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others; or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house, such as is contrary to law, and forbidden to be kept by 33 Hen. 8, c. 9."

By 17 & 18 Vict. c. 38, s. 4, "Any person being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the

purpose aforesaid, and any person having the care or management of, or in any manner assisting in conducting the business of any house, room, or place, opened, kept, or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place, may, on summary conviction thereof before any two justices of the peace, be adjudged by such justices to forfeit and pay such penalty not exceeding five hundred pounds, as to such justices shall seem fit, &c.

The P. proprietary club was, by its rules, to consist of 500 members; its internal arrangements were to be managed by a committee of twelve of them, with whom also rested the election of members; hazard was not to be played, nor dice used in the club-house; the points at which were not to exceed 11; and the committee had power to make such bye-laws and regulations as might appear necessary for the good order and regulation of the club. The proprietor was remunerated by the entrance fees and annual subscriptions of members and card-money, the kitchen being carried on at a loss, and the wines and cigars being sold at almost cost price. There was habitually played in the club, for from eight to thirteen hours nightly, the game of baccarat, a game of chance played with cards, at which sums of money from 25l. to 1000l. were lost every twenty minutes, by reason whereof the proprietor became possessed of money compared with which the sums received for the entrance fees and subscriptions were insignificant. The proprietor of the club, four members of the committee, and three players of baccarat in the house, having been convicted by a magistrate of an offence against 17 & 18 Vict. c. 38, s. 4:

Held, on case stated, that the game of baccarat, being a game of cards other than a game of mere skill, was an "unlawful game" within the meaning of 33 Hen. 8, c. 9, s. 11, and 8 & 9 Vict. c. 109, s. 1, and the club a common gaming-house within the meaning of 8 & 9 Vict. c. 109, s. 2; and that, therefore, the proprietor was, on the facts stated, rightly convicted under 17 & 18 Vict. c. 38, s. 4, of "being the occupier of, and opening, keeping, or using," and the committee-men of "having the care and management of and assisting in conducting the business of" the club "for the purpose of unlawful gaming being carried on therein;" but that the players were wrongly convicted under the said section, inasmuch as the mere membership of and playing in the club did not amount to "assisting in conducting the business" of it within the meaning of the section.

THIS was a case stated under the provisions of 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, and the Rules of Court made in pursuance of 38 & 39 Vict. c. 77, the appellants being Morris Jenks, Sir Charles Cunningham, Lewis David Franklin, John C. Wilkinson, Francis Phillips, Arthur Fitch, Sussex Nesbit, and Frederick Charles Hayes, and the respondents Newman Turpin, inspector of police, and Sir James Taylor Ingham, chief magistrate of the police courts of the metropolis. The case was as follows:—

The appellants were duly summoned before the respondent, Sir James Ingham, chief magistrate of the police courts of the metropolis, sitting at Bow-street Police court, on the 7th Feb. 1884 for

(a) Reported by J. SMITH Esq., Barrister-at-Law.

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having on the 1st Dec. 1883, at 7, Park-place, St. James's-street, in the Metropolitan Police District, each committed offences against sect. 4 of 17 & 18 Vict. c. 38, which is as follows:

Any person being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, and any person who being the owner or occupier of any house or room shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid, and any person having the care or management of or in any manner assisting in conducting the business of any house, room, or place, opened, kept, or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place, may, on summary conviction thereof before any two justices of the peace, be adjudged by such justices to forfeit and pay such penalty not exceeding 500*l.* as to such justices shall seem fit, and may be further adjudged by such justices to pay such costs attending such conviction as to them shall seem reasonable, and on the nonpayment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding twelve calendar months.

The appellants had each a right to claim to be tried by a jury according to sect. 17 of 42 & 43 Vict. c. 49, and the respondent, Sir James Ingham, hereinafter called the magistrate, informed them of their right, and asked whether they desired to be tried by a jury. Their counsel and solicitor waived that right, and stated that they would submit to the magistrate's summary jurisdiction. It was further agreed that the cases of all the appellants should be heard and determined on the same evidence, each being allowed to make their defence either personally or by counsel or solicitor. There were similar summonses against all the defendants for committing the same offence on the 28th and 29th Nov. 1883, and although the evidence of those offences was identical with that of the offence on the 1st Dec. on which the magistrate adjudicated, only one penalty for one offence was adjudged on conviction.

It was proved that Jenks was the proprietor of the Park Club, and occupier of the house, 7, Park-place, St. James's-street. It was proved that John C. Wilkinson, Sir Charles Cunningham, Lewis David Franklin, and Francis Phillips were members of the committee of management of the said club, and that Arthur Fitch, Sussex Nesbit, and Frederick Charles Hayes, were players of baccarat in the said house on the said 1st Dec. 1883. The powers of the committee are set out in the rules of the club (a), and letters of the secretary showed that the committee had given orders that between certain days baccarat should not be played by any members of the card-room; that subsequently the committee had resolved to allow the said game of baccarat to be resumed by members in the card-room; and that finally on the 18th Jan. 1884, at a full meeting of the committee, a resolution was unanimously passed suspending the game of baccarat until after the 31st Jan. following.

The general facts are contained in the notes of evidence, which, so far as are material, are as follows:

(a) These rules are, so far as material, set out in the judgments delivered by the Court.

Inspector Donald Swanson (Criminal Investigation Department):

On the 19th Dec. I went to the Park Club, 7, Park-place, St. James's-street, accompanied by Inspector Turpin. I saw the proprietor, Mr. Jenks, and Mr. Dalton, the secretary. I asked Mr. Jenks to tell me the particulars respecting the club that I would ask him. I wrote down in his presence what he said, and subsequently read it over to him. The statement is as follows: "Morris Jenks says: The Park Club was opened by me on or about June or July 1882. At the game of baccarat a regulation bank is the one taken by one of the members in his turn who chooses to take it. It must not be less than 50*l.* Every third bank before 2 a.m. is a regulation bank; the other banks are offered at auction. Each banker pays 1 per cent. and the punters 5*s.* each, which is called "card money," up to 2 a.m. After that hour 5*s.* an hour is charged up till 5 a.m., when, to make playing prohibitory, 1*l.* an hour is charged. The club is a proprietary one, of which I am the proprietor. The profits, if any, go to me. The profits arise from subscriptions and card money. The kitchen has been a loss, and wine and cigars sold at almost cost price." On the 21st Dec. I saw him again. He then said, "Members' own cheques are cashed by my authority, and 1 per cent. is charged as an insurance against bad cheques. I should not cash any member's cheques beyond a reasonable amount. I should cash cheques to the amount of 200*l.*, which I consider a reasonable amount." I understood the game was played according to the rules, and that each member could take the bank by putting his name down on the slate.

Inspector Turpin corroborated.

Frederick Hatton (night steward of the Park Club):

Mr. Jenks is the only proprietor I know. There is a card-room at the club. Baccarat is played there nightly. It requires a special table, with arrangements for the banker and punters. My duties are in the card-room. About twelve gentlemen play nightly, beginning at 4.30 p.m. and ceasing at 7.30 p.m.; commencing again from 10.30 to 11 p.m. and continuing till 3 o'clock a.m. and up to 8 o'clock in the morning. There would be a fresh bank every twenty minutes. If the bank lost, the word "banco" would close the bank, which means that the punter declines to play for the amount of money in the bank. I cash the cheques for Mr. Jenks amounting to 200*l.* to a member. I would cash more than one cheque a night for a member. The bank would not unusually amount to 300*l.* I hand over all moneys to the proprietor, and I receive the money to cash cheques from Mr. Jenks. When the banker has lost his money the bank is ended, but he can renew it three times, paying nothing for renewals. The banker has to put down ready money to the amount of 300*l.* The game is played sometimes with three packs of whist cards, so there would be 156 cards. There would be about sixteen deals before the cards would be exhausted, which takes about twenty minutes.

Stephen Coleman (one of the defendants):

I have been in the habit of playing baccarat at the club, and have seen banks from 25*l.* to 300*l.* I was present on the three nights specified in the summons, and the game of baccarat was played on those nights upon the average I have named. The game has been higher. An open bank is 1000*l.* and upwards. I have known it reached very seldom, possibly once a week. I never saw it over 1000*l.* The object of the game is to get nine. Ten is baccarat. The skill is in knowing when to draw and when not to draw. All the fairly-exercised skill in the world would not enable you to draw the nine of cards, if you had no luck. The nine beats every card below it. Baccarat is a fair game between the players. The chances are equal, and no advantage is to be had except from skill and luck. If I had funds I would prefer to bank, as, with luck, I could win much quicker. The banker has a slight extra chance, because he can draw.

In giving my decision I expressed my reasons as follows:

The first question to determine is, for what purpose does Mr. Jenks keep open this house. Is it an ordinary club, at which a little gambling

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is casually introduced, or is it substantially a gaming-house? I think that question can be determined very easily upon the evidence. The profits arising from the sale of wines and spirits and tobacco are admitted to be very trifling. The profits upon the supply of food are absolutely nothing, the kitchen is carried on at a loss. Now the subscriptions received from 270 members at six guineas each would produce an annual income of 1711*l*. That sum would be subject to very large deductions for rent, taxes, the wages and maintenance of servants and divers other expenses attendant upon keeping up so large an establishment. It is clear that as a club for social purposes this business would be not worthy of the care and attention which it would require. Now what is the case with respect to the gambling? Mr. Jenks receives 1 per cent. upon all the banks. He receives contributions from all the players. He receives also fines from the players who stay on after certain hours of the morning. I calculate that, considering the number of games that would be ordinarily played in the course of the evening and following morning, and the number of players, and the ordinary amount of the banks, that the profit of Mr. Jenks must be at least from 45*l*. to 50*l*. nightly, and that his yearly profits must be ten, twelve or even many thousands more. Now that being so, no one can doubt that this house has been kept and used for the purposes of a gambling-house. Its character as a club—as a social club—is absolutely ancillary to its business as a gambling-house. The club is either a pretence or a sham altogether, or it is merely assistant to the main business which Mr. Jenks carries on, namely, that of gambling. But the statute requires that there should not only be gambling, but gambling at an unlawful game, and the main question I have to consider therefore is, whether the game of baccarat is unlawful or not. In Bacon's Abridgment, a book of great authority, title "Gaming" (A), I find this: "It seems that by the common law, the playing at cards, dice, &c., when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful nor punishable as any offence whatever." The important points to mark are that an innocent game is that which is played as a recreation, the better to fit a person for the business of life. That is the principle to be extracted from that passage in the Abridgment. Then in the 5th vol., title "Nuisance" (A), this is stated: "It is clearly agreed that all common gaming-houses are nuisances in the eye of the law, being detrimental to the public." I shall find that this game is—apart from the money to be got from it—not a game played for recreation, whereby a person is fitted for the performance of the ordinary duties of life. I shall find that it is a game which promotes idleness and avaricious ways of getting money, and that it unfits persons for the performance of their duties in life. A man at this game of baccarat, as it has been played at the house of Mr. Jenks, might lose 1000*l*. before dinner time, and between ten o'clock in the evening, when gaming is renewed, and the hours of six, seven, and eight in the morning, to which sometimes the game is protracted, he might lose two, three, or even four thousand pounds. I should therefore have no hesitation in saying that, with reference to the gentlemen who compose this club, the gaming at Mr. Jenks' house has been

large and excessive, and that it comes within the principle of law laid down by Abbott, C.J. in *Rea v. Rogier* (1 B. & C. 272). There is in the repealed statutes of Anne and George II. a clear legislative declaration, more than once repeated, that losing 10*l*. at a sitting, or 20*l*. in twenty-four hours, constitutes excessive gaming, and the statutes remained in force down to the year 1845. No one therefore, before 1845, could have pretended to say that there was any difficulty whatever in determining what should constitute excessive gaming. "Well, but that statute," it is said, "has been repealed." Now, why has it been repealed? The 8 & 9 Vict. commences with this preamble, "Whereas, the laws heretofore made in restraint of unlawful gaming have been found of no avail to prevent the mischief which happens therefrom"—and then it repeals the statute of Anne. Why does it repeal it? Simply because the law has been found inoperative. But it does not repeal the declaration that gaming to the amount of 10*l*., or to the amount of 20*l*. in twenty-four hours, is excessive gaming. Now, that affords a standard upon which I can decide this case upon clear and rational legal grounds. If in the year 1845 gaming to the extent of losing or winning 10*l*. at a sitting was unlawful, surely at the present day there can be no doubt whatever that, where men lose, as they must do, or may do, upwards of 100*l*.—nay even of 1000*l*.—it must be deemed to be unlawful gaming, and upon that ground I base my decision. I find that all these parties now before me have been guilty of unlawful gaming.

I adjudged the appellant Jenks to have been guilty of the said offence on the 1st Dec. 1883 (as occupier or having the use of the said house) in keeping and using the said house for the purpose of unlawfully gaming, and fined him 500*l*.

I adjudged the appellants, Wilkinson, Cunningham, Franklin, and Phillips, to have been guilty of the said offence as persons who, being committee men, had the management of and assisting in conducting the business of the said house so kept and used for the purpose of unlawful gaming, and fined each of them 500*l*. respectively.

I adjudged the said appellants Fitch, Nesbit, and Hayes to have been guilty of the said offence as persons who assisted by playing in conducting the business of the said house so kept and used for the purpose of unlawful gaming, and fined each of them 100*l*. respectively.

The appellants, being dissatisfied with these decisions as erroneous in point of law, required me to state and sign this case, under the statutes and rules mentioned.

The points of law submitted are:

1. Is the gaming, according to the facts proved, unlawful?

2. Are the appellants, other than Jenks, the proprietor and occupier, persons who in law, upon the facts proved, come within the descriptions mentioned in the Act—i.e., either having the management or assisting in conducting the business of the said gaming-house?

*Russell, Q.C.* (with him *Poland*) for the appellants.—Baccarat is not an unlawful game. The common law on the subject of unlawful gaming is stated in Bacon's Abr. tit. "Gaming" (A) as follows: "It seems that by the common law the playing at cards, dice, &c., when practised



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innocently and as a recreation, the better to fit a person for business, is not at all unlawful, nor punishable as any offence whatsoever." [HAWKINS, J.—Then, if one person sits down to win money, and another to fit himself better for business on the morrow, is the former guilty of an offence and the latter not?] That would be so; but in gaming itself there is nothing unlawful, the offence with which it has been confounded being the keeping of a common gaming-house. As we find under the same title in *Bac. Abr. (ubi sup.)*, "All common gaming-houses are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood. Also from the destructive and pernicious consequences which must necessarily attend excessive gaming, both the courts of law and equity have shown their abhorrence of it." This passage shows how easily the confusion between gaming and keeping a gaming-house arises; but its meaning is not that excessive gaming is an offence at common law, but that keeping a common gaming-house is an offence, because excessive gaming is an evil. [HAWKINS, J.—If excessive gaming is an offence, two men sitting down to play, one being the possessor of 50,000*l.* and the other of 500*l.*, would one be guilty of an offence and the other not?] It is not an offence. In *Stephen's Dig. Crim. Law*, p. 110, the law now existing is said to be: "A common gaming-house is a house kept or used for playing therein at any game of chance, or any mixed game of chance or skill, in which (i.) a bank is kept by one or more of the players, exclusively of the others; or (ii.) in which any game is played, the chances of which are not alike favourable to all the players, including among the players the banker, or other person by whom the game is managed, or against whom the other players stake, play, or bet." It is submitted that the game of baccarat does not come within this category, there being, according to the facts stated in the case, no bank in it in the sense in which the word is used in the passage quoted, in the sense in which there is a bank at, for instance, roulette, all the players at baccarat having the option of taking their turn at the bank. [HAWKINS, J.—Do you say that the same game may be lawful in a private house, and unlawful in a common gaming-house?] I say that this house is not a common gaming-house, and, that being so, there is nothing in the common law or on the Statute-book to make the playing of baccarat in it "unlawful gaming." [HAWKINS, J.—Then, if it is a common gaming-house, are the others guilty of aiding and abetting Mr. Jenks in keeping it?] I contend not. [HAWKINS, J.—Would they not be guilty of playing an unlawful game in a common gaming-house, if this should appear to be an unlawful game, and the house a common gaming-house?] No; as in the case of common bawdy-houses, those who resort thither merely for the purposes of the business of the house are guilty of no offence. The passage from *Bac. Abr. (ubi sup.)* shows the truth of this position at common law, and an examination of the statutes will show that it has never been altered. The first statute on the subject is 38 Hen. 8, c. 9, s. 11, which is: "Be it also

enacted by the authority aforesaid, that no manner of person or persons, of what degree, quality or condition soever he or they be, from the feast of the Nativity of St. John the Baptist now next coming, by himself, factor, deputy, servant, or other person, shall, for his or their gain, lucre, or living, keep, have, hold, occupy, exercise, or maintain, any common house, alley, or place of bowling, coiting, cloyah-cayls, half-bowl, tennis, dicing table, or carding, or any other manner of game prohibited by any statute heretofore made, or any unlawful new game now invented or made, or any other new unlawful game hereafter to be invented, found, had, or made, upon pain to forfeit and pay for every day keeping, having, or maintaining, or suffering any such game to be had, kept, executed, played, or maintained within such house, garden, alley, or other place, contrary to the form and effect of this statute, forty shillings." Although unlawful games are spoken of here, the keeping of a common house alone is made an offence. The next enactment is 16 Car. 2, c. 7, and that is indeed directed against deceitful, disorderly, and excessive gaming, and so is 9 Anne, c. 14; but both these statutes have for their chief object the prevention of fraud and cheating, and, whatever their effect, they were both wholly repealed by 8 & 9 Vict. c. 109, s. 15. We then come to 2 Geo. 2, c. 28, the 2nd section of which declares the games of the ace of hearts, pharaoh, basset, and hazard to be games or lotteries by cards or dice, within the intent and meaning of certain recited Acts, namely, 10 & 11 Will. 3, c. 17; 9 Anne, c. 6; 10 Anne, c. 26; 8 Geo. 1, c. 2; and 9 Geo. 1, c. 19, which were Acts for the suppression of lotteries, and then enacts that all and every person or persons who shall set up, maintain, or keep the said games of the ace of hearts, pharaoh, basset, and hazard shall be liable to all the penalties inflicted by the Act on persons setting up lotteries as in the Act mentioned. Then the 3rd section goes on to say that "all and every person and persons who shall be adventurers in any of the said games, lottery or lotteries, sale or sales or shall play, set at, stake or punt at either of the said games of the ace of hearts, pharaoh, basset, and hazard," shall forfeit 50*l.* Here only certain specified games are mentioned, and there are no general words as to similar or new games. Next comes 13 Geo. 2, c. 19, s. 9, which recited that, contrary to the true intent and meaning of the last-mentioned Act, some fraudulent and deceitful games had been invented, and a certain game called "passage" was daily practised, and enacted that "the said game of 'passage', and all and every other game and games invented or to be invented with one or more die or dice, or with any other instrument, engine, or device in the nature of dice, having one or more figures or numbers thereon (backgammon and the other games now played with the backgammon tables only excepted) shall severally forfeit," &c. Then in 18 Geo. 2, c. 34, s. 1, we find that a certain pernicious game called roulette or roly-poly, was daily practised, and the laws then in being had by experience been found ineffectual to put a stop to such pernicious practices, and it is therefore enacted that "no person or persons of what condition soever shall keep any house, room, or place for playing, or permit or suffer any person or persons whatsoever within any such house,



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room, or place to play at the said game of roulette, otherwise roly-poly, or at any other game, with cards or dice, already prohibited by the laws of this realm." Except, therefore, as to roulette, this statute makes no difference in the then existing law. This was the state of the law in 1823, when the case of *Rea v. Rogier* (1 B. & C. 272) was decided. That decision is to the effect that the keeping of a common gaming-house and for lucre and gain unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called *rouge et noir*, and permitting the said idle and evil-disposed persons to remain playing at the said game for divers large and excessive sums of money, is an indictable offence at common law. But at the time of that decision the statute of Anne (9 Anne, c. 14) was in force, and Abbot, C.J. says in his judgment, "Besides, the 9 Anne, c. 14, s. 2, makes playing at any game unlawful, if more than 10l. shall be lost. Now, in this case, the indictment states, not only that the defendants kept a common gaming-house, but that they permitted persons to play there for divers large and excessive sums of money. The playing for large and excessive sums of money would of itself make any game unlawful; and, if so, there can be no doubt that this is an offence at common law." That decision, therefore, has no weight apart from the statute of Anne, which is now repealed, it being impossible to draw any distinction between moderate and immoderate gaming, as the result would be to make what was an offence in the case of one person no offence in the case of another. Then in 1842 there was the case of *Applegarth v. Colley* (10 M. & W. 723), in which Rolfe, B. delivered a very lengthy judgment, alluding in the course of it to the statute of Charles II. (16 Car. 2, c. 7), which may be relied upon by the respondents. He says, as to it, that though it might bear the construction that it made all gaming illegal, "yet it certainly will admit of another, and, as we think, far more reasonable interpretation, namely, that the fraud, deceit, ill-practices, &c., mentioned in the 2nd section of the Act, are intended to apply to all which follows in that section, and consequently that the clause in question has no reference to the case of persons fairly running horses for money, or fairly betting on races or other sports of like nature. And we adopt this construction because the Act itself, both in its title and preamble appears to be directed solely against fraudulent and excessive, and to be in no respect pointed at moderate play, when there is no fraud." We now come to the statute 8 & 9 Vict. c. 109, which Stephen, J. in his Digest treats as the only legislative enactment dealing with what a gaming-house is. That Act was aimed at the large number of gaming-houses, similar to Crockford's, which then flourished, and its idea all through is to make illegal the keeping of a common gaming-house. After repealing certain parts of 33 Hen. 8, c. 9, and amongst others so much as declared any game of mere skill to be an unlawful game, it proceeds, in the 2nd section, to say what shall be sufficient evidence that a house is a common gaming-house, enacting that it shall be sufficient to prove that a house "is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played

therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house such as is contrary to law and forbidden to be kept by 33 Hen. 8, c. 9, and all other Acts containing any provision against unlawful games or gaming-houses." The effect of this section is that to prove a house to be a common gaming-house you must either prove it to be so by common law, because idle and disorderly persons resort there, and it is a nuisance, or by one of the tests set out in this section. The facts set out in the case are insufficient to prove this club to be such, either by common law or under this section. [SMITH, J.—You say, then, that baccarat is not an unlawful game. What do you say is the meaning of "unlawful game" in this 2nd section?] The games forbidden by the Legislature in 2 Geo. 2, c. 28, s. 3; 13 Geo. 2, c. 19, s. 9; and 18 Geo. 2, c. 34, s. 1, which I have already quoted. [SMITH, J.—How, then, do you explain the case of *Rea v. Rogier* (1 B. & C. 272) in which the game was *rouge et noir*, not mentioned in those statutes?] There the conviction was for keeping a common gaming-house, the material point being the excessive gaming contrary to the statute of Anne, now repealed, and not the game of *rouge et noir*, which is not forbidden by any statute. The 3rd, 4th, 6th, and 8th sections of 8 & 9 Vict. c. 109 all deal with the keeping of gaming-houses alone. [HAWKINS, J.—If a man goes to such a house and wilfully plays at an unlawful game he is doing that which he knows to be illegal.] He is committing no offence, just as persons resorting to bawdy-houses are guilty of no offence. [HAWKINS, J.—Is there any case which says this?] No prosecution for such a thing has ever been known. [SMITH, J.—But at baccarat, according to the facts set out, "a bank is kept by one or more of the players exclusively of the others." No; at roulette and similar games the bank plays against all comers, but at baccarat the deal passes. The last statute on the subject is 17 & 18 Vict. c. 38, under the 4th section of which this conviction took place. This statute, again, is directed wholly against the opening, keeping, and using of gaming-houses, and, although both the 3rd and the 5th sections deal with persons who are found in such houses, neither suggests that they should be prosecuted for unlawful gaming therein. The case of betting-houses, legislated against by 16 & 17 Vict. c. 119, is exactly parallel, and there is no suggestion in that Act that persons should be prosecuted for wagering therein. The 3rd section contains the only approach to any proceeding against them, enacting a penalty for not giving their names and addresses, the object being to obtain witnesses against the keepers of the houses. If the Legislature had intended to make the mere playing for money or for more than a certain sum of money an offence, they would in a statute such as this, which goes carefully into detail, have said so in plain terms. Until they have said so, it is not the duty of the court to strain the interpretation of any statute so as to infer this. Finally, as to Mr. Jenks, this club was not a house opened, kept, or used for the purpose of unlawful gaming; as to the committee, they were merely members of a proprietary club, and might at any time have to

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quit it if Mr. Jenks so willed, and therefore, even if the house was kept for unlawful gaming, they had no part in the opening, keeping, or using of it, or in the care or management of it, or in conducting the business of it, within the meaning of the statute; and, as to the players, in no case can they have been guilty of any offence against this section.

*Besley* (with him *H. Clarke*, Q.C.).—As to the distinction drawn between Mr. Jenks and the committee. The 2nd, 4th, 6th, 11th, and 27th rules of the club, set out in the case, show that the committee had a sufficient share in the management of the club to bring them within the section, at any rate, as aiders and abettors in keeping the house. [SMITH, J.—To aid and abet an unlawful act may be a common law misdemeanour, but would not justify the fine of 500*l.* inflicted on the members of the committee.] The words of the section are very wide; both the committee and players clearly come within the words, "in any manner assisting in conducting the business of any house, room, or place, opened, kept, or used for the purpose aforesaid." Further, as to the players, the 9th section of the Act of 1845 (8 & 9 Vict. c. 109) shows beyond doubt that the Legislature regarded playing as an offence prior to that statute, and, in not re-enacting any penalty for their offence, merely intended to leave them *in statu quo*. The 9th section is "And for the more effectual prosecution of the keepers of common gaming-houses be it enacted that every person who shall have been concerned in any unlawful gaming, and who shall be examined as a witness by or before any police magistrate or justice of the peace, or on the trial of any indictment or information against the owner or keeper, or other person having the care or management of any common gaming-house, touching such unlawful gaming, and who upon such examination shall make true and faithful discovery, to the best of his or her knowledge, of all things as to which he or she shall be so examined, and shall thereupon receive from the magistrate, or justice of the peace, or judge of the court, by or before whom he or she shall be so examined, a certificate in writing to that effect, shall be freed from all criminal prosecutions, and from all forfeitures, punishments, and disabilities, to which he or she may have become liable for anything done before that time in respect of such unlawful gaming." The Legislature, therefore, clearly thought that unlawful gaming was an offence rendering a person liable to prosecution and punishment, and the form of warrant in the schedule to the Act gives power to arrest, search, and bring before a justice "as well the keepers of the same as also the persons there haunting, resorting, and playing, to be dealt with according to law." It is true that there is no reported case in which persons merely present in betting-houses have been convicted; but it is within the knowledge of the court that they are so convicted. [HAWKINS, J.—Then you would say that resorting to a bawdy-house is an offence also? Mr. Poland could cite no case to the contrary.] It may be so; but at any rate it is submitted that the players "assisted in conducting the business of the house" within the meaning of the statute. [SMITH, J.—Why did not the statute say, "and playing thereof?"] That was already the law. There was no object in enacting under 33 Hen. 8, c. 9, and 8 & 9 Vict. c. 109, ss. 3 and 6, that the

players should be seized and taken before the justice, if they had committed no offence. Besides, the players in this case were members of the club, and as such assisted in conducting the business of the club, and occupied and used the club for the purpose of gaming therein.

*Poland* in reply.—The case of *Rex v. Pierson* (2 *Ld. Raym.* 1197) is the authority desired by the court as to the law on the subject of persons resorting to bawdy-houses. It was there held that an indictment cannot be maintained against anyone for being a bawd and procuring ill-disposed persons to meet and commit fornication, for, said the court, "what is charged in this indictment is but solicitation of chastity, which is a spiritual offence, and not inquirable or punishable at common law." So far is it from being an offence to resort to such a place, that it is not so to resort there and successfully induce others so to do. This, however, is not material to the issue raised in this case, the point being, not whether the mere playing at an unlawful game in a common gaming-house—supposing the court should hold this club to be such—is an offence at all, but whether it is an offence for which the appellants, who merely played in the club, can be rightly convicted under this particular section.

*Cur. adv. vult.*

*June 26.*—HAWKINS, J.—Upon the facts stated in the case, there can be no doubt that Mr. Jenks was, to all intents, the occupier and keeper of the house in question, whatever were the purposes for which it was open and kept. This, indeed, was not disputed upon the argument before us, or before the learned magistrate before whom the case was heard. The real and only substantial question is whether it was opened and kept for the purpose of unlawful gaming being carried on therein. On the part of the appellants it was argued that the primary object in opening and keeping the house was that it might be used as an ordinary social club, and that, although there was nightly play in the house, at which considerable sums of money were won and lost, yet such play was merely incidental and ancillary to that primary object. On the other hand, the respondents contended that the primary object was that the house should be used for the purpose of gaming, just as much as the old gaming-houses were used, which it was the object of the statute to suppress, and that the social arrangements were merely subsidiary to its use for such gaming purposes, indeed were necessary for the accommodation and comfort of the members of the club, and to conceal its true character. The learned magistrate took this latter view. I very much doubt whether, even if we differed from him, we should be justified in reversing his decision, the question being one purely of fact. I do not, however, differ; on the contrary, I think that the evidence in support of this conclusion is overwhelming. What are the admitted facts? We must assume Mr. Jenks to be a person of ordinary intelligence and business capacity, and having no special regard or affection for the members of his club (who, moreover, were to be elected by the committee, and not by himself), to be at least desirous of making some profit out of the house, for the rent and all the expenses of which he was personally liable. Now, the wine and cigars being sold at only little above cost price, and the kitchen

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carried on at a loss, it may be taken that there was really no profit on these items, and I very much question whether the rent, repairs, insurances, rates, taxes, gas, water, candles, firing, salaries of day and night stewards, wages of servants, their maintenance and clothing, depreciation of furniture, &c., and interest on capital invested, could possibly be covered by the annual subscriptions and entrance fees of the members, the number of whom was probably in a great measure induced by the fact that play would be the order of things for sixteen hours out of the day. The printed rules are no doubt most admirable, and from reading them nobody would suppose there was even a *souppçon* of a gambling character about the establishment. Rule 21 says that "Hazard shall not be played in the club, nor shall dice be used in the club-house;" rule 22, "The points at whist shall not exceed 11.;" and rule 23, "All games shall be played for ready money only." One could almost imagine that these three rules were framed expressly in order that they might be set up, if necessity arose, to vindicate the character of the club as one of a non-gambling character, where a gentleman might dine and enjoy his rubber of whist, if he pleased, but would not be permitted under any circumstances to gamble. In the letter, I do not find that these rules were broken, but nothing could be less indicative than these rules of the nightly routine of the establishment. From half-past four in the afternoon till eight o'clock on the following morning those who liked could play. There was a night steward (Mr. Hatton) whose duties were in the card room. Baccarat was the game throughout the night, and at it thousands were nightly won and lost. Mr. Russell gave us a very vivid description of this game, and the privileges and respective positions, and chances of the bankers and players at it. And from the evidence we learn that no regulation bank could be less than 50*l.*; that the ordinary regulation banks ranged from 50*l.* to 300*l.*; that an "open" bank sometimes reached 1000*l.*; that ordinarily there was a fresh bank every twenty minutes; that a special table and arrangements were provided for the bankers and players; that for each bank three packs of cards were used; that for this accommodation Mr. Jenks received for each bank 1 per cent., and from each punter 5*s.* as card money up to two a.m., and afterwards 5*s.* an hour up to five a.m., when, to make playing prohibitory, 1*l.* an hour was charged; and that members' cheques were cashed by Mr. Jenks at a charge of 1 per cent.—for what purposes the cheques were cashed we can draw our own conclusions. When all these facts are looked at, even with a most indulgent eye, is it possible for any man in his senses to doubt that the house was really kept and opened for the purpose of gaming, at the game of baccarat, as its main and principal object, and not as a mere social club, in which gambling even to a considerable extent was ancillary? I think it right, however, to add that if the house had been kept open for a double purpose—viz., as an honest social club for those who did not desire to play, as well as for the purpose of gaming for those who did—it would none the less be "a house opened and kept for the purpose of gaming." The enactment, however, under which this conviction took place (17 & 18 Vict. c. 38, s. 4) is not directed against every

person who keeps a house in which gaming takes place; it imposes a penalty only on those who open, keep, or use a house for the purpose of "unlawful" gaming being carried on therein, or who assist in the management of the business of such house. This brings me to the first question submitted for our opinion, viz., whether the gaming, for the carrying on of which this house was opened, was "unlawful" gaming. In dealing with this question I think the learned magistrate has taken rather too narrow a view of the 4th section in treating the question whether the gaming was unlawful as dependent upon whether the games played were unlawful games. The section makes no mention of unlawful games—nor does it in any way confine its operation to persons keeping houses for gaming at such games. It is directed generally against all persons keeping houses for the purpose of unlawful gaming. The illegality of the gaming is what we have to look to, and not merely the illegality of the game. Gaming may be unlawful by reason of the place in which it takes place, or of the unlawfulness of the game itself. The common law did not prohibit the playing at dice and cards: (11 Co. Rep. 87; *Sherbon v. Colebach*, 2 Vent. 175.) They were not unlawful games. But the keeping of a common gaming-house was at common law an indictable offence: (Hawk. P. C. b. 1, c. 75, sects. 1, 6; Bacon's Abr. vol. 5, tit. "Nuisance" (A).) Can anybody doubt that at common law if dice and cards were played in a common gaming-house as part of the unlawful business thereof such gaming would not be unlawful, though the games in themselves were not so? To me, therefore, it seems that in order to determine whether the gaming was lawful two matters present themselves for consideration. First, was this house a common gaming-house in which all gaming was unlawful? Secondly, was it opened for the purpose of an unlawful game being played therein so as to make that particular gaming unlawful? In considering this latter question we have confined our attention to the game of baccarat, no other game played therein having been suggested to be an unlawful game. First, was this house kept as a common gaming-house so as to make it an indictable nuisance at common law? In Hawkins Pleas of the Crown, b. 1, c. 75, s. 6, it is said that "All common gaming-houses are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood;" and in the following sect. 7 he says: "A common playhouse may be a nuisance if it draw together such numbers of coaches or people as prove generally inconvenient to the places adjacent;" but he goes on to draw a distinction between nuisances so occasioned and such nuisances as bawdy-houses and common gaming-houses, stating that "Playhouses are not nuisances in their own nature, but may only become such by accident, whereas the others cannot but be nuisances." Speaking of gaming, Blackstone, in vol. 4, p. 171, says: "Next to that of 'luxury' (a) naturally follows the offence of gaming, which is generally introduced to supply or retrieve the expenses occasioned by the former; it being a

(a) Against which summary laws then existed. See 4 Bl. C. 170, s. 7.—H. H.

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kind of tacit confession that the company engaged therein do in general exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But taken in any light, it is an offence of the most alarming nature, tending by necessary consequence to promote public idleness, theft, and debauchery among those of a lower class; and, among persons of a superior rank, it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honour and virtue, and too often hath ended in self-murder." Later on in the same section he says, "It is the gaming in high life that demands the attention of the magistrate, a passion to which every valuable consideration is made a sacrifice." In *Russell on Crimes*, vol. 1, p. 428, the principle alleged upon which common gaming-houses are punishable as nuisances is, that they are "detrimental to the public as they promote cheating and other corrupt practices, and incite to idleness and avaricious ways of gaining property great numbers whose time might be otherwise employed for the good of the community." In *Res v. Rogier and another* (1 B. & C. 272, and better reported in 2 Dowl. & Ry. 431), which was an indictment for keeping a common gaming-house, Best, J. said, "Any practice which has a tendency to injure the public morals is a common law offence," and both he and Abbott, C.J. treated playing at even innocent games for excessive amounts as illegal. As to excessive gaming, however, I shall have a word or two to say hereafter. After a careful consideration of the facts, and of all that has been so ably addressed to us upon the subject, I have come to the conclusion that there was an abundance of evidence that in all its essential characteristics the Park Club House was a "common gaming-house," and that as such the keeper of it might have been indicted as for a nuisance at common law. Its pernicious tendency cannot be doubted, and to it almost all the dicta of the various writers I have referred to might be truly applied, and the learned magistrate expressly finds that the game played at this house is one which promotes "idleness and avaricious ways of getting money, and that it unfits persons for the performance of their duties in life." It is true that no annoying interference in the public streets can be pointed to so that in that sense a public nuisance can be said to have been created, but that is not necessary (see *Reg. v. Rice and another*, L. Rep. 1 Cr. Cas. Res. 21). In my judgment, the keeping a common gaming-house is in itself a nuisance, and the keeper of it is, as such, guilty of an indictable offence. Neither, although doubts seem to have arisen, do I think it makes any difference that the use of the house and the gaming therein was limited to the subscribers and members of the club, and that it was not open to all persons desirous of using the same. If this could be set up as a defence to an indictment, any indictment for keeping a common gaming-house might be defeated. To no gaming-house is the public at large invited to go without restrictions of some sort or other. The keeper of such a house has always the right to permit or refuse admission to anyone he pleases,

or to make such rules as he may think fit for the regulation of such admission. Here he placed himself in the hands of the committee to elect whom they would, provided only the number of members did not exceed 500. If the admission of 500 persons to a gaming-house does not make it a common gaming-house, it might equally be said that the admission of 5000 would not. The law does not require that it shall be a public gaming-house; a common gaming-house is that which is forbidden; that is, a house in which a large number of persons are invited habitually to congregate for the purpose of gaming. I now proceed to discuss the question whether this house was kept for the purpose of unlawful gaming in the sense of gaming at unlawful games, a somewhat difficult subject to deal with, because, with very few exceptions, no games have been, in so many words by name, declared to be unlawful, and yet, in using the words "unlawful games," it is clear the Legislature intended them to cover and include some games which being lawful in themselves were only made unlawful when played in particular places or by particular persons. This I shall point out when I come to refer as I must do, to the statutes cited in the course of the argument. I have already stated that at common law the playing at any game was legal and permissible: (11 Co. Rep. 87.) In *Sherbon v. Colebach* (2 Ventris 175, A.D. 1691), which was an action to recover 20% lost by the defendant to the plaintiff at hazard, the court said, "Neither is play at dice in itself unlawful though prohibited by several statutes to certain persons and to be used in certain places." Bacon's Abridgment, however, title "Gaming" (A), states this with some qualification, viz. that such games must be played innocently and by way of recreation. The passage runs thus: "It seems that by the common law the playing at cards, dice, &c., when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful nor punishable as any offence whatever." I do not find this qualification recognised in any reported case or in any other of the old text books. If played innocently and for recreation only, it would not be gaming at all: (see *Reg. v. Ashton*, 1 Ell. & B. 286.) There a publican was convicted "for suffering an unlawful game called dominoes to be played in his house against the tenor of his licence which makes it a provision that the party licensed do not knowingly suffer any unlawful games or any gaming whatsoever therein." It was not proved that any stake was played for. The court quashed the conviction. Lord Campbell in giving judgment said: "It had not been shown that the game of dominoes was necessarily in itself unlawful," and as to the gaming he said "parties may play at a game which is not in itself unlawful without gaming. If money were staked, that would be gaming." I think, therefore, that in the passage cited from Bacon's Abridgment the writer only intended to state generally that innocent play was perfectly lawful, and not to leave it to be inferred that at common law to play at dice otherwise than for recreation was unlawful. No case was cited to us, nor have I been able to find any, in which a person was held punishable at common law in respect of gaming except for a nuisance as the keeper of a common gaming house. We must take it therefore, I

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think, that at common law no game was in itself unlawful, and must look to the statutes to see what games are rendered unlawful by legislative enactments. The first to which reference need be made of these statutes—the 33 Hen. 8, c. 9—had for its main object not so much the prevention of gaming as a vice injurious to the morals of the people, as the advancement and maintenance of archery for the defence of the country, the science and practice of which had been neglected by the growing habit of playing at “unlawful games and play.” It is entitled “The Bill for the maintaining Artillery and the debarring of unlawful games.” By the 11th section it is enacted that no person shall for his gain keep any common house, alley, or place of [bowling, (a) coyting, cloysh-cayls, half bowl, tennis], dicing table, or carding, or any other game prohibited by any statute theretofore made (see 3 Hen. 8, and 6 Hen. 8, c. 2), or any unlawful new game then invented, or thereafter to be invented upon pain of 40s. for every day, &c. By the 12th section every person using and haunting any of the said houses and plays and there playing was to forfeit each time 6s. 8d. The 16th section of the same Act imposed penalties on artificers, servants, &c., playing at unlawful games out of Christmas, &c. The 17th section repealed all previous statutes made for the restraint of unlawful games. Now in this statute it will be observed there is nothing to make any game absolutely unlawful. It is made unlawful to keep for gain any house for playing at such games as are specified in sect. 11, and it is made penal for any person to play at such games in such houses, and persons of humble ranks, such as artificers, are forbidden to play at such games out of Christmas or without licence; but that is all. The games, though called unlawful, are only forbidden to be played in certain places, and by a specified class of persons only at specified times. Next comes the statute 16 Car. 2, c. 7 (the whole of which is repealed by 8 & 9 Vict. c. 109, s. 15), entitled “An Act against deceitful, disorderly, and excessive gaming.” It was, as its preamble shows, passed for a totally different purpose than that contemplated by 33 Hen. 8, c. 9. It begins by reciting that “all lawful games and exercises should not be otherwise used than as innocent and moderate recreations, and not as constant trades or callings to gain a living or make unlawful advantage thereby;” then it goes on to recite that “by the immoderate use of them, many mischiefs and inconveniences do arise,” and among them the encouragement of idle and disorderly persons and the debauching of many of the younger sort both of the nobility and gentry, and others, to the loss of their time, the ruin of their fortunes, and the withdrawing them from laudable employments. The 2nd section of the Act is directed against fraud and deceit in playing at any game. The 3rd section is directed against excessive and immoderate gaming, and enacts that if any person shall play at any game (other than with and for ready money) and shall lose exceeding 100l. at any one time he shall not be bound to pay, and the person winning shall forfeit treble the value of all

he shall win above 100l. Again, it will be observed, in this statute no game is made unlawful in itself. In *Applegarth v. Colley* (10 W. & M. 729) Rolfe, B. said: “The Act (16 Car. 2, c. 7) itself, both in its title and preamble, appears to be directed solely against fraudulent and excessive play, and to be in no respect pointed at moderate play where there is no fraud.” Next in order comes the 9 Anne c. 14, entitled “An Act for the better preventing of excessive and deceitful gaming.” By sect. 2 any person who shall at any one sitting lose 10l. and shall pay the same, may within three months recover the same back from the winner, and in case the person losing the money does not recover it back any other person may recover the same and treble the value thereof—one moiety for his own use, the other for the poor of the parish “where the ‘offence’ shall be committed.” The 5th section makes it an indictable offence to win any amount by fraudulent play, or to win of any person at any one time above the value of 10l. Sect. 6 is directed against persons who support themselves by gaming only, and it empowers justices of the peace to inquire from every person who appears to them to maintain the principal part of his expenses by gaming to find sureties for his good behaviour for twelve months, and, in default, to be committed to the common gaol. Again, it will be noted that no game is rendered unlawful, but excessive or fraudulent gaming at any game is made an indictable offence. The 12th Geo. 2, c. 28, entitled “An Act for the more effectual preventing of excessive and deceitful gaming,” in the 1st section recites various statutes prohibiting lotteries, and then, after reciting that several persons have for many years past carried on and set up certain fraudulent games and lotteries to be determined by the chance of cards and dice, under the denomination of the games of the ace of hearts, pharaoh, basset, and hazard, by sect. 2 enacts “that the said games of the ace of hearts, pharaoh, basset, and hazard, are, and are thereby declared to be, games and lotteries by cards or dice within the meaning of the Acts prohibiting lotteries, and that every person who shall keep the said games shall be subject to all the penalties inflicted upon persons keeping lotteries;” and in sect. 3 it is enacted that every person who shall play or stake at either of the said games shall be liable to a penalty of 50l. In this, as in several other statutes, there is a provision that the Act shall not extend to prevent playing or gaming at any games within any of the royal palaces. This statute expressly declared the games of ace of hearts, pharaoh, basset, and hazard to be lotteries, and, on that account, to be illegal. In the following year, 13 Geo. 2, another statute was passed (13 Geo. 2, c. 19), which, after enacting some curious and interesting provisions (since repealed by 3 & 4 Vict. c. 5) relating to horseracing, and, in sect. 9, reciting that, notwithstanding the good and wholesome law made in the preceding year, some fraudulent and deceitful games had been invented, and that a game called “passage” was then daily practised and carried on; it was therefore enacted that the said game of passage, and every other game invented, or to be invented, with a die or dice (backgammon and the other games then played with the backgammon tables only excepted), shall be deemed games or lotteries by dice, and it inflicts penalties upon all

(a) These games within brackets and the like are by 8 & 9 Vict. c. 109, s. 1, declared to be no longer unlawful.  
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persons keeping tables for playing, or playing at the said games. Passage and other games of a like nature played with dice are thus added to the list of unlawful games. The 18 Geo. 2, c. 34, s. 1, after reciting the mischief attendant upon excessive gaming, &c., and that a "pernicious" game called "roulet" or roly-poly was then daily practised, enacted that no person should keep any house for playing roulette or roly-poly, or any other game with cards or dice already prohibited by law under penalties prescribed. By sect. 2 it was enacted that if any person should play at roulette, or at any game with cards or dice, already prohibited by law, he should incur the penalties therein prescribed. By the 8th section of the same Act it was enacted that any person winning or losing at play at any one time 10*l.* should be liable to be indicted and fined five times the value of the sum so won or lost. This section was repealed by 8 & 9 Vict. c. 109. This Act, it will be seen, makes illegal the game of roulette, which is a game of chance. The 25 Geo. 2, c. 36, throws but little light upon the subject. Sect. 8, however, enacts that any person who shall appear, act, or behave himself as master, or as the person having the care, government, or management of any gaming-house, shall be deemed and taken to be the keeper thereof, and liable to be punished as such, notwithstanding he shall not in fact be the real keeper or owner thereof. In this state the law (so far as relates to the immediate question before us) was when the 8 & 9 Vict. c. 109 (1845) was passed. By that Act, entitled "An Act to amend the law concerning games and wagers," after reciting that "the laws heretofore made in restraint of unlawful gaming have been found of no avail to prevent the mischiefs which may happen therefrom, and also apply to sundry games of skill from which the like mischiefs cannot arise, by sect. 1 it is enacted that so much of 33 Hen. 8, c. 9, whereby any game of mere skill, such as bowling, coytting, cloysh-cayls, half-bowl, tennis, or the like, is declared an unlawful game, or which enacts any penalty for playing at such game of skill as aforesaid shall be repealed, and also so much of the said Act as makes it lawful for every master to licence his servants, and for every nobleman, &c., to license his or their servants or family to play at cards, dice, or tables, or any unlawful game, shall be repealed; and no such licence shall avail any person to exempt him from the danger or penalty of playing at any unlawful game, or in any common gaming-house. Nothing could more clearly indicate the intention of the Legislature to legalise to all persons and at all times mere games of skill, but to preserve in their integrity all the penalties which then attached to the playing at unlawful games anywhere, or gaming at all (even at lawful games) in common gaming-houses; and to deprive every person of the power to licence such playing or gaming. The 2nd section defines what in default of other evidence shall be sufficient to prove a house to be a common gaming-house. (a) After reciting that doubts had arisen whether certain houses, alleged or reputed to be opened for the use of the subscribers only,

or not open to all persons desirous of using the same, are to be deemed common gaming-houses, it is declared and enacted that "in default of other evidence proving any house or place to be a common gaming-house it shall be sufficient in support of the allegation in any indictment or information that any house or place is a common gaming-house to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others; or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house, such as is contrary to law and forbidden to be kept by 33 Hen. 8, c. 9." By sect. 4 it is enacted that "the owner or keeper of any common gaming-house, and every person having the care or management thereof, and also every banker, croupier, and other person who shall act in any manner in conducting the business of any common gaming-house" shall, on conviction, besides any penalty or punishment to which he may be liable under 33 Hen. 8, c. 9, be liable to forfeit a penalty not exceeding 100*l.* The power to indict for keeping a common gaming-house is not taken away, but a summary conviction would be a bar to a subsequent indictment. By this statute (8 & 9 Vict. c. 109, s. 15) the statutes 16 Car. 2, c. 7, 9 Anne, c. 14 (so far as it is above referred to) and 18 Geo. 2, c. 34 (so far as above-mentioned) were repealed. The statute 16 & 17 Vict. c. 119 was directed to the suppression of betting-houses, and has no application to the present case. Then came the statute 17 & 18 Vict. c. 38 (1854) under which the conviction now in question was obtained. It is entitled "An Act for the suppression of gaming-houses." It recites the 8 & 9 Vict. c. 109, and by sect. 4 enacts that "any person, being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid, and any person having the care or management of, or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place," may on summary conviction be adjudged to pay a penalty not exceeding 500*l.*, with costs, &c. I have cited at some length these various statutes, even where the provisions have been repealed, for the purpose of showing the general current of legislation against gaming-houses, and making more intelligible what I am about to say upon the question as to what are "unlawful games" within the meaning of the statutes. I divide them into two classes: first, those which are absolutely forbidden by name, and to the gaming at which a penalty is attached. This class includes ace of hearts, pharaoh (or faro), bassett and hazard made illegal by 12 Geo. 2, c. 28, passage and every other game with a die or dice except back-

(a) The fact that a house is a common gaming-house may still be established by any evidence which might prove it to be so at common law. This second section only defines what will suffice in default of other evidence.  
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gammon, made illegal by 13 Geo. 2, c. 19, and roulette (or roly-poly), made illegal by 18 Geo. 2, c. 34. The second class comprises a number of games not altogether prohibited under penal consequences nor declared to be altogether illegal, but which nevertheless have been styled "unlawful" by the Legislature, because the keeping of houses for playing them, and the playing them therein by anybody, were rendered illegal. Now, the games thus treated as unlawful by 33 Hen. 8, c. 9, are bowling, coyting, cloysh-cayls, half-bowl, tennis, dicing table or carding, or any other manner of game prohibited by any statute theretofore made or any unlawful new game then invented or made, or any other new unlawful game thereafter to be invented, found, had, or made. As to bowling, coyting, cloysh-cayls, half-bowl, and tennis, these seem to have been games of mere skill, and although they remained unlawful games until the year 1845, the statute 33 Hen. 8, c. 9, was repealed as to them and all other like games of skill by 8 & 9 Vict. c. 109, s. 1. Since that statute therefore the only games made unlawful by 33 Hen. 8, c. 9, are games of dice or cards, whether such games were known at the time of the passing of that statute or have been since invented. All such games, if they are games of chance, or games of chance and skill combined (which cannot be called games of mere skill), are in my opinion clearly within the meaning of the words "unlawful games" in the 17 & 18 Vict. c. 38. The language of the 1st section of 8 & 9 Vict. c. 109, in referring to the 33 Hen. 8, c. 9, and repealing only so much of it as applied to games of skill, is a strong indication of the intention of the Legislature that all the other games mentioned in the statute of Hen. 8, were to continue to be treated as unlawful in the sense in and to the extent to which they were made unlawful by that statute, viz., unlawful if played in a house kept for playing at them. The unlawful games, then, now are ace of hearts, pharaoh, basset, hazard, passage, roulette, every game of dice except backgammon, and every game of cards which is not a game of mere skill, and I incline to add any other mere game of chance. Does baccarat come within this category? The description of the game given by Mr. Russell satisfies me that it does. It is a game of cards. It is a game of chance, and though, as in most other things, experience and judgment may make one player or banker more successful than another, it would be a perversion of words to say it was in any sense a game of mere skill. It is therefore, in my opinion, an unlawful game within the meaning of the statute. It is said that it is a game of modern invention. That may be, and, assuming it to be so, it is just what the Legislature intended to include in the phraseology of the 11th section of 33 Hen. 8, c. 9, as a "new unlawful game thereafter to be invented." If I am right in this view, then, apart from any question whether the other evidence establishes this to be a common gaming-house, there is clearly sufficient to establish it as such under sect. 2 of 8 & 9 Vict. c. 109. I think it expedient to say that, since the repeal of the statute of Anne (9 Anne, c. 14), and 18 Geo. 2, c. 34, I do not think excessive gaming upon any game would in itself render the game unlawful, for excessive gaming *per se* is not any longer a legal offence. It was not one at common law, and there now exists no statute against

it. The dictum of Lord Tenterden in *Beas v. Rogier* (1 B. & C. 272, 275) that "the playing for large and excessive sums of money would of itself make any game unlawful," must be now read having regard to the fact that when that dictum was uttered the statute of Anne against excessive gaming was in full force. Nevertheless, though excessive gaming is no longer *per se* unlawful, the fact that it is habitually carried on in a house kept for the purpose of gaming is a cogent piece of evidence to be offered to a jury or other tribunal called on to determine whether that house is a common gaming-house, so as to make the keeper of it liable to be indicted for a nuisance at common law. Being satisfied that Mr. Jenks was the occupier of the house, that he opened and kept it for the purpose of gaming at, among other games, baccarat, and that baccarat is an unlawful game within the meaning of the statute, I am of opinion he was properly convicted under the 4th section of 17 & 18 Vict. c. 38, of opening and keeping a house for the purpose of unlawful gaming, and having regard to what I have already said as to the house being a common gaming house, I am of opinion that the conviction may also be supported upon the ground that all gaming therein, even at lawful games was unlawful gaming. I have now disposed of the case so far as regards Mr. Jenks. As regards the four members of the committee of management, Mr. Wilkinson, Sir Charles Cunningham, Mr. Franklin, and Mr. Phillips, having decided that the house was opened and kept for unlawful gaming, the only remaining question is whether these appellants had the care or management of or in any manner assisted in conducting the business thereof. I am of opinion that they did undertake and had such care and management, and did so assist in conducting the business of the house. It is impossible to doubt that they were cognisant of the rules and regulations of the club, and of its true character. The second rule expressly places the internal arrangements of the club under the management of the committee; the committee elect the members; they have power to make bye-laws for its regulation; and, above all, they exercised an authority with reference to this very game of baccarat to allow it to be played, or to suspend the game pending the proceedings before the magistrate. I think there was abundance of evidence to warrant their conviction. And now, lastly, as to the players, Messrs. Fitch, Nesbit, and Hayes, I do not find any evidence that they did more than play at baccarat in the house. By so doing it may be that they to some extent enhanced the profits of the house, but it does not show that they took any part in the care or management of it. A customer who buys an article at a shop might just as well be said to assist in conducting the business of the shop. The law does not make it an offence to add to the profits of a gaming establishment. It requires that there should be assistance in conducting the business. Whenever the Legislature has intended to impose a penalty upon a mere player at an unlawful game, there has been an express enactment to that effect: (See 33 Hen. 8, c. 9, s. 12; 16 Car. 2, c. 7, s. 3; 9 Anne, c. 14, s. 5; 12 Geo. 2, c. 28, s. 3; 13 Geo. 2, c. 19, s. 9; 18 Geo. 2, c. 34, s. 2, &c.) It is not necessary for us to inquire whether for playing at such a game as baccarat a player is subject to



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any penalty. It is sufficient for us to say that this conviction for assisting in conducting the business of the house cannot be sustained as against the mere players. In the course of the argument it was asked, what is the magistrate to do with persons taken into custody in a common gaming-house under the authority of 33 Hen. 8, c. 9, or 8 & 9 Vict. c. 109, ss. 3, 6? It is not necessary now to answer that question, but I would refer to the 14th section of 33 Hen. 8, c. 9 (see 8 & 9 Vict. c. 109, ss. 1, 3, 6), which does not seem to have been repealed, and from which it would seem that the justices have power to require recognisances from such persons no more to haunt such gaming-houses, or to play at such prohibited games. Moreover, the 12th section of 33 Hen. 8, c. 9, also unrepealed, imposes a penalty on persons playing in gaming-houses at unlawful games, and 12 Geo. 2, c. 28, s. 3, also unrepealed, makes persons playing at ace of hearts, &c., liable to a penalty of 50*l*. So also 13 Geo. 2, c. 19, s. 9, makes it penal to keep houses, or to play at games of dice. For the reasons above expressed, I am of opinion that the gaming in respect of which the convictions were made was unlawful, that as regards the defendants Jenks, Wilkinson, Cunningham, Franklin, and Phillips, the convictions ought to be affirmed, but that as regards the defendants Fitch, Nesbit, and Hayes, they ought to be quashed. I have but a few words more to say. Mr. Russell, at the conclusion of his able argument for the appellants, appealed to us not to make a law to meet a defect in the laws as they now stand. We have no idea of doing so. We do but administer the law as we believe it to be, and to have existed for many a long year, though it has been so often broken and disregarded with impunity that at last its existence seems to have been forgotten, and quoting the language of Blackstone (vol. 4, p. 173), I say, "Our laws against gaming are not so deficient as ourselves and our magistrates in putting those laws in execution."

SMITH, J.—This is a case stated by Sir James Ingham for the opinion of the court. The matter for determination is, whether all or any of the defendants have been guilty of the offence created by sect. 4 of the 17 & 18 Vict. c. 38. That section enacts that "any person being the owner or occupier or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any person for the purpose aforesaid, and any person having the care or management of, or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place, may, on summary conviction thereof before any two justices of the peace, be adjudged by such justices to forfeit and pay a penalty not exceeding 500*l*." The facts are as follows: The appellant, Morris Jenks, was on the 1st Dec. 1883 proprietor of and occupied the house No. 7, Park-place, St. James's-street. He opened this house for the purposes hereinafter detailed in the month of

July 1882, and kept it so open down to the 1st Dec. 1883. The appellants, Sir Charles Cunningham, Lewis David Franklin, John C. Wilkinson, and Francis Phillips, were members of the committee of management of what was called the Park Club, which club existed at No. 7, Park-place, St. James's-street. The appellants, Arthur Fitch, Nesbit, and Frederick Charles Hayes, were, on the 1st Dec. 1883, engaged in playing a game called baccarat at the house, and were members of the club, but were not otherwise interested in the house. When the appellant Jenks opened the house in July 1882 he formed the club therein which was called the Park Club. By the rules and regulations for the government of the same, it was provided, amongst other things, (a) that the club of 500 members and that the internal arrangements of the club should be managed by a committee of not more than twelve members; (b) the election of candidates should be by the committee, and one black ball should exclude; (c) the entrance fee should be 10 guineas, the annual subscription 6 guineas; (d) under no pretence should strangers be admitted into the card room; (e) hazard should not be played at the club, nor should dice be used in the club house; (f) the points at whist should not exceed 1*l*.; (g) all games should be played for ready money only; (h) the committee should have power to make such bye-laws and regulations as might appear necessary for the good order and better regulation of the club. There were other rules regarding the internal management of the establishment which to me seem immaterial to the present case. The mode by which the appellant Jenks remunerated himself for opening and keeping the house was as follows: (1) by entrance fees; (2) by annual subscriptions; (3) by card money and other money obtained from persons playing at cards at his house. The kitchen was carried on at a loss, and the wine and cigars sold were sold at almost cost price. There was no other source of income. I have not any account showing the expenditure necessary to be made for rent, servants, and other establishment charges. The following facts were proved: From four in the afternoon until three the next morning, and at times until eight the next morning, with the exception of some three hours between 7.30 and 10.30 p.m., there was played nightly at the house a game called baccarat; about twelve persons played at it at a time. To state it shortly, the game is as follows: A special table is provided for the game, with arrangements for the banker, and others playing. One of the persons playing keeps the bank and is called the banker, the others playing are called "punters." The banker plays against the others, who all sit round the table. Three packs of cards shuffled together are used for the deal, one card is dealt to each player, the banker included. The object of the game is to get "nine in pips," or as near thereto as possible. After each player has had a card dealt to him and has seen it, it is at his option whether he will stand upon it or take another. In this consists what has been termed at the bar the skill of the game, namely, the determining whether he will stand as he is or will take another card. If the banker has nine and none of the others have, he sweeps the board; if he has not nine, but a lesser number, he wins from all who are further from nine, and pays to all who

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are nearer to nine than he is. The banker has a slight extra chance, and with luck can win much quicker than an ordinary player. The banks kept at the house ranged in amounts from a minimum of 25*l.* to a maximum of 1000*l.*; the regulation bank, as it is called, was not less than 50*l.*, and would not unusually amount to 300*l.*; every third bank before 2 a.m. was a regulation bank, and it took about twenty minutes to play for the respective amounts in each successive bank; there was a fresh bank about every twenty minutes. Upon each of these banks Jenks received 1 per cent. He also received 5*s.* from each player up to 2 a.m., after that hour 5*s.* per hour was paid to him by each player up to 5 a.m., and after that hour 1*l.* per hour was paid to him by each player. This was the game habitually and continuously played at No. 7, Park-place. Jenks also cashed cheques for the players up to 200*l.* in amount, charging for so doing 1 per cent.; he would cash more than one cheque a night for a member. From these facts two things, in my judgment, are patent. The one, that in this house a game of chance was habitually played at which sums ranging from 25*l.* to 1000*l.* might be, and at times were, lost and won every successive twenty minutes whilst play existed. The other, that Jenks, by reason of such play, became possessed of money which dwarfed into insignificance the amounts received by him for entrance fees and annual subscriptions. I cannot define with accuracy what he actually received for permitting this play to take place in his house, but I must say that I think that the learned magistrate was not beyond the mark when he put it at between 40*l.* and 50*l.* a night. These being the facts proved, and to which there was no contradiction, what did Jenks keep? A common gaming-house has been defined to be a house kept or used for playing therein at any game of chance, or any mixed game of chance and skill in which (1) a bank is kept by one or more of the players exclusively of the others; or (2) in which any game is played, the chances of which are not alike favourable to all the players, including among the players the banker or other persons by whom the game is managed, or against whom the other players stake, play, or bet. That constitutes a common gaming-house. Was No. 7, Park-place, such? I say unquestionably yes. It was suggested at the bar that the bank must be kept by the owner or occupier or keeper of the house, and if kept by one of the players it was not a bank within the above definition. I know of no such limitation, and I am of opinion that it does not exist. I entirely agree with the learned magistrate when he found that the club in this case was either a pretence or a sham altogether, or was merely assistant to the main business which Jenks carried on, namely, that of gambling. Could anything be a greater farce in an establishment such as this was, where it was possible to lose 1000*l.* in some twenty minutes, than to have as one of its rules (and it has been suggested that these rules show that it was nothing but a *bonâ fide* club, with an ordinary card room), "The points at whist shall not exceed 71." When the learned counsel who argued for the appellants sought to liken the Park Club to Brooks's, White's, and the other well-known proprietary London clubs, they sought to liken it to subject-matters to which it had no resemblance,

and had nothing in reality in common excepting that each had a proprietor and each was called a club; in the one case a gambling-house pure and simple was kept, in the other this certainly was and is not the case. Holding as I do, and agreeing as I do with the learned magistrate when he held that the Park Club was nothing but a common gaming-house within the true intent and meaning of that term, the question comes whether, within sect. 4 of 17 & 18 Vict. c. 38, Jenks did keep or use No. 7, Park-place, for the purpose of unlawful gaming being carried on therein. It was admitted that he kept or used No. 7, Park-place, for the purpose of gaming, but it was strenuously argued that he did not do so for the purpose of unlawful gaming being carried on therein. It was argued that by 12 Geo. 2, c. 28, s. 2, to set up, maintain, or keep the games of the ace of hearts, pharaoh, basset, and hazard was illegal; that by 13 Geo. 2, c. 19, the game of passage and all other games with one or more dice was illegal; that by 18 Geo. 2, c. 34, to keep any house, room, or place for playing roulette was illegal, and that the gaming at those games was the unlawful gaming aimed at by sect. 4 of 17 & 18 Vict. c. 38, and none other. I am of opinion that this is not so. When the Act of 17 & 18 Vict. c. 38 was passed in the year 1854, it is common knowledge that the games of ace of hearts, pharaoh, and basset had fallen into disuse. I cannot suppose that the statute was passed simply to meet the game of hazard and games played with dice and the keeping of a house in which to play roulette. These were by no means the only games by which gambling was carried on at the period. If this had been the intention of the Legislature, in my judgment, it would have particularised those three games, and not have used the most general words possible, namely, unlawful gaming. The real question appears to me to be this. To play at a game of chance with cards for money in a common gaming-house is unlawful gaming; in other words, to game in a common gaming-house is unlawful. To keep a common gaming-house for the purpose of gaming therein is unlawful. To game therein must be either lawful or unlawful. It is not lawful, that is clear. What is it then? I say unlawful. But it is said it may be unlawful in the sense that the law will not aid it, and yet that the law will not punish it. In my judgment this distinction does not apply to gaming in a common gaming-house, and I am of opinion that the law will punish it, and that it is unlawful in the sense of being criminal. It follows, consequently, that to game in a common gaming-house is unlawful gaming and criminal. Holding as I do upon the facts proved that No. 7, Park-place, was kept as a common gaming-house, it is unnecessary to refer to sect. 2 of 8 & 9 Vict. c. 109, as to what should be sufficient evidence to establish that a house was a common gaming-house, for there is ample evidence in the case as to what No. 7, Park-place, in reality was. I wish also to add that, in my judgment, what was said by Best, J. in *Re v. Rogier* (2 Dowl. & Ry. 435) seems to me to be still good law, and therefore common sense, even though the statute of Anne has been repealed. He there says: "It is quite clear that any practice which has a tendency to injure public morals is a common law offence. No game is unlawful in itself, but

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every game may be rendered so by playing at it for an excessive stake, for it is the amount played for, and not the name or nature of the game, which is the essence of it, and which constitutes an offence in the eyes of the law." Much criticism was exercised upon this passage by the learned counsel for the appellants. What, it was asked, is an excessive stake? It was said that the criminality of a particular act could not depend upon the pecuniary means or position of the particular persons playing. What, it was urged, might be moderate to one man would be altogether excessive to the other, and so on. It was said the excess of the stake could have nothing to do with it. I do not agree. Can it be said, as to the point whether particular gaming had or had not a tendency to injure public morals, that it was immaterial whether it was played say for counters of no value or for hundreds or thousands of pounds? It seems to me that it cannot be. The tribunal before which each case comes will have to determine, if it becomes necessary, whether the stakes played for, the position of the parties, and the circumstances under which they were played for, have or have not a tendency to injure public morals. I see no more difficulty in this than for the tribunal having to decide whether a certain writing has a tendency to bring a man into discredit and disrepute so as to constitute a libel; or having to decide whether certain acts and sayings have a tendency to alienate the affections of the people by bringing the Government into disesteem so as to constitute sedition; or having to decide, as it has daily to do, whether the facts proved do or do not constitute the offence charged. Each case must be adjudicated upon on its own merits. If the circumstances of a particular case of gaming are such as to lead the tribunal before which it comes to the conclusion that they tend to injure public morals, then I say that, in my judgment, the offence of unlawful gaming has also been established within the true intent and meaning of sect. 4 of 17 & 18 Vict. c. 38. If the circumstances of the particular case do not so tend, then the tribunal will so decide. In the present case, as it seems to me, for the reasons given above, it is unnecessary to determine this fact, but had it been, I apprehend that the court would not have experienced any difficulty in making up its mind upon the subject. I am of opinion, therefore, that Jenks was rightly convicted. The next question which arises is, were the appellants, the committee-men, properly convicted? Were they persons, within the meaning of sect. 4 of 17 & 18 Vict. c. 38, having the care or management of or in any manner assisting in conducting the business of the house? The business, as before stated, was that of a common gaming-house for unlawful gaming. By the rules the committee managed the internal arrangements of the so-called club; they elected those who were to be admitted therein; they were the persons who were to make bye-laws and regulations for the good order and better regulation of the same; they were the persons who had the power of excluding a member from the club; and it was also proved that, after the police had the cognisance of what was going on at No. 7, Park-place, they gave orders that between certain days baccarat should not be played by any members in the card-room, and that they subsequently resolved to allow the game

to be resumed, and that finally, on the 18th Jan. 1884, at a full meeting of the committee, a resolution was unanimously passed suspending the game until after 31st Jan. 1884. It seems to me that these appellants the committee-men did assist in conducting the business of the house within the meaning of the statutes, and that the learned magistrate was quite right in so finding. The last question is this: Were the three appellants who were merely players at the game on the 1st Dec. 1883 rightly convicted? This depends upon whether it can be said that they were in any manner "assisting in conducting" the business of the house. If a man goes into a shop and buys an article therein, can it be said that he was assisting in conducting the business of the shop? He certainly, as it seems to me, avails himself of the business there carried on, but does he assist in conducting the business there carried on? I think not. It is, however, said that the appellants were members of the club; so they were, but in my opinion it cannot be maintained that by merely being a member of a club a man thereby assists in conducting its business. He, as before stated, avails himself of its business, but does not, in my judgment, assist in conducting it any more than a customer who purchases an article in a shop. It was further urged that these appellants used the house, and therefore come within the words of sect. 4 of 17 & 18 Vict. c. 38, which enact "any person being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same," &c. In my judgment the words "having the use of any house" point to a person having the use of a house as a licensee to carry on its business, and do not apply to a person merely going in to avail himself of the business which happens to be carried on there. The words, moreover, in the section applying to persons advancing money for the purpose of gaming with persons frequenting the house seem to show also that mere players were not aimed at by the section. I cannot and do not therefore agree with the learned magistrate as to this, and I think that the players were wrongly convicted of the charge preferred against them under the statute. Whether they were guilty of a common law misdemeanour is another matter, but that is not the point now to be considered. My brother Hawkins has gone through the whole of the statutes and cases brought to our notice by the learned counsel who argued the case, and I do not again now refer thereto. I am of opinion, for the above reasons, that the convictions against Jenks and the committee-men should be affirmed, and with costs of this appeal, and that the convictions against the three players should be quashed.

*Convictions affirmed against Jenks and the members of the committee with costs. Conviction against the players quashed, but without costs.*

Solicitors for the appellants, *Lewis and Lewis*.  
Solicitors for the respondents, *Wontner and Sons*.

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REG. v. GUARDIANS OF THE POOR OF THE STEPNEY UNION.

[Q.B. Div.]

Thursday, May 22, 1884.

(Before STEPHEN and MATHEW, JJ.)

REG. on the prosecution of THE GUARDIANS OF THE POOR OF THE MERTHYR TYDVIL UNION v. GUARDIANS OF THE POOR OF THE STEPNEY UNION. (a)

*Poor law—Settlement by residence—Pauper a sailor in the mercantile marine—Constant absence of pauper—Pauper without any independent home—39 & 40 Vict. c. 61, s. 34.*

A pauper, who was born in the appellant union, from 1876 up to the time of his application for relief, was a sailor in the merchant navy, serving on board different ships and on different voyages. Between the different voyages he always returned to his mother's house in the respondent union, remaining there on an average for four or five weeks in each year. In 1881 he also obtained jobs on shore, which lasted about three months, during which time he came to his mother's house in the respondent union, from Saturday to Monday in each week. When away he invariably left some of his clothes and other belongings at her house, and also brought to her a portion of his earnings as a contribution towards the expenses of the house, but he had no separate bedroom or bed there. In 1883 the pauper became afflicted with blindness, returned to his mother's house, and then sought parish relief. The justices made an order that he was settled in the appellant union, and directed that he should be removed there.

Held, that the justices were right in holding that the pauper had not a residence, and therefore had not acquired a settlement, in the respondent union, and had not become irremovable from there, and that he was settled in the appellant union.

On an appeal to the Glamorganshire quarter sessions against an order of removal of the stipendiary magistrate of Aberdare, adjudging the last legal settlement of John Mullines to be in the parish of St. Paul, Shadwell, in the Stepney Poor Law Union, the Court of Quarter Sessions confirmed the order subject to a

## CASE.

The pauper, John Mullines, was born in the appellant union in 1849, and resided with his parents until 1865, when he accompanied his father to America.

In Aug. 1866 his father died in America, and the pauper returned to his mother, who was living at Swansea.

From that time till 1871 the pauper gained his living by employment on shore at Swansea, and by going to sea as a sailor on different voyages—while working on shore he lived with his mother, and when following the sea he always returned to and resided with her after each voyage, and until the commencement of the next.

In 1872 the pauper's mother removed to the parish of Aberdare, in the respondents' union, and married William Crammer.

In August of that year the pauper, on his return from a voyage, went to reside with her.

William Crammer died Nov. 1875. During his stepfather's life the pauper, when on shore for a

short time, resided at his stepfather's house, and during the longer periods (which never exceeded four or five months) paid for his lodgings and food,

In Jan. 1876 the pauper returned from a voyage to his mother's house at Aberdare, and remained there till June 1876. On the 9th June 1876 he joined the *Etna*, and left her in July 1876, when he returned to his mother's house at Aberdare, where he remained till 31st Aug. 1876.

Between Aug. 1876 and Oct. 1877 the pauper served in different ships on different voyages, returning after each voyage to Cardiff, and in Oct. 1877 he returned to his mother's house at Aberdare, and remained there till December.

Between Dec. 1877 and April 1879 he served in different ships on different voyages, returning to various ports in the United Kingdom between each voyage, and in April 1879 he returned to his mother's house at Aberdare, where he remained till May.

On the 16th May 1879 he joined the *Cartaburn*, at Cardiff, for Calcutta and back, and upon his discharge from her at Dundee, on the 11th April 1880, he returned to his mother's house at Aberdare, where he remained until the end of May 1880.

On the 31st May 1880 he shipped at Cardiff on board the *Euphrates* for Calcutta and back, and was discharged from her in London, on the 31st March 1881, when he returned to his mother's house in Aberdare, where he remained a month.

He then got a shore job at Cardiff, returning from Saturday to Monday in each week to his mother's house at Aberdare. On the 8th June 1881 he shipped on board the *Beatrice*, and went certain voyages in her until his discharge the 9th Aug. 1881, when he returned to his mother's house, and remained there for a week or two.

He then obtained work under the Great Western Railway Company, at Quaker's-yard (adjoining respondents' union) five miles from Aberdare, returning at first each night to sleep at his mother's house. He afterwards slept at Quaker's-yard, leaving his clothes at his mother's house, and returning there from Saturday to Monday. He contributed to the house while with his mother, and generally brought home what he could.

When this work was over, he returned to his mother's house at Aberdare, where he remained for a week or two.

On the 21st Nov. 1881 he shipped on board the *Cordillera* to Sydney and back, and on his discharge on the 20th Feb. 1883 he returned to his mother's house at Aberdare, having in the meantime become blind, and remained there till he made his first application for relief on the 25th May 1883.

When the pauper was away at sea or otherwise, he invariably left some of his clothes and other belongings, and when on the conclusion of his voyages he returned to his mother's house, he had no separate bedroom or bed, but generally slept with his brother.

Upon returning home from any voyage he was in the habit, up to the date of his discharge in

(a) Reported by W. P. EVERELLY, Esq., Barrister-at-Law.

Feb. 1883, of handing over to his mother a portion of his savings.

The questions for the court were:

1. Whether under the circumstances stated the pauper had, during the period which elapsed from the death of his stepfather on the 22nd Nov. 1875 to the date of the order, acquired a settlement by residence (actual or constructive) in the parish of Abdare, in the respondent union, under the 39 & 40 Vict. c. 61; or

2. Whether the pauper was, at the date of the order, irremovable from the respondent union, by reason of a residence therein (actual or constructive) for a year without receiving relief during the same period.

*B. F. Williams* for the appellants.—The question here resolves itself into this, whether the pauper had resided in the respondent union in such a manner as to acquire a settlement under 39 & 40 Vict. c. 61, s. 34. The statutes fixing the period of residence necessary to render any person irremovable are 9 & 10 Vict. c. 66, s. 1, fixing it at five years; 24 & 25 Vict. c. 55, s. 1, which altered the term to three years; and 28 & 29 Vict. c. 79, s. 8, reducing the term to one year. The facts here show that the pauper resided with his mother for more than three years in the respondent union before the application for the warrant, going to sea for different voyages, but always returning to his mother's house. Hence he had an *animus revertendi*, and so there was no break in his residence. Where there is an *animus revertendi*, there is no break in the residence:

*Reg. v. Brighton*, 4 E. & B. 236;

*Reg. v. East Stonehouse*, 4 E. & B. 901.

*Reg. v. Glossop Union* (L. Rep. 1 Q. B. 227) was cited in the court below against the appellants, but that case is distinguishable on the ground that there was no absolute intention of returning, but only a conditional intention; and also on the ground that the pauper had no house to which he had a right to return. In the present case the pauper helped by his earnings to keep up the house, and always left his things there when he went away.

*W. Evans* for the respondents.—When the pauper came home, he merely lodged with his mother; no room was kept for him which he could call his own. There is no finding here that the pauper had any *animus revertendi*. *Reg. v. Glossop Union* is the case most in point. That case shows that there must be not only an intention to return, but also a place to which the pauper had a right to return. Here the pauper resided for a very short time in each year in the respondent union; but even supposing that he had an intention to return when he went away, his mother's house was not a place to which he could claim a right to return. He gave his mother a great part of his earnings, but he was merely a lodger, not having any bedroom of his own.

*Williams* in reply.—The argument that the pauper had no fixed abode to which he could claim the right to return is disposed of by the case of

*Reg. v. St Leonard's, Shoreditch*, 13 L. T. Rep. N. S. 278; L. Rep. 1 Q. B. 21,

where it was held that a person might reside in a parish, though he wandered about the street of the parish by day, and slept on doorsteps at night.

*STEPHEN, J.*—During the argument of this case I have had doubts first on one side and then on the other, which are not very easy to deal with. In 1846 it was enacted that no person should be removed from any parish in which such person had resided for five years next before the application. In 1861 the five years constituting a status of irremovability was reduced to three years, and at a later date, in 1865, to one year. But the foundation of the whole is the statute of 1846, as to the status of irremovability. The question, therefore, before us is, did the pauper in the present case reside for three years in the parish of Abdare within the respondent union. It comes to that in point of fact, because, if the mode in which the pauper lived with his mother constituted a "residence," he resided for more than three years. Now I feel bound to say that the question is mainly one of fact to be decided in each particular case, and does not admit of any absolute rule or principle of law being laid down upon the point. But there are principles of law which guide the courts in coming to a conclusion on the facts, and having found those principles it is for the court to apply them to the facts of each particular case. That being so, there are a large number of cases which show that if a person lives in a parish, but removes for a temporary purpose with the intention of returning, he does not break his residence so as to destroy his settlement. I may go further, and say that, if a person had a house which he made his head-quarters and where he kept his servants, but was absent for fifty-one weeks out of the fifty-two in the year, I should hold that that absence did not break his residence. Therefore, I do not feel concluded by the fact that the pauper in this case was away from his mother's house for a considerably longer time than he lived there. But the question comes to this, had he a residence there? Now this is a question of fact. *Mr. Williams* cited a case to us of a woman sleeping on doorsteps; and one can imagine cases from that to the opposite extreme. The present case is more like that of *Reg. v. Glossop Union* (L. Rep. 1 Q. B. 227) than any other. The pauper here lived with his mother when he returned from sea or from other work. There was no contract with his mother, though I do not lay much stress upon that, except in so far as it tends to show that, if she had turned him out of her house, he would have had no remedy against her. He did in one sense reside with his mother, because he lived there when he returned, but I do not think that he had a residence there. Upon the whole I have come to the conclusion that I cannot say that the magistrates were wrong in holding that he was not settled in Abdare, and that he was settled in Stepney.

*MATHSW, J.*—I am of the same opinion. I cannot say that the magistrates were wrong. During the life of his stepfather, the pauper was clearly only a lodger with his stepfather's consent. Then after the death of his stepfather, he lived with his mother, but was most of the time away. It

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is rather difficult to discover upon what footing he was received at her house. He appears to have been generous to her, and to have given her a part of his earnings, but her house was not a place to which he had any right to come back as a residence. On the whole, therefore, I think that the judgment ought to be affirmed.

*Order affirmed.*

Solicitor for the appellants, *W. H. Sweepstone.*

Solicitors for the respondents, *J. H. Wrentmore*, for *James and Co.*, *Merthyr Tydvil.*

*Feb. 22 and March 8, 1884.*

(Before Lord COLERIDGE, C.J. and CAVE, J.)

THE COMPAGNIE FRANÇAISE DU TÉLÉGRAPHE DE PARIS A NEW YORK (apps.) v. THE ASSESSMENT COMMITTEE OF THE PENZANCE UNION AND OTHERS (resps.). (a)

*Poor rate—Telegraph company—Rateability of overhead wires—43 Eliz. c. 2.*

A telegraph company entered into an agreement with the Postmaster-General by which it was agreed that the latter should provide and keep appropriated and maintained for the exclusive use of the company certain telegraph wires between certain specified places and a pneumatic tube between two specified places, and should also provide, "keep appropriated, maintain, and work for the exclusive use" of the "company in connection with the wires two translators and the necessary batteries;" the special wires, pneumatic tube, and translators and batteries to "remain the property of the Postmaster-General;" the Postmaster-General not to be liable to make good any damage to any of the special wires certified by his officers to have been occasioned by the act, neglect, or default of the company; the company not to use any of the special wires for the transmission of any messages except American messages and service messages of the company; the company to pay, in consideration of the "appropriation and maintenance by the Postmaster-General for the use" of the company of the special wires in respect of each special wire a yearly rent or sum calculated at the rate of 5*l.* for every mile, and, in respect of the pneumatic tube, the yearly rent or sum of 350*l.*, and, in respect "of the appropriation, maintenance, and working by the Postmaster-General to the use and on the behalf of the company" of the translators and batteries, the yearly rent or sum of 350*l.*; the company not to part with the possession of the special wires without the consent of the Postmaster-General; the Postmaster-General, on the expiration of the agreement, "to resume possession" of the wires. The company, under this agreement, took the use, as therein provided, of certain telegraph wires, which were supported on poles in the ordinary way, and, a portion of them passing through

a parish in the P. Union, the Assessment Committee thereof rated the company to the relief of the poor in respect of an alleged occupation by them of the said wires and poles. The company having appealed:

*Held, on case stated by consent, that, upon the true construction of the agreement, the company had not the exclusive occupation of the wires, and, therefore, were not liable to be rated in respect of them.*

This was a special case stated by consent of all parties and by the order of a judge under the provisions of the statute 12 & 13 Vict. c. 45, s. 11, for the opinion of the court as to the liability of the appellants therein to be rated to the relief of the poor under the circumstances therein appearing.

The facts set out in the special case were, so far as material, as follows:—

The appellants are a telegraph company owning certain submarine telegraph cables between France and America, and also working submarine cables between France and a point on the Cornish coast near the Land's End, and carrying on the business of a telegraph company in connection therewith; and the respondents were the assessment committee of the Penzance Union in the county of Cornwall and the churchwardens and overseers of the poor of the parish of St. Buryan in the said union.

In order to enable them to carry on their business as aforesaid, the appellants on the 14th April 1880 entered into an agreement with certain submarine telegraph companies, who were possessed of concessions for the laying of submarine telegraph cables between England and France, for the construction of a telegraph cable between the aforesaid point near the Land's End and a point of the French coast, and also with Her Majesty's Postmaster-General. And on or about the 25th Jan. 1881 they also entered into a supplemental agreement with the Postmaster-General relative to the above matter.

Under and in pursuance of such agreements, the appellants have the use, as therein provided, of two telegraphic wires which are the property of the Postmaster-General. These wires are supported upon poles in the ordinary way, and extend from Penzance in Cornwall to the landing place of the aforesaid telegraph cable near the Land's End.

During a portion of their course the said wires pass through the parish of St. Buryan in Penzance Union in the county of Cornwall, and the respondents, the assessment committee, having jurisdiction over such parish, in drawing up their supplemental valuation list, included the appellants as persons liable to be rated to the relief of the poor of such parish in respect of an alleged occupation by them of the said telegraph wires and poles situated in such parish, and in accordance with such valuation list the appellants were on the 5th Oct. 1881 rated to the relief of the poor in the said parish in the sum of 16*s.*, the following being a copy of such rate:

No.	Name of Occupier.	Name of Owner.	Description of Property Rated.	Name or Situation of Property.	Gross Estimated Rental.	Rateable Value.	Rateable in the £.
12	French Transatlantic Telegraph Company.		Telegraph poles and wires.	Parish through-out.	£30.	£16.	£ s. d. 0 16 0
13							

The appellants have no further or other interest in the said telegraph wires and poles than such

(a) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

as is given to them by the provisions of the agreements herein above referred to.

"The question for the opinion of the court was,



whether the appellants were liable to be rated in respect of the said telegraph poles and wires, or either of them, and judgment in conformity with the decision of this court, and for such costs as the court might adjudge, was to be entered on motion by either party at the sessions next or next but one after such decision should have been given.

The following were the paragraphs of the above-mentioned agreement of 14th April 1880 which were material to the issue raised in the case:

10. The Postmaster-General shall, with all convenient speed, provide and shall thenceforth during the continuance of his agreement keep appropriated and maintain for the exclusive use of the Paris and New York Company the following telegraph wires (hereinafter called special wires) that is to say,

(1) A telegraph wire between the landing place of the Déolin Cable, near the Land's End, in the county of Cornwall, and an office to be established by the said company at Penzance in the said county.

(2) A telegraph wire between the office to be established by the said company at Penzance aforesaid, and an office to be established by the said company in the city of London.

(3) A telegraph wire between the office to be established by the said company at Penzance aforesaid, and an office to be established by the said company at Liverpool, in the county of Lancaster.

(4) A telegraph wire between the office to be established by the said company in the city of London, and the office to be established by the said company at Liverpool aforesaid.

11. The Postmaster-General shall also, with all convenient speed, provide and shall thenceforth during the continuance of this agreement keep, appropriate, and maintain for the exclusive use of the Paris and New York Company a pneumatic tube connecting the Central Telegraph Office of the Postmaster-General in the city of London with the offices of the Paris and New York Company at No. 24, Royal Exchange, in the said city.

12. The Postmaster-General shall also, with all convenient speed, provide and shall thenceforth during the continuance of this agreement keep appropriated, maintain, and work for the exclusive use of the Paris and New York company in connection with the said special wires, two instruments called translators and the necessary batteries in connection therewith at the head post-office in Bristol, or at such other postal telegraph office as may be selected by the Postmaster-General, and the said translators shall be such as can conveniently be worked in connection with the instrument known as the Morse apparatus, with polarised relay and single or double-current key.

13. The special wires, pneumatic tubes, and translators and batteries for the time being appropriated to the use of the Paris and New York company as aforesaid shall remain and be the property of the Postmaster-General.

14. Except as aforesaid, the Paris and New York Company shall provide and maintain their own instruments and batteries, and shall work the special wires for the time being at their own cost.

15. The Paris and New York Company shall not in working either of the special wires passing through Bristol use any instrument which, in the opinion of the Postmaster-General or any of his officers, cannot conveniently be used in connection with the said translators; and the Paris and New York Company shall not in working the special wires to be provided and appropriated as aforesaid, or any of them, use any instrument, battery, or materials which, in the opinion of the Postmaster-General or any of his officers, shall or may injure or be likely to injure any part of the said wires; and the Paris and New York Company shall within twenty-four hours after notice in writing shall have been sent to their principal office for the time being in London by or on behalf of the Postmaster-General, or any of his officers, that any instruments used by the company cannot be conveniently used in connection with the said translators, or that any instrument, battery, or materials used by the Paris and New York Company is or are injurious or likely to be injurious to any of the special

wires, discontinue the use of the instruments, batteries, and materials specified in such notice; and the Paris and New York Company shall permit the Postmaster-General, by his engineers, electricians, or any other officer or officers who may be appointed by him for that purpose, to inspect from time to time, with or without notice, the instruments, batteries, and materials used or intended to be used by the Paris and New York Company in the working of the special wires or any of them.

16. The Postmaster-General shall incur no liability to the Paris and New York company by reason of any accidental defects or interruptions to the working of any of the special wires or of the translators or batteries for the time being appropriated to the use of the said company, but will repair, with all convenient speed, such accidental defects or interruptions.

17. Notwithstanding the stipulations hereinbefore contained, the Postmaster-General shall not be liable to make good any damage to any of the said special wires which any of the officers of the Postmaster-General for the time being in charge of their maintenance respectively shall certify to have been occasioned by the act, neglect, or default of the Paris and New York Company, or their servants or agents, and if the Postmaster-General shall make good any such damage as aforesaid, the said company shall on demand pay to him the costs of so doing and the certificate of any such officer as aforesaid shall be conclusive as to the amount of such costs.

18. The Paris and New York Company shall not use any of the said special wires for the transmission of any messages except American messages and service messages of the said company.

19. In consideration of the appropriation and maintenance by the Postmaster-General for the use of the Paris and New York Company of the special wires, the said company shall, during the continuance of this agreement, pay to the Postmaster-General in respect of each special wire a yearly rent or sum calculated at the rate of five pounds for every mile of the length of such special wire and at the like rate for any fraction of a mile of such length.

20. In consideration of the appropriation and maintenance by the Postmaster-General for the use of the Paris and New York Company of the said pneumatic tube, the said company shall, during the continuance of this agreement, pay to the Postmaster-General in respect thereof the yearly rent or sum of 350l.

21. In consideration of the appropriation, maintenance, and working by the Postmaster-General to the use and on the behalf of the Paris and New York Company of the said translators and batteries, the said company shall, during the continuance of this agreement, pay to the Postmaster-General the yearly rent of or sum of 350l.

24. The special wires, the Déolin cable, and the American cable, shall, whilst worked by the Paris and New York Company, be open for the messages of all persons alike, without favour or preference.

34. The Paris and New York Company shall not part with the possession of the special wires, or any of them, without the consent of the Postmaster-General under his seal, and the said company shall not, without the like consent, assign, dispose of, or underlet the benefit of the agreements and stipulations between the Postmaster-General and the said company contained in these presents, or any of them or any part thereof.

41. Provided also that, in case the Paris and New York Company shall, without the consent of the Postmaster-General and the submarine companies under their respective seals, part with the possession of the Déolin cable, or of the special wires or any of them, or shall, without such consent as aforesaid, assign, dispose of, or underlet the benefit of the agreements and stipulations herein contained, or any of them, or any part thereof; or, in case any sum of money which shall be payable by the Paris and New York Company to the Postmaster-General or to the submarine companies under or by virtue of these presents, shall be in arrear and unpaid for two calendar months after the same ought to have been paid, or in case the Paris and New York Company shall use the Déolin cable or the special wires, or any of them, for the transmission of any message not being a service message or a message which has been, or is intended to be, transmitted from or to America by means of the American cable; or in case the Paris and New York Company shall not commence the business of



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transmitting messages between France and America within six calendar months after the date of these presents, or, having commenced such business, shall afterwards cease for a period of twelve calendar months to carry on the same, then, and in any such case, it shall be lawful for the Postmaster-General and the submarine companies at any time thereafter, by notice in writing under their respective seals, to determine these presents and the rights and obligations hereby created as from the date of the service of such notice at the office or last known office of the Paris and New York Company in London.

43. Upon the expiration or determination by any means of these presents and the rights and obligations hereby created, it shall be lawful for the Postmaster-General to resume the possession of the said special wires and each of them, and for the submarine companies to take possession of the Déolin cable free from any right or interest of the Paris and New York Company therein respectively, but subject, as to the said cable, to the provisions of any agreement or agreements that may be then subsisting between the Postmaster-General and the submarine companies in relation thereto.

The following addenda were by consent added on to the special case:

The special wires kept appropriated and maintained for the exclusive use of the appellants under the said agreements are supported on poles, or otherwise fixed, in precisely the same manner as other telegraphic wires. During the whole of their course between Penzance and London, the special wires above referred to are supported on the same poles as other wires belonging to the Postmaster-General, and used by him for general telegraphic purposes. The Postmaster-General has not, up to the present time, established any telegraphic station at the landing-place of the Déolin cable (a distance of nine miles from Penzance), nor at any such station along this route of the separate wires between those two places.

All the wires of the Postmaster-General from Penzance which go in the same direction as the special wires to Déolin are supported on the same poles as such special wires for about a quarter of a mile. They then (with the exception of two which go to Newlyn) branch off in directions differing from that of the special wires. The two wires to Newlyn continue to be supported upon the same posts as the said special wires for a further distance of a mile and a quarter, and then branch off.

*F. Meadows White, Q.C.* (with him *Moulton*) for the appellants.—The appellants are not rateable in respect of these wires. The facts set out in the special case show that, the poles being wholly the property of the Postmaster-General, and in no wise in the possession or occupation of the appellants, there is no occupation on their part of the soil. All that the Postmaster-General agrees to do is to give the use of two wires, and he may vary them and assign wires going by a different route through different parishes. The use of the words "rent" and "possession" in the agreement are not material, "rent" being also used with respect to things which are obviously chattels, and the provisions with respect to repairs showing that the Postmaster-General was really in possession of the wires. The contention of the appellants is that the agreement confers on them no occupation within the meaning of 43 Eliz. c. 2, s. 1. It is true that telegraph wires and poles are within the statute (*The Electric Telegraph Company v. The Overseers of Salford*, 11 Ex. 181), but that is on the obvious ground

that the poles occupied the ground. Here the poles are obviously in the possession of the Postmaster-General, and the arguments which prevailed in the case cited do not apply to the wires, on the occupation of which alone the respondents must rely here. The appellants have the right to use the wires, which is a mere easement as distinct from the exclusive occupation of them, the duty of maintaining them being with the Postmaster-General, and the company only having the right to use them, not for any messages they please, but only for certain specified purposes. The case resembles that of *Allen v. The Overseers of Liverpool* (30 L. T. Rep. N. S. 93; L. Rep. 9 Q. B. 180), in which the words "appropriate for the use" and "rent," being very similar to the words in the present agreement, were used, and it was held notwithstanding, that the quay-space appropriated by the Mersey Docks Board to a steamship company at a certain "rent" was not in the exclusive occupation of the steamship company so as to render them liable to be rated in respect thereof. There *Blackburn, J.* says: "As to the words 'appropriated for the exclusive accommodation and use,' I do not know whether it was done purposely, but just such words are used as would be applicable to the case of an inmate of an inn or a lodger who has a room or lodgings set aside for his use and occupation," and "The poor rate is a rate imposed by the statute on the occupier, and that occupier must be the exclusive occupier, a person who, if there was a trespass committed on the premises, would be the person to bring an action for trespass for it. A lodger in a house, although he has the exclusive use of rooms in the house in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass *quare clausum fregit*, the maintenance of the action depending upon the possession." These words apply exactly to the present case, the appellants having merely the exclusive enjoyment of the occupation, and not being in a position to support an action for trespass. So in *Smith v. The Churchwardens and Overseers of St. Michael, Cambridge* (3 L. T. Rep. N. S. 687; 3 E. & E. 383) A. let to the Inland Revenue Department five rooms of a house in his occupation, it being stipulated that the rent was to be 90*l.*, to include rent, rates, taxes, &c., and it was held that the premises were not exempt. The word "rent" in the agreement in the present case is not material. The case of *Willing v. The Assessment Committee of St. Pancras* (37 L. T. Rep. N. S. 126; 2 Q. B. Div. 581) is stronger than the present case. There, in consideration of a yearly payment, a person had affixed to the land hoardings for advertising purposes, but it was held that he was not rateable as an occupier of an advertising station," *Mellor, J.* saying (2 Q. B. Div. 585): "We must, in accordance with the principle laid down in *Smith v. The Overseers of St. Michael, Cambridge*, look to what was the substance of the relation between the parties, and not to isolated ex-

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pressions, such as the word 'rent,' used in the course of the transaction. I agree with the opinion cited by Lord Hatherley in *Cory v. Bristow* (36 L. T. Rep. N. S. 594; 2 App. Cas. 275), as that of Lord Campbell, C.J. in the case of *Forrest v. The Overseers of Greenwich* (8 E. & B. 900), that in order to be rateable the occupation must be permanent in its nature." Here the Postmaster-General had power at any time to assign other wires travelling by other routes, and therefore it cannot be said that the occupation was permanent. The case of *The Midland Railway Company v. The Overseers of Badgworth* (34 L. J. 25, M. C.) is also exactly in point. There it was held that there was no rateable occupation by the Midland Railway Company, but only an easement of a piece of railway belonging to the Great Western Railway Company, which the latter company kept in repair, and supplied with a staff of officials, although the Midland Railway Company used one line, viz., a narrow-gauge line unsuitable to the rolling stock of the other company, exclusively. [Lord COLERIDGE, C.J.—The company in this case repay the Postmaster-General for the repairs done, and the posts carry no wires for the Postmaster-General, and he has no further interest in them than the rent he gets from the company.] The Postmaster-General has the right to put wires on the posts for his own use. [Lord COLERIDGE, C.J.—Does he not exclusively appropriate something to the use of the company for which he gets a payment which is called rent?] He takes the rent in return for the obligation to place at the disposal of the company any two wires.

*Charles, Q.C. (with him Bullen).*—This case is concluded by the case of *The Electric Telegraph Company v. The Overseers of Salford* (11 Ex. 181; 24 L. J. 146, M. C.), the real decision in that case being that the wires occupy so much of the ground as they are suspended over. Pollock, C.B. there says: "It seems to be conceded, that if the wires of the telegraph passed under ground the company would be liable; and in that case it is not suggested that any difficulty would arise from the fact that they are subject to removal to some other place. Again, suppose the wires passed under water, would not the company be liable? Then they are liable if the wires pass through the air, instead of land or water. The passage which my brother Martin cited from Burns' Justice shows that there is no distinction between the occupying land by passing through a fixed point of space in the air to another fixed point, or by passing in the same manner through land or water. Land extends upwards as well as downwards, and whether the wires and posts are fixed above or below the surface, they occupy a portion of the land." So also a flat in the Temple is rateable. [CAVE, J.—Can you bring an action for trespass against a man who passes over your field in a balloon?] In such a case there would be no permanent occupation so as to affect the present case. [CAVE, J.—Suppose a publican or the border of a parish put out a signpost hanging over another parish, would he be rateable in respect of it?] If telegraph wires passed over a corner of a parish, and there were no posts in that parish, they would be rateable under the authority of the *Electric Telegraph Company v. The Overseers of Salford*. The case of *Allan v.*

*The Overseers of Liverpool* is not in point. The decision there is to the effect that the sections of the Mersey Docks Act (21 & 22 Vict. c. 92), empowering the Docks Board to give appropriate quay spaces to companies, did not confer a rateable occupation. Here the company alone use the wires. [CAVE, J.—That is only the exclusive enjoyment. The question is, can they maintain an action for trespass?] Under the 10th, 16th, and 17th clauses of the agreement they could. [CAVE, J.—They could maintain an action for damages for cutting the wire so as to prevent them from sending their messages, but could they for the price of the wire?] That would be an action for trespass. [CAVE, J.—Suppose a composition was discovered, which if placed upon the wires would facilitate the transmission of messages, could they paint the wires with it?] As the Postmaster-General gives the company the exclusive use he cannot send messages of his own along the wires, and therefore the agreement amounts to an actual demise, giving the company an exclusive and rateable occupation:

*The London and North-Western Railway Company v. Buckmaster*, 31 L. T. Rep. N. S. 835; 33 L. T. Rep. N. S. 329; L. Rep. 10 Q. B. 70, 444.

*F. Meadows White, Q.C. in reply.*—There can be no permanent and exclusive occupation when two wires along any of the various routes would satisfy the agreement. [Lord COLERIDGE, C.J.—Have not the company the exclusive occupation of the wires of one route so long as they use those passing by that route?] The legal possession remains with the Postmaster-General. [Lord COLERIDGE, C.J.—What possession then does he resume under clause 43?] Only so much as he has parted with in pursuance of the earlier clauses.

*March 8.*—The judgment of the Court was delivered by

CAVE, J.—The question in this case is whether the appellants by the terms of an indenture of the 14th April 1880 are in the exclusive occupation of certain telegraph wires so as to be rateable to the poor rate of the parish of St. Buryan in respect thereof, or whether they have only the enjoyment of the wires without any actual occupation thereof. It does not appear distinctly from the case or the addenda whether the Postmaster-General has any wires in the parish of St. Buryan except the special wires, but it is stated that during the whole of their course between Penzance and London the special wires are supported on the same poles as other wires belonging to the Postmaster-General. There is nothing in the agreement to prevent the Postmaster-General from attaching other wires to the telegraph posts throughout the parish of St. Buryan, and our judgment cannot turn upon the fact, if it be so, that none other but the special wires are supported by the telegraph posts in the parish in question. Telegraph posts and wires have been held to be rateable (*The Electric Telegraph Company v. The Overseers of Salford*, 11 Exch. 181; 24 L. J. 146, M. C.), and from the report of that case it appears to have been the unanimous conclusion of the judges of the Exchequer that the wires as well as the posts are rateable. By that judgment we are bound, and the only remaining question is, whether the appellants have an exclusive occupation of the wires. The indenture recites that it has been

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agreed that the Postmaster-General shall appropriate for the use of the appellant company certain special wires. In the operative part there is no demise in terms; but the Postmaster-General covenants that he will, with all convenient speed, provide and thenceforth during the continuance of the agreement keep, appropriate, and maintain, for the exclusive use of the company, a telegraph wire between the landing place of the Déolin cable near the Land's End, and an office to be established by the company at Penzance, and also a telegraph wire between the office at Penzance and an office to be established by the company in London. The Postmaster-General also covenants that he will, with all convenient speed, provide, and thenceforth during the continuance of the agreement keep appropriated and maintain for the exclusive use of the company, a pneumatic tube connecting the Central Telegraphic Office of the Postmaster-General in London with the offices of the company in that city; and further, that he will, with all convenient speed, provide, and thenceforth during the continuance of the agreement keep appropriated, and maintain and work for the exclusive use of the company, in connection with the special wires, two translators, and the necessary batteries in connection therewith at the head post office at Bristol. By the 13th clause of the agreement the special wires, pneumatic tube, translators, and batteries for the time being appropriated to the use of the company are to remain and be the property of the Postmaster-General. Pausing here for a moment I would remark, (1) that the Postmaster-General does not covenant to appropriate any definite wires to the use of the company, and that if there were a dozen wires suspended from the telegraph posts, it is left entirely to the Postmaster-General to decide which he would appropriate to the use of the company, and that he may change the wire as he thinks fit; (2) that there are no words used in this part of the agreement which import that the company is to have possession of the wire; (3) that the words "shall keep appropriated and maintain" rather point to a retention of possession by the Postmaster-General; and (4) that the same words, with the addition of the words "and work," are used with reference to the translators of which the Postmaster-General is obviously to retain possession, as are used with reference to the wires and the pneumatic tube. By clause 14 the company are to provide and maintain their own instruments and batteries, and to work the special wires for the time being at their own costs. By clause 15 the company are not in working the special wires to use any instrument, &c., which shall or may injure, or be likely to injure the wires, and they are to permit the Postmaster-General to inspect from time to time the instruments, &c., used or intended to be used in the working of the special wires. By clause 16 the Postmaster-General is to incur no liability to the company by reason of any accidental defects or interruptions to the working of any of the special wires, or of the translators or batteries for the time being appropriated to the use of the company, but is to repair, with all convenient speed, any such accidental defects or interruptions. By clause 17 the Postmaster-General is not to be liable to make good any damage to the special wires which any

of the officers of the Postmaster-General for the time being in charge of their maintenance respectively shall certify to have been occasioned by the act, neglect, or default of the company or their servants, and, if the Postmaster-General shall make good any such damage, the company shall, on demand, pay to him the costs of so doing. By clause 18 the company are not to use any of the wires for transmission of any messages except American messages and service messages of the company. Pausing here again, I fail to see in any of these stipulations anything to lead me to conclude that the company are to be the exclusive occupiers of the wires. The clause empowering the Postmaster-General to inspect the company's instruments, but not to inspect the wires, rather points the conclusion that the wires are regarded as being still in the possession of the Postmaster-General. And so does clause 17, which does not give the Postmaster-General power to enter and make good damage done by the company, but simply provides that, if he makes good any such damage (assuming, apparently, that he has a right to do it), the company will pay the costs of so doing. Clause 19, which provides for a rent to be paid by the company in respect of such special wire in consideration of the appropriation and maintenance of the wires for the use of the company, would favour the contention of the respondents, were it not that precisely similar language is used in clause 20 in respect of the pneumatic tube, and in clause 21 in respect of the translators and batteries. There are, however, two clauses, the 34th and the 43rd, which, to my mind, create some difficulty, and I am not sure that I understand them. Clause 34 provides that the company shall not part with the possession of the special wires without the consent of the Postmaster-General. Clause 41 provides that if they do so the Postmaster-General may determine the agreement, and clause 43 provides that on the expiration or determination of the agreement the Postmaster-General may resume the possession of the wires. I find no similar provisions with respect to the pneumatic tube, and I have come to the conclusion that these words refer not to the wires as the subject of physical occupation, but to the control over the use of the wires which the company obtain by reason of the wires being in communication with the instruments in their offices at Penzance, London, and Liverpool. The Postmaster-General is the owner of the posts and of all the wires. He is admittedly to retain possession of the posts. He is to provide special wires (not definite wires, but any wires he may from time to time deem suitable) for the use of the company, and he is to keep these wires appropriated to such use and maintain them during the agreement by his officers who are to be in charge of their maintenance. The company, on the other hand, are to have the exclusive use of the wires, but they are not to work them with any instrument, &c., they please, but only with such as in the opinion of the Postmaster-General will not injure the wires, nor are they to use the wires except for the transmission of American messages and service messages, and they are to keep them open for the messages of all persons alike without favour or preference. Suppose a stranger injured the wires in some way that did not interfere with their power of transmitting messages, as for

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instance by painting them or affixing advertisements to them, could the company bring an action? I think not. Suppose some way of utilising the wires were discovered which would produce a profit also without interfering with the power of transmitting messages, to whom would the right of so using the wires belong? Surely to the Postmaster-General and not to the company. But if these things are so, the Postmaster-General is the occupier and not the company. On the whole I have come to the conclusion that the Postmaster-General and not the company occupies the rateable subject, and that the company have only an exclusive enjoyment without occupation. The case seems to me to resemble most the case of a lodging-house keeper who agrees that a particular lodger shall have the exclusive use of a bedroom, and stipulates that, if the rent is not duly paid, the lodger shall give up and the lodging-house keeper may resume possession of the bedroom. I apprehend that, in that case no one would suggest that the lodger was rateable, more especially if, as is the case here, the selection of the particular bedroom was to be left to the keeper of the lodging-house, and I therefore think our judgment should be for the appellants.

Lord COLERIDGE, C.J.—It has often been said by men of undoubted distinction, that questions of construction are those on which judges are most likely to differ, and I confess that if I had written the judgment in this case I think that I should have begun to reason from the other end of the agreement, and, taking the 41st and 43rd clauses as containing the unambiguous words, I should have explained its ambiguous parts by those which are to my mind clear. It is to my mind difficult to understand how the telegraph company can give up possession to the Postmaster-General unless the Postmaster-General has first given up possession to them, and therefore I should have started from the opposite point of view. But after the arguments that have been put forward by my brother Cave, I do not feel sufficient confidence in the view I have suggested to differ formally from him.

Solicitors for the appellants, *Mackrell and Co.*  
Solicitors for the respondents, *Dangerfield and Blythe.*

*Tuesday, April 1, 1884.*

(Before DAY and SMITH, JJ.)

BRYSON v. RUSSELL. (a)

*Contagious Diseases (Animals) Act 1878 (41 & 42 Vict. c. 74)—Action against constable for wrongful conversion of cattle—Local venue—Notice of action—1 & 2 Will. 4, c. 41, s. 19—2 & 3 Vict. c. 93, s. 8.*

*Sect. 19 of 1 & 2 Will. 4, c. 41 (an Act by which special constables were appointed) provides that all persons sued for anything done in execution of the provisions of that Act shall be entitled to local venue and one month's notice of action.*

*Sect. 8 of 2 & 3 Vict. c. 93 provides that constables appointed under that Act shall have all the powers, privileges, and duties which any constable has within his constableness by virtue of the common law, or of any statute made or to be*

*made; and every provision of the first recited Act (i.e., 1 & 2 Will. 4, c. 41) shall be deemed to extend to constables appointed under this Act.*

*In an action brought against a constable . . . for detainue and wrongful conversion of the plaintiff's cattle . . . while acting under the powers and provisions of the Contagious Diseases (Animals) Act 1878:*

*Held, that the right to local venue and notice of action given by sect. 19 of 1 & 2 Will. 4, c. 41, though extending to constables appointed under 2 & 3 Vict. c. 93, but acting under the earlier Act, does not extend to constables acting under the provisions of any subsequent Act, and, consequently, that the constable sued in respect of acts done under the Contagious Diseases (Animals) Act 1878 was not entitled to local venue or notice of action.*

QUESTION of law raised by the pleadings under Order XXV., r. 2.

The action was brought for detainue and wrongful conversion of cattle belonging to the plaintiff.

From the statement of defence, it appeared that the defendant was a superintendent of police for the county of Cumberland, and that he had stopped and detained the plaintiff's cattle under the powers given by the Contagious Diseases (Animals) Act 1878, on the ground that such cattle had been removed into the county of Cumberland without a licence, contrary to certain regulations made under that Act by the local authority of the place, and also that the plaintiff had refused to inform the defendant as to the place or district from which the cattle had been removed, or to take the cattle back to that place.

The 4th paragraph of the defence, upon which the present question turned, was as follows:

*The defendant further says that the acts complained of were committed by him in the execution and in pursuance of the Acts 1 & 2 Will. 4, c. 41, and 2 & 3 Vict. c. 93, as well as under and in pursuance of the Contagious Diseases (Animals) Act 1878, and this action has not been laid in the county where the said acts were committed, viz., in the said county of Cumberland, and no notice in writing of the said cause or causes of action was given to the defendant one calendar month before the commencement of the said action, pursuant to the said first-mentioned statutes.*

The venue in the action was laid in the county of Northumberland, and the question was whether the defendant was entitled to have the venue laid in Cumberland, or to have one calendar's month's notice of action, as alleged in paragraph 4 of the statement of defence.

By sect. 19 of 1 & 2 Will. 4, c. 41 (an Act under which special constables were appointed), it is provided,

*That all actions and prosecutions for anything done in pursuance of this Act shall be tried and laid in the county where the fact was committed, and notice in writing of such cause of action shall be given to the defendant one calendar month at least before the commencement of the action.*

And by sect. 8 of 2 & 3 Vict. c. 93, it is provided,

*That the chief constable and other persons so appointed (i.e., as constables under this Act) shall have all the powers, privileges, and duties throughout the county . . . which any constable duly appointed has within his constableness by virtue of the common law, or of any statute made or to be made; and every provision of the first recited Act (i.e., 1 & 2 Will. 4, c. 41) shall be deemed to extend to constables appointed under this Act.*

*Ridley for the plaintiff.—As to local venues, all*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

[Q.B. Div.]

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local venues were abolished by the Judicature Act 1875. By sect. 19 of 1 & 2 Will. 4, c. 41, special constables acting under that Act are entitled to local venue and notice of action; and by sect. 8 of 2 & 3 Vict. c. 93, constables appointed under the later Act are to have the same rights and privileges when acting under that Act as special constables appointed under the former Act. Again, by sect. 110 of the Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70), persons acting under that Act were entitled to local venue and notice of action. My point is that, inasmuch as notice of action was required by these statutes, and no notice was required by the Act of 1878, the Legislature must have intended that constables acting under the Act of 1878 should not be entitled to notice of action. [He was stopped.]

*R. O. B. Lane* for the defendant.—The position of constables is unaltered and is the same as under 2 & 3 Vict. c. 93. By sect. 5 of 1 & 2 Will. 4, c. 41, special constables appointed under that Act are to have all the powers and advantages which any constable duly appointed now has within his constablewick. If I stopped at this section I should be in the difficulty of importing into that Act any subsequent rights and duties; but, coming to sect. 8 of 2 & 3 Vict. c. 93, this section provides that constables appointed under that Act shall have all the powers, privileges, and duties which any constable duly appointed has within his constablewick by virtue of the common law or any statute made or to be made, thus giving constables the same privileges under any law then existing or afterwards to be made. The 19th section of the earlier Act would seem to limit me to acts done in execution of that Act; but, turning to the later Act, the effect is that we must read the provisions of the earlier Act into the later Act. If this be the right construction of these statutes, then so long as 2 & 3 Vict. c. 74 is unrepealed, constables acting under the provisions of the Contagious Diseases (Animals) Act 1878, are entitled to the privilege of that Act, for sect. 50 of that Act imposes on constables appointed under 2 & 3 Vict. c. 74 the duty of carrying out the provisions of the Act of 1878. We must read 2 & 3 Vict. c. 74 as if it contained the 19th section of 1 & 2 Will. 4, c. 41. Then sect. 50 of the Contagious Diseases (Animals) Act 1878 says that one of the functions and duties of a constable (*i.e.*, a constable appointed under 2 & 3 Vict. c. 93) shall be to execute the provisions of that Act. Again, if a constable is not entitled to notice of action, he would have no opportunity of making amends. In all the Police Acts the provisions for notice of action have always been repeated, and the strong inference is that the Legislature intended the police to have this protection in all cases and everywhere, and therefore, if they have omitted it here, it was because they thought it unnecessary, as the provisions of the earlier Act should be deemed to have been extended to the later Act.

*Dar, J.*—I cannot undertake a duty so onerous as to correct a statute, as Mr. Lane argues we ought to do. He contends that in a great number of instances the Legislature have introduced provisions into statutes for the protection of the police, and as that has not been done in the present case we ought to do it for them. I rather draw an opposite inference, and think that

if the Legislature omitted these provisions it was because they intended that they should be omitted, and that constables acting under the provisions of the Act should not have the protection given by the former statute. I find here in the first Act a protection to police in respect of things done in pursuance of that Act: this protection was, no doubt, necessary and desirable, as a large number of duties was imposed on them by that Act. Then 2 & 3 Vict. c. 74 was passed, which regulates rural police, and sect. 8 of which provides that constables appointed thereunder shall have all the powers, privileges, and duties throughout the county which any constable duly appointed has within his constablewick, by virtue of the common law, or of any statute made or to be made; and that every provision of the first recited Act (*i.e.*, 1 & 2 Will. 4 c. 41) shall be deemed to extend to constables appointed under this Act. The effect of this is that a constable appointed under the second Act, but acting in pursuance of the former Act, is, no doubt, entitled to the protection given by sect. 19 of the former Act. The whole question is whether the provisions of the 19th section of the former Act can be deemed to protect a constable in respect, not of acts done under that Act, but in respect of acts done under an Act lately come into force. I can find no real or substantial ground for holding that those provisions do extend to the protection of constables acting under a recent Act. In the last Contagious Diseases (Animals) Act, the police are not protected by any such provision as is contained in sect. 19 of 1 & 2 Will. 4 c. 41; and when police seize cattle under the Act of 1878 they are not acting under the former Act. I think, therefore, that paragraph 4 of the statement of defence is bad, and must be struck out.

*SMITH, J.*—The defendant here is a county constable, who is sued by the plaintiff for having taken his cattle, and he can only be protected under the Contagious Diseases (Animals) Act 1878, for without that Act he could not be justified. The defendant says that under that Act he is entitled to local venue and notice of action. But under the Act of 1878 there is no provision which entitles him to local venue or notice of action; but then he says that by sect. 19 of 1 & 2 Will. 4, c. 41, he is protected. By that Act special constables might be appointed, and they would have all the rights and powers which any constable duly appointed has by virtue of the common law or of any statute; and by sect. 19 of that Act constables sued in respect of acts done in execution of that Act would be entitled to local venue and notice of action. So matters stood till 2 & 3 Vict. c. 93, sect. 8 of which provides "that constables appointed thereunder shall have the same powers, privileges, and duties throughout the county which any duly appointed constable has within his constablewick by virtue of the common law or of any statute made or to be made." It cannot be said that this local venue or notice of action was a privilege within the meaning of that 19th section; but then it is said that the defendant is entitled to notice of action, as the protection given by sect. 19 of the earlier Act is incorporated into the Act 2 & 3 Vict. by the latter part of sect. 8 of that Act, which says that "every provision of the first recited Act shall be deemed to extend to the constables appointed under this Act." It may be observed

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that the Act of Will. 4 is not incorporated in the Act 2 & 3 Vict. Now, let us look at the first recited Act, it says "for the protection of all persons acting in the execution of this Act, all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act;" that is, in pursuance of this first Act, but not in pursuance of any subsequent Act. I think, therefore, that the defendant is not entitled to local venue or notice of action. Mr. Lane says the Legislature must have meant it, and he argues that, because in many statutes the police have this protection, the Legislature must have meant to extend it to them in this case. Why, if the Acts of Will. 4 and 2 & 3 Vict. gave this protection, was there an express provision in the Contagious Diseases (Animals) Act 1869 giving the same protection? Then came the Act of 1878, in which the protection was left out. Local venues were abolished in 1875, and I have no doubt the Act of 1878 advisedly left out the provisions as to local venue; but it may be that the Legislature intended to retain the notice of action, and that it was left out unintentionally; but, if so, I cannot now put it in. I am of opinion, therefore, that the defendant fails on the question now before us.

*Judgment for the plaintiff. Order to strike out paragraph 4 of the statement of defence.*

Solicitors for the plaintiff, *Bell, Brodrick, and Gray.*

Solicitor for the defendant, *Morris.*

Monday, May 26, 1884.

(Before STEPHEN and MATHEW, JJ.)

REG. on the prosecution of *GAY v. POWELL AND OTHERS*, Justices of Truro. (a)

*Bye-law—Validity of—Playing concertina through streets of city—Conviction for—Reasonable cause—Disqualifying interest of justices—Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), s. 90.*

*Sect. 90 of the Municipal Corporations Act 1835 gives powers to boroughs to make bye-laws for the good rule and government of the borough, and for the prevention of all such nuisances as are not already punishable in a summary way.*

*Under these powers the city of Truro made the following bye-law: "Every person who shall sound or play upon any musical instrument, or sing or make any noise whatsoever in any street, or near any house within the said borough, after having been required by any householder resident in such street or house, or by any police constable, to desist from making such sounds or noises, either on account of any illness of any inmate of such house, or for any reasonable cause," &c.*

*Edwin Gay was summoned before the justices of Truro on the 13th Oct. 1883, and convicted by them of an offence against the above bye-law, and fined 2l. 2s. and costs. It was proved that Gay was a captain in the Salvation Army, and that on the morning of Sunday, the 7th Oct., he was in Victoria-square, Truro, playing a concertina, and surrounded by a large crowd; that he was requested by the superintendent of police to desist from playing the concertina, but he refused to do so, the superintendent at the same time telling him*

*that he had reasonable cause for asking him to desist, as several complaints had been made by the inhabitants. It was also proved that on many previous occasions the Salvation Army had marched through the streets, playing musical instruments, tambourines, and triangles; that they had been frequently cautioned and required to desist, as many complaints had been made of their proceedings.*

*On a rule for a certiorari to remove the conviction into this court:*

*Held, that the bye-law was not unreasonable, and that the conviction thereunder ought to stand; also that there was reasonable cause for calling on the prosecutor to desist from playing.*

*Held, also, that the mere fact of the justices having attended a meeting, convened by the superintendent, at which a summons was applied for, but refused, did not render them interested parties so as to disqualify them from afterwards dealing with the case, even if at that meeting they had discussed the facts of the case.*

*RULE calling on the justices of Truro to show cause why a writ of certiorari should not issue to remove into the High Court a conviction dated the 13th Oct. 1883, under which one Edwin Gay was convicted for an offence against a bye-law then in force in the city of Truro.*

The facts of the case, as it appeared from the affidavits, were as follows:—

Edwin Gay, against whom the conviction was obtained, was a member of the body called the Salvation Army, and about the month of Sept. 1883 he came to Truro as captain of the branch of the army there.

In the early part of 1883 numerous complaints were made to the police of the great annoyance caused to the inhabitants of the city by the proceedings of the army, especially with reference to disturbances caused by them in marching through the streets, accompanied by banners, and sounding tambourines and triangles, and playing concertinas, thereby attracting disorderly crowds. A summons was taken out by the police against the officers of the army, but, as they undertook to desist from playing musical instruments in the streets, no fines were inflicted. As soon as Gay was appointed captain the playing of instruments began again, and complaints were again made by the inhabitants. Gay was cautioned by the superintendent of police, and requested to desist, but the proceedings were continued as before, with complaints on the part of the inhabitants.

On the morning of Sunday the 7th Oct. Gay was in Victoria-square, surrounded by a large crowd. He was playing a concertina, and was again requested to desist by the superintendent, who informed him that he had reasonable cause for making such request, as many complaints had been made by the inhabitants. Gay refused to desist from playing the concertina, and he was accordingly summoned by the superintendent for an offence against sect. 17 of the bye-laws of the city, which section is as follows:

*Every person who shall sound or play upon any musical instrument, or sing or make any noise whatsoever in any street or near any house within the said borough, after having been required by any householder resident in such street or house, or by any police constable, to desist from making such sounds or noises, either on account of any illness of any inmate of such house, or for any reasonable cause, &c.*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.



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This bye-law was made under the powers of the 90th section of the Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), which provides that

It shall be lawful for the council of any borough to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not already punishable in a summary manner, and to appoint by such bye-laws such fines as they shall deem necessary for the prevention and suppression of such offences, provided that no fine shall exceed the sum of 5*l*.

Gay was convicted by the justices under the above bye-law, and fined in the sum of 2*l*. 2*s*. and costs. Notice of appeal was given for the next quarter sessions at Bodmin; but, as Gay had omitted to serve a notice of such appeal on the superintendent, objection was taken to the appeal on that ground, which was held to be fatal.

It appeared that on the 1st Oct. the superintendent wrote a letter in which he said that he was directed by the magistrates to say that they would not allow the playing of musical instruments in the streets. No such direction had in fact been given by the magistrates.

It was also stated in one of the affidavits filed on behalf of Gay that there were three meetings held by the magistrates to consider the question of issuing the summons against Gay, and it was argued that the magistrates were thus in fact the prosecutors in the case, and so were disqualified from dealing with the case as being interested in it. But by the affidavit of the justices it appeared that one meeting only was held by them. This was convened by a circular issued by the superintendent, and at that meeting a summons was applied for against Gay, which was refused, and the justices further stated that they were in no way acquainted with the facts of the case against Gay until it came on for hearing before them in the ordinary course.

A rule for a *certiorari* was obtained on the following grounds:

(1) That the bye-law, under which the conviction was made, is an unreasonable, illegal, and bad bye-law, and contrary to the common law of England.

(2) That there was no evidence of any such "reasonable cause" for calling on the said Edward Gay to desist playing his concertina on the occasion in question, nor any evidence of any offence against such bye-law having been committed.

(3) That the justices who made the said conviction, or some of them, were interested in the matter of the said conviction.

*A. Charles, Q.C. and Fraser Macleod* showed cause.

*A. Collins, Q.C. and Pitt-Lewis*, in support of the rule, cited the following cases:

*Everett v. Grapes*, 3 L. T. Rep. N. S. 669;  
*Stationers Company v. Salisbury*, Comberbach Rep. 221;  
*Torquay Local Board v. Fridge*, 47 J. P. 133;  
*Reg. v. Milledge*, 40 L. T. Rep. N. S. 748; 4 Q. B. Div. 332; 48 L. J. 139, M. C.; 27 W. R. 659;  
*Reg. v. Lee*, 9 Q. B. Div. 334; 30 W. R. 750.

STEPHEN, J.—There are three questions in this case, the first of which is, whether the bye-law is good; the second is, whether there was any evidence of reasonable cause; and the third is, whether the magistrates were interested in this matter. Taking these questions in their inverse

order, I do not see the smallest evidence that the magistrates were interested in this matter. If the case of *Reg. v. Milledge* (*ubi sup.*), which has been referred to, is looked into, it will be found that the magistrates there who took part in the proceedings were substantially prosecutors in the case, and it was on that ground they were not allowed to sit as judges also, which would be a perfectly proper and wholesome ground in any case. If the magistrates in this case had taken a part to show they were prosecutors, I should not have had any doubt or hesitation in saying they could not sit as magistrates; but I see no evidence of anything of the kind. I see a very indiscreet, and, as it now appears, an untrue letter written by the superintendent of the police, which might give Mr. Purnell a notion of undue interference on the part of the inspector of police, and I think the inspector of police took upon himself a part in this matter which certainly was not well judged. I think he was presumptuous. I think he took upon himself a position which he had no right in point of fact to take. He wrote to the magistrates and gave them notice to attend a meeting—an act which, had I been a magistrate, I should have considered an insulting act from a public officer. It was not a proper thing to do; but to say, because the magistrates talked about the matter they had disqualified themselves, would be to lay down a principle of a most dangerous kind. Nothing should ever induce me to give any assent to the proposition that, when it is known a question more or less of importance is to come before judges, the judges who are well aware such a question is to be brought before them, are to have their judgment set aside, and are to be described as interested parties merely because they may meet and discuss the matter. It may, in many cases, be most necessary they should meet. In former times it was not an uncommon thing, and even in the present day it is not a thing which is unknown, that when matters which are likely to require judicial decision are about to come before the judges, the judges should talk over those matters and exchange their views as to what the law is. I could give very many instances in which such conversations have taken place. I am by no means disposed to lay down the rule that merely because magistrates meet together and talk over a matter which may arise before them, therefore they are to be said to come before the court with their minds biassed and prejudiced. I do not see the smallest evidence of it in this case. Then the second question is, whether there was evidence of reasonable cause. That is a matter of evidence. This court does not sit here for the purpose of acting as a court of appeal from justices. When we are asked to issue a *certiorari* we are not in such a position as to magistrates as that in which we stand upon a motion for a new trial on appeal from a judge of the High Court. The proper course is to call up their decision to be quashed upon a variety of grounds which may be made to appear before us, such as mistakes upon the matter of jurisdiction, and other things I need not go into now. But it is not our duty to consider the proceedings that take place before the magistrates, and to say there was no evidence on which they could rightly prohibit this playing of the concertina. The parties were not without a remedy if they thought the magistrates had acted



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improperly in that way. Not only were they not without a remedy, but they took their remedy of an appeal to quarter sessions. Unluckily, there was a technical mistake about a notice, and that mistake prevented the appeal being heard upon its merits. That was a misfortune so far as it went, but that is a misfortune we cannot set right. I agree with the quarter sessions in thinking it was not the wisest thing in the world to object to that notice, but the objection was taken. The matter might have been heard on the evidence, and the quarter sessions could have given their decision. Then we come to the third and great question, which is, whether this bye-law is in itself unreasonable. I do not consider that, in discussing that question, I am bound to look at or I am at liberty to look at every word that the bye-law contains, and to consider whether some of the words may or may not be ill-chosen and too vague. It would be a very strong thing indeed to say that the bye-law is unreasonable and void merely because particular matters which do not refer to the question under consideration might turn out to be unreasonable. With regard to the case which has been cited about the fowls, I should decide in the same words if I had to decide it again. The point which was there decided was, not only that the bye-law was completely unreasonable, but that its unreasonableness was exhibited in the particular case which then arose, because its unreasonableness was shown in a man being liable to be fined 30*l.* on account of six fowls which had got through into his park, and I suggested that it was quite as reasonable that a little boy should be kept to turn them out of the park, as that people should be called upon to fence their hedges. Now, if we look at this bye-law, the part I am now considering, and which is all we have to deal with, is: "Every person who shall sound or play upon any musical instrument, or sing or make any noise whatsoever, in any street or near any house within the said borough, after having been required by any householder resident in such street or house, or by any police constable, to desist from making such sounds or noises, either on account of the illness of any inmate of such house, or for any reasonable cause." Now what is there unreasonable in that? I have not the words of the London Act before me, but it is exactly like a well-known provision in some of the metropolitan Acts, which in substance enables any householder, who does not like barrel organs, to order them to go away out of his hearing. We have heard about the common law of England and the liberty of the subject, which are always suspected words. It is like talking Latin. When one talks of the liberty of the subject and the common law of England, one always suspects it cannot be true. The liberty of the subject always consists in doing something a man is not forbidden to do, and why it is unreasonable and void that he should be forbidden to play a musical instrument in the public streets of Truro, I cannot see. It is a thing which nobody would visit with severity; but on the other hand it is an extreme annoyance to have a man playing under your window with a concertina for a couple of hours, and having a number of people to listen to it and to sing. That may be a great nuisance. It is for the magistrates to say whether it is or not. If I saw, or if there was the least reason to think, that that bye-law was strained unjustly,

and distorted from its natural meaning; if I thought that, merely because these people did not like the Salvation Army and their meetings, they tried to strain that bye-law to prevent their doing what they *prima facie* have a right to do, my view of the case would be altogether different; but, as far as I can judge, it appears from the whole of the proceedings there was fair reason to think that the playing of this musical instrument in this place was an annoyance to some of the persons who heard them, and the man who was summoned and fined was fined for that reason. On the one hand he has every right to be protected in conducting religious worship in whatever harmless way he thinks fit; but, on the other hand, he must obey the law, and if the law of a particular borough is that he is not to play a musical instrument in the streets if people object, then he must not play it there, or he must play it where people will not object, and I daresay there are many places where he could play it without getting into trouble. Therefore this rule will be discharged.

MATHEW, J.—I am of the same opinion. I agree with my brother Stephen. An attempt has been made to induce us to rehear this case, and we have been invited to differ from the conclusion to which the magistrates have come. We have no power to rehear the case; our functions are extremely narrow in a case of this sort. We have to consider whether the magistrates had jurisdiction to dispose of the matter. I am clearly of opinion that they had jurisdiction. It is said they had not, because the bye-law was bad. Upon reading the bye-law, I think it is most reasonable, and I cannot help thinking the learned counsel who has addressed us against it would have some difficulty in framing a bye-law in a better form, such bye-law having the laudable meaning this one has, to prevent people being disturbed by disagreeable noises from musical instruments. The magistrates here had entire jurisdiction, and, that being so, we cannot interfere.

*Rule discharged with costs.*

Solicitors for the prosecutor, F. E. Bennett, for Greenway, Truro.

Solicitors for the defendants, Street and Poynder, for Cock, Truro.

Tuesday, May 27, 1884.

(Before STEPHEN and MATHEW, JJ.)

HEAWOOD (app.) v. BONE (resp.). (a)

*Lodger* — *Lodgers' Goods Protection Act 1871* (34 & 35 Vict. c. 79)—*Premises used for business purposes.*

*In order to constitute a person a "lodger" within the meaning of the Lodgers' Goods Protection Act 1871, it is necessary that he should live, i.e., habitually sleep, on the premises.*

*The protection afforded by the Act does not extend to the occupation of premises for business purposes only.*

THIS was a case stated by Sir R. Carden, one of the justices for the City of London, on the application of the appellant, for an order for the restoration of certain furniture, goods, and chattels under the *Lodgers' Goods Protection*

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

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Act 1871 (34 & 35 Vict. c. 79), s. 2. The furniture, &c., had been seized by the respondents for a distress for rent due and owing by one Solomon Botibol, the immediate landlord of the appellant.

Sec. 1 of the said Act provides:

If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff, or other person employed by him to levy such distress, with a declaration in writing made by such lodger setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger, and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord, and such lodger may pay to the superior landlord, or to the bailiff, or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord, and to such declaration shall be annexed a correct inventory subscribed by the lodger of the furniture, goods, and chattels referred to in the declaration, and if any lodger shall make or subscribe such declaration and inventory knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour.

Sec. 2 of the said Act is as follows:

If any superior landlord, or any bailiff, or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent, if any, which by the last preceding section such lodger is authorised to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person, shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods, and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to any action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into.

The following facts were either proved before me or admitted by both parties:

(a.) That the said William Thomas Bone and George William Henry Bone were the "superior landlords" of the said premises at No. 77, Fleet-street, and that Solomon Botibol, the "immediate landlord" was their tenant.

(b.) That the said Thomas Christian Heawood (the appellant) was in occupation of the first floor and basement of the said premises at a yearly rent of 75*l.*, to be paid quarterly in advance under an agreement in writing (but it was not in evidence).

(c.) That on the 26th March last the said William Thomas Bone and George William Henry Bone, the superior landlords, levied a distress on the furniture, goods, and chattels of the said Thomas Christian Heawood for 75*l.* rent due to them by the said Solomon Botibol, the immediate landlord.

(d.) That subsequently thereto the said Thomas Christian Heawood tendered to the said superior landlord the sum of 18*l.* 15*s.*, being the amount of a quarter's rent due from him in advance to the said immediate landlord, and also made the declaration required by sect 1 of the said Act, and

annexed thereto an inventory in due form, as required by the said Act.

It was admitted that all the formalities required by the Act had been complied with so far as to entitle the said Thomas Christian Heawood to make the said application to me, and that the said superior landlords had nevertheless proceeded with the said distress.

(e) The appellant stated in evidence that he lived at Peckham, and did not sleep at the said premises, No. 77, Fleet-street, but carried on business as a publisher there; and he also stated in evidence that he had no key of the outer door; that the said immediate landlord had the possession and control of that door on the said 26th March, and had always had it before then; and that the said immediate landlord used to wait for him every morning and open the outer door for him.

5. The said superior landlords, through their counsel, having pointed out that there was no definition of the word lodger in the said Act, contended that as the appellant did not reside or sleep on the premises, and that as he occupied them for purposes of business, he was not a lodger within the meaning of the said Act. The appellant's counsel contended that it was not necessary for the appellant to sleep on the premises in order to claim the protection of the said Act, as the immediate landlord had control over the outer door.

6. The following cases were cited: *Morton v. Palmer* (45 L. T. Rep. N. S. 427; 51 L. J. 7, Q. B.); *Phillips v. Henson* (37 L. T. Rep. N. S. 432; 3 C. P. Div. 26; 47 L. J. 273), and *Doe v. Laming* (4 Camp. 77); and reference was also made to the clause relating to lodgers in the Representation of the People Act 1867 (30 & 31 Vict. c. 102), s. 4.

7. After hearing the case, and the arguments of the counsel on both sides, I held that the said Thomas Christian Heawood was not a lodger within the meaning of the said statute, and thereupon I dismissed the application, and declined to make the order required.

8. The question for the opinion of your honourable court is, Whether the said Thomas Christian Heawood (the appellant) was a "lodger" within the meaning of the Act 34 & 35 Vict. chapter 79?

Given under my hand this 25th day of April 1884, at the Mansion House Justice-room aforesaid.

(Signed), ROB. W. CARDEN,  
Alderman and J. P., London.

*Lionel Hart* for the appellant.—The appellant is entitled to a return of the goods. The statute does not give any definition of the word "lodger." The standard dictionaries define a lodger as one who lives or resides in the house of another. This is no assistance, as it leaves open the meaning of living or residing. The authorities do not make living or residing the test of lodging. Generally speaking, a lodger is a person whose occupation is of part of a house, and subordinate to and in some degree under the control of a landlord or his representative, who either resides in, or retains possession of or a dominion over, the house generally, or over the outer door, and under such circumstances as that the possession of any particular part of the house held by the lodger

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does not prevent the house generally being in the possession of the landlord. Per Bovill, C.J.:

*Thompson v. Ward*, 24 L. T. Rep. N. S. 679; L. Rep. 6 C. P. 327.

He cited

*Bradley v. Baylis*, 46 L. T. Rep. N. S. 253; 8 Q. B. Div. 195;

*Wansley v. Perkins*, 7 M. & G. 151.

The object of the Act is to protect the goods of persons between whom and the landlord there is no direct privity:

*Phillips v. Henson*, 37 L. T. Rep. N. S. 432; 3 C. P. Div. 26;

*Morton v. Palmer*, 45 L. T. Rep. N. S. 427; 51 L. J. 7, Q. B.

*J.V. Austin* for the respondents.—The appellant cannot be said to be a lodger. The word "lodger" is to be used in its ordinary sense. If the Legislature had intended that it should be understood in a special sense, a definition would have been inserted in the Act. The Act is in derogation of the common law rights of a landlord, and should be construed strictly as against the appellant. Residence is the essential element of lodging, and by residence is meant living and sleeping on the premises. In the registration cases residence is absolutely necessary to constitute a lodger. He cited

*Barnes v. Peters*, L. Rep. 4 C. P. 547.

STEPHEN, J.—I am of opinion that this appeal must be dismissed. The question whether, upon the facts stated, the appellant is a lodger is no doubt a fickle one to determine. I do not think that the registration cases bear on the matter at all. It seems to me that by the word "lodger" the Legislature meant a person who lives on the premises. Now, living at a place generally implies habitually sleeping there—that is, going to bed at night there. It is to be observed that the object of the statute was to protect poor people from having their homes broken up by a distress of the superior landlord. I am clearly of opinion that the Legislature never intended that a person in the position of the appellant should be included in the description of lodger so as to be entitled to the protection of the Act. The appeal must be dismissed.

MATHEW, J.—I am of the same opinion. It seems to me that the essential element of lodging is living or residence, and that, to constitute a person a lodger of any premises, it must be shown that he resides—that is, sleeps there. The appellant does not come within that definition, and this appeal must therefore fail.

*Appeal dismissed.*

Solicitor for the appellant, *H. J. V. Philpots*.

Solicitors for the respondents, *A. S. Edmunds and Son*.

Friday, May 31, 1884.

(Before HAWKINS and SMITH, JJ.)

REG. v. COOKE. (a)

Gaming—Betting Houses Act 1853 (16 & 17 Vict. c. 119), s. 3.—"Person having the care or management of"—*Bicycle match*.

The appellant, who was the manager of certain grounds belonging to a company, and which were

used for trotting matches, bicycle races, and other sports, was convicted under sect. 3 (a) of 16 & 17 Vict. c. 119, for unlawfully having the care and management of a certain place opened and kept for the purpose of persons betting upon certain events.

On the day named in the conviction a championship bicycle match took place at which there were twenty thousand persons present more than on any previous occasion, and a number of persons known to the police as betting men were in one part of the grounds offering to make bets upon the races.

Held, that the conviction was wrong.

CASE stated by the Recorder of Leicester on an appeal of John Seymour Cooke against a conviction by the justices for the borough of Leicester, "for that he unlawfully had the care and management of a certain place, to wit, the Belgrave-road cricket and bicycle grounds, situate, &c., then and there opened, kept, and used for the purpose of other persons betting therein upon certain events and contingencies of and relating to a certain bicycle race."

1. The appellant was the manager employed by the directors of a company to which the grounds belonged. Their extent is about ten acres; they contain a fenced oval track for trotting matches, inclosing a circular bicycle track (also fenced) within which is the cricket ground, thus leaving two crescent-shaped plots from which the spectators witness the sports. A charge is made for admission. On the day named in the conviction a championship bicycle race took place, at which there were twenty thousand persons present more than on any previous occasion.

2. The winning post was at the junction of the two tracks, on the left-hand side from the entrance, and in the acute angle nearest to it there was a great crowd collected.

3. At this spot stood also a number of persons known to the police as betting men. Some were accompanied by clerks, who took down bets as made, and the odds were called out in a loud voice. The appellant was acting as judge or umpire at the winning post, counting the times each bicyclist passed, and scoring them upon a board. This was about twenty yards from the spot where the bets were called out. A witness who assisted him was called to prove that no betting was heard, but he admitted that he had remarked to the appellant upon its being a tame affair, as he had expected to

(a) 16 & 17 Vict. c. 119, s. 3: Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned or either of them; and any person who being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of, or in any manner assisting in conducting the business of, any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding one hundred pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable, and on the non-payment of such penalty and costs, or in the first instance if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months.

(a) Reported by H. D. BOWSER, Esq., Barrister-at-Law.

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hear betting as on previous occasions; but it appeared that the result of this race was supposed to be a foregone conclusion for one of the competitors. Other witnesses were called to prove that no betting took place. I was, however, satisfied that there was betting, and that the appellant was aware that it would, and did, take place, although he may not have heard any particular wager made.

4. Upon this day he had asked for and obtained the services of twelve police constables, who were paid by the company. These men received no instructions to interfere with betting either from him or from the police authorities. But six other constables in plain clothes were sent from the station to report upon what took place, and were called as witnesses for the prosecution. They did not, however, complain to the appellant nor to the directors, with some of whom one or two of them conversed, nor did they make any attempt to stop what was going on, except that the inspector spoke to one man, who thereupon desisted.

5. Placards, with the words "no betting allowed" were posted in the grounds by the appellant, but beyond this he did not interfere. After the race was over a large number of printed betting cards, bearing the names of men engaged in betting, were picked up by the police. These had been torn up and thrown on the turf. It was proved that money was received as deposit for the bets made, in return for which these tickets were given.

6. There were no chairs or stools used, and the persons making the bets had been admitted like others at the ordinary entrance.

7. An inspector of police proved that, some three or four years before, he had called the attention of the appellant to betting upon a trotting match, and that they went together to the offenders desiring them to desist, which they accordingly did. The crowd, however, on the day of the offence charged in the conviction, was, as above stated, very large, and particularly at the part of the ground where this betting took place, and I was satisfied that the appellant could not have wholly prevented betting, under the circumstances, although he might have repressed it to a certain extent, with the aid of the constables.

8. The counsel for the appellant submitted that there was no case upon these facts, and that the appellant had not knowingly and wilfully "permitted" the grounds to be opened, kept, or used for the purpose of betting.

9. The counsel for the respondents contended, that those words in the 3rd section did not apply to the person "having the care or management" but only to the case of an owner or occupier, and I was of that opinion. The cases relied upon were *Haigh v. The Town Council of Sheffield* (31 L. T. Rep. N. S. 536; L. Rep. 10 Q. B. 102; 44 L. J. 17, M. C.); and *Eastwood v. Miller* (30 L. T. Rep. N. S. 716; L. Rep. 9 Q. B. 440; 43 L. J. 149, M. C.), within which I thought the present conviction came. But for the judgments in those cases, I should have doubted whether, under the circumstances, the appellant could be held to have opened, kept, or used a house, office, or other place, for the purpose of persons using the same for betting with persons resorting thereto, having regard to the purpose of the Act, and the language of sect. 1; and I should have also doubted whether he could be said to so keep it, on the facts here, for a purpose not primarily contemplated, and which it was not practicable, in such a

concourse of persons, effectually to suppress. But as both these points had been fully considered and dealt with in the decided cases, and the second especially by Lush, L.J. and Archibald, J., in *Eastwood v. Miller*, and also by Lord Blackburn in *Haigh v. The Town Council of Sheffield* (L. Rep. 10 Q. B. 107), I affirmed the conviction. On the application of Mr. Lawrence, counsel for the appellant, I granted a case to this honourable court.

10. The question for the opinion of the court is, whether upon the above facts the appellant was properly convicted of opening and keeping the grounds for the purpose of betting.

*Sills* for the appellant.—The conviction was wrong. There is nothing illegal in the business, and the mere fact that persons who went to the ground made bets is not sufficient to make the manager liable under the Act. The Act was passed for the prevention of betting-houses and places where the business of betting was carried on. This place was not kept for the purpose of betting. The cases of *Eastwood v. Miller* and *Haigh v. The Town Council of Sheffield*, by which the Recorder thought himself bound to uphold the conviction, do not support the contention that a person in the position of the appellant in this case is a person "having the care or management of, or in any manner assisting in conducting the business" within the meaning of the 3rd section of the Act. The conviction is bad on the face of it, because it does not state that the appellant was assisting in conducting the business.

*A. K. Loyd* for the respondents.—It is not necessary that the place should be kept primarily for the purpose of betting, and it is sufficient if it is kept under such circumstances that betting actually does take place as incident to the sport. The offence is completely made out on showing that the appellant had the care or management of a place where betting took place. The 3rd section applies to three classes of persons: (1) The owner or occupier, or persons using the premises for the purposes stated in the Act; (2) the owner or occupier who knowingly permits the premises to be used; and (3) the manager. It is not necessary to show that the manager knowingly permitted the betting, but, if it is, the facts show that he did know it. If he connived at it there is sufficient evidence to support the conviction:

*Redgate v. Haynes*, 33 L. T. 779; 1 Q. B. Div. 80.

*HAWKINS, J.*—The appellant was convicted under the statute 16 & 17 Vict. c. 119, "for that he unlawfully had the care and management of a certain place, to wit, the Belgrave-road cricket and bicycle grounds, situate, &c., then and there opened, kept, and used for the purpose of other persons betting therein upon certain events and contingencies of and relating to a certain bicycle race." The question for our opinion, as stated in the case, is whether, upon the facts, the appellant was properly convicted of opening and keeping the grounds for the purpose of betting. In my opinion the conviction ought to be quashed, and I will now proceed to state my reasons. In the first place, the conviction, on the face of it, discloses no such offence as is contemplated by the statute. It simply alleges that the place was used for the purpose of other persons betting therein upon certain events and contingencies of and relating to a certain bicycle race, and it would imply that it was used in a way that is not interfered with by

the Legislature. I suppose it is common knowledge that, before the passing of this Act, there existed in London, and other populous places, houses and offices where the regular business of betting was carried on; sometimes carried on by the owners themselves, and sometimes by persons who were placed there to manage the business. The sort of business that was carried on in such places was this: a long list of the races about to take place, and the current odds for or against any horse, were placarded, and the persons who conducted the business were in the habit of receiving ready money, and in return for the deposit they gave a ticket, which entitled the holder to the amount of the bet if he won, and if he lost the deposit was gone. That was the state of things in the year 1853, and it was confined chiefly to houses and offices. It was found that such places brought many people to ruin, especially clerks and apprentices, and this Act which we have now to consider was passed to prevent people from keeping houses of this description. The preamble states that, "Whereas a kind of gaming has of late sprung up, tending to the injury and demoralisation of improvident persons, by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies; for the suppression thereof, be it enacted as follows." Then sect. 1 enacts that, "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, expressed or implied, to pay or give thereafter any money or valuable thing, on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying, or giving, by some other person of any money or valuable thing, on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law." Then by sect. 2, "every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house, within the meaning of an Act of the session holden in the eighth and ninth years of Her Majesty, chapter one hundred and nine, to amend the law concerning games and wagers." But this section did not inflict any penalty on the owners who kept houses for those purposes. The 3rd section, which is the section under which this conviction was made, does impose a penalty, and the meaning of the section seems to me to be very clear when I come to read it: "Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes

hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of, or in any manner assisting in conducting the business of, any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them shall, on summary conviction hereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding one hundred pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable." Now, in the first place, the section provides against, and imposes penalties on all persons who, being owners or occupiers, keep houses for the purposes mentioned in the 1st section of the Act, and persons who use the houses for such purposes. It next imposes penalties on all persons who permit their houses to be used for unlawful betting, and then goes on to say that any person having "the care or management of, or in any manner assisting in conducting the business of any house" kept for any of the purposes mentioned in the 1st section shall be liable to certain penalties, and the question is, whether the present defendant is within this latter part of the section. What is there to fix liability or guilt upon him? No doubt he had the care and management of the business, and was assisting in conducting it, but the business was a perfectly lawful one, and the directors, who were the defendant's employers, did not contemplate an unlawful user of the ground. I confess I cannot imagine how it can be said, as stated in the conviction, that he "unlawfully had the care and management" of the place. It would be idle affectation to suggest that the directors did not suppose that betting would go on there, that is to say, ordinary betting; it is almost a matter of course in such places, and the law does not prohibit it. The law will not assist the winner of a bet to recover the money that he has won, and in such a case leaves each man to rely on the honour of the other, but there is nothing to prevent two persons making a bet. What is prohibited is, keeping houses or offices or other places as betting-houses. It has been argued that the proper meaning of the section is, that any person having the care or management of, or in any manner assisting in conducting a business which in itself is perfectly lawful, may be liable to a penalty imposed by the statute, if some portion of the place is used for betting. I do not think so, and I am fortified in my opinion by the language of the 1st section. I think it was intended to make the owner or occupier responsible, and even his servants, if they took any part in the management of such a business as is prohibited by the statute, but it was not intended to impose a penalty on a person who had the care and management of a perfectly lawful business, simply because betting happened to be carried on in some part of the house or place where the business was carried on. Although the manager, under the circumstances set forth in the case, is not responsible, and is not within the meaning of the statute, I think there is ample evidence that there were betting men there, using the ground for an unlawful purpose, and for the purpose of

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betting with all persons resorting thereto, and these men would be liable and within the operation of the statute, but the attention of the magistrates does not appear to have been called to that. I think the defendant is not liable, and that this conviction ought to be quashed.

SMITH, J.—I am of the same opinion. It seems to me that, when you look at the sections of this statute and read them carefully, this conviction is manifestly wrong. The defendant was the manager of a perfectly lawful business, and on the day in question when there was a bicycle match, and when there were about twenty thousand persons present, some betting men were there also, offering to bet with all persons, and it is said therefore the manager of the ground is liable to be convicted under this statute. It is important to look at the 1st section, which provides that no place shall be kept or used for the purpose of the owner or occupier, or any person using the same, or of any person having the care or management, or in any manner conducting the business, betting with persons resorting thereto, and for other purposes mentioned in the section. If the place is kept open for any of those purposes, it would undoubtedly be a common gaming-house. Then the 3rd section provides that, any person being the owner or occupier, who opens, keeps, or uses a house for certain purposes, shall be liable to a penalty; secondly, any person who knowingly permits a house to be opened, kept, or used for such purposes shall be liable to a penalty; and thirdly, any person having the care or management of, or in any manner assisting in conducting the business of, any house kept for such purposes, shall also be liable to a penalty. Therefore the 3rd section is really identical with the first. Mr. Loyd argued that any person having the care or management of the business, although a lawful one, might be made liable if it was used for any purpose prohibited by the statute, by persons who happened to go there, but I do not think this is the true construction of the section. In order to fix the manager or servant of the owner with liability it must be an unlawful business, but in this case the business was perfectly lawful. I think, therefore, that this conviction should be quashed.

*Conviction quashed.*

Solicitors for the appellant, *Longcroft and Myers*, agents for *Fowler, Smith, and Warwick*, Leicester.

Solicitors for the respondent, *Field, Roscoe, and Co.*, agents for *R. R. Blackwell*, Leicester.

Tuesday, June 10, 1884.

(Before STEPHEN and WATKIN WILLIAMS, JJ.)

REG. v. HASLEHURST. (a)

*Poor law—Select vestry—Workhouse and industrial schools—Power to pay Roman Catholic clergymen for religious ministrations—Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76), s. 46; Poor Law Order 1867.*

*Sect. 46 of the Poor Law Amendment Act 1834 gave the Poor Law Commissioners power to direct the overseers or guardians of any parish or union to appoint "paid officers," which term, by sect. 109, was to include clergymen.*

*By a Poor Law Order of 1867 "the guardians" (which included the select vestry of a parish)*

(a) Reported by W. P. EVERSOLEY, Esq., Barrister-at-Law.

*"might employ such persons as they should deem requisite in or about the workhouse premises, or on the land occupied for the employment of the pauper inmates, or otherwise in or about the relief of the indoor poor, upon such terms and conditions as should appear to them to be suitable."*

*Held, that the select vestry of L. had power, under the above statute and order, to appoint and pay Roman Catholic clergymen to minister to the Roman Catholic inmates of the workhouse, and the industrial schools connected therewith.*

THIS was an application on behalf of William Jones, a member of the select vestry of the parish of Liverpool, for a writ of *certiorari* to remove into this court the certificate of disallowance made on the 1st Aug. 1883 by George Haslehurst, the district auditor, where he disallowed the several sums of 37l. 10s., 37l. 10s., 18l. 15s., and 18l. 15s., being payments made by the select vestry to the Rev. Thomas O'Donnell and the Rev. Frederick Bonte, Roman Catholic priests, for performing religious services at the workhouse and the industrial schools respectively belonging to the vestry, and surcharged William Jones with those sums.

The material facts were as follows:—

The administration of the poor laws in the parish of Liverpool was by a local Act of 1842, placed in the hands of a select vestry.

On the 16th Nov. 1880 the select vestry passed the following resolution: "That this board is prepared to receive and to consider favourably applications for payment made by persons rendering religious services to the inmates of the workhouse where, in the judgment of the board, the nature and extent of the services rendered are such as reasonably call for remuneration."

Consequent upon this resolution applications were made to the select vestry by the Rev. Thomas O'Donnell and the Rev. Frederick Bonte, the Roman Catholic priests in attendance respectively at the workhouse and the industrial schools, for payment in respect of their services, and on the 30th Nov. 1880 the select vestry resolved to grant to the Rev. Thomas O'Donnell a salary at the rate of 150l. per annum during the pleasure of the vestry for his services to the Roman Catholic inmates of the workhouse; and to grant to the Rev. Frederick Bonte similarly a salary of 75l. per annum for his services to the Roman Catholic inmates of the industrial schools.

The Local Government Board, on being asked for their approval of these arrangements, replied that with regard to the inmates of the workhouse the select vestry had power under the General Order of 1867, without the assent of the board, to employ such persons in the workhouse as they should deem requisite upon such terms and conditions as appeared suitable; and with regard to the schools, the board gave their assent.

Payments were accordingly made to the two Roman Catholic priests from the 30th Nov. 1880, for the religious services rendered by them at the workhouse and industrial schools.

At the audit of accounts on the 1st Aug. 1883, for the half-year ending at Lady-day 1883, the district auditor disallowed the payments made on account of the half-year's salary of the two Roman Catholic priests, and surcharged William



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Jones (who signed the cheques for these payments) with these sums.

The reasons given by the auditor for the disallowance, so far as material, were as follows:

1. Because the offices to which the said Rev. Thomas O'Donnell and Rev. Frederick Bonte were appointed were not offices contemplated or authorised to be created at the charge of the poor rate by 4 & 5 Will. 4, c. 76, or by any other statute.

2. Because the proviso to sect. 19 of 4 & 5 Will. 4, c. 76, only authorises licensed ministers to attend at the workhouse for the purpose of affording religious assistance in the case therein specified, and the statutes have not authorised the payment of any salary or remuneration in respect thereto, and further because sect. 21 of 31 & 32 Vict. c. 122 permits an inmate to attend some place of worship of his or her own denomination.

3. Because the Poor Law Order of the 9th Aug. 1867 did not authorise the select vestry to make such an appointment or pay such salary or remuneration; and because the select vestry had not any statutory or other lawful authority to make such appointments nor to make such payments out of the funds of the parish.

4 & 5 Will. 4, c. 76, s. 19:

No rules, orders, or regulations of the said commissioners, nor any bye-laws at present in force or to be hereafter made, shall oblige any inmate of any workhouse to attend any religious service which may be celebrated in a mode contrary to the religious principles of such inmate . . . provided also that it shall and may be lawful for any licensed minister of the religious persuasion of any inmate of such workhouse, at all times of the day on the request of such inmate, to visit such workhouse for the purpose of affording religious assistance to such inmate, and also for the purpose of instructing his child or children in the principles of their religion.

Sect. 46:

It shall be lawful for the said commissioners, as and when they shall see fit, by order under their hands and seal, to direct the overseers or guardians of any parish or union . . . to appoint such paid officers, with such qualifications as the said commissioners shall think necessary, for superintending and assisting in the administration of the relief and employment of the poor, &c.

Sect. 109:

The word "officer" shall be construed to extend to any clergyman, &c.

Poor Law Order of 1843 (to the select vestry of Liverpool): (a)

Art. 60: For the performance of the duties and ensuring the observance of the regulations herein set forth, the select vestry shall, as soon as may be requisite, and from time to time hereafter upon the occurrence of any vacancy, appoint all or any of the following officers, that is to say . . . a chaplain . . . and also such assistants and servants as shall be necessary for the efficient performance of the duties of the said several officers.

Art. 76: The duties of the chaplain are to read prayers and preach a sermon on every Sunday, and to read prayers on every Good Friday and Christmas-day, and to examine the children, and to catechise such as belong to the Church of England at least once in every month, &c.

Gen. Order of the 19th Aug. 1867:

Art. 1: The guardians may employ such persons as they shall deem requisite in and about the workhouse or

(a) A General Order of the 24th July 1847 contains, in articles 153 and 211, provisions similar to those contained in the above special order of 1843, which was only directed to the select vestry of Liverpool.

workhouse premises, or on the land occupied for the employment of the pauper inmates of the workhouse, or otherwise in or about the relief of the indoor poor, upon such terms and conditions as shall appear to them to be suitable.

Art. 6: The word "workhouse" shall include every school, infirmary, or hospital, provided by the guardians for the reception of paupers.

*French (C. Russell, Q.C. with him) for the motion.*—Sect. 46 of the Poor Law Amendment Act of 1834 does not mean that the Poor Law Commissioners (now the Local Government Board) can only direct the appointment of a clergyman of the Church of England as a "paid officer." By sect. 109 paid officer includes "clergyman," which may mean a clergyman not a member of the Church of England. This is shown by the definition clause (sect. 74) in the Poor Law Amendment Act 1844, where a minister is defined to mean a person in holy orders and also every person teaching or preaching at religious worship in a certified place of meeting. No doubt by the order of 1843, articles 60 and 76, the select vestry could only appoint a chaplain, such chaplain to be, it is admitted, a clergyman of the Church of England. By sect. 43 of the Poor Law Amendment Act 1844, schools are put upon the same footing as workhouses as regards the appointment of paid officers, and as regards the conscience clause in the matter of religious instruction. But then by a General Order of the 19th Aug. 1867, the Poor Law Board authorised the guardians (the select vestry being included in that term) to employ such persons as they think requisite. These words are wide enough to include a clergyman of the Roman Catholic Church. Sect. 19 of the Poor Law Amendment Act 1834 gives religious freedom to all inmates of a workhouse, and a licensed minister may visit the workhouse for the purpose of affording religious assistance to his co-religionists. Surely Parliament intended that these ministers should not be mere volunteers, but should be paid by the vestry or guardians, and be under their control. Moreover, by sect. 21 of 31 & 32 Vict. c. 122 (Poor Law Amendment Act 1868), if no religious service is provided in the workhouse for the inmates according to their creed, they may go to some place of worship outside. This shows that the guardians or vestry may direct religious services, other than those of the Church of England, to be held in the workhouse, and that they have the power to pay the ministers who conduct them. Hence in this case the select vestry had power to appoint and pay these two Roman Catholic clergymen.

*Sir H. Giffard, Q.C. and C. Higgins, for the auditor, showed cause.*—Sect. 46 of the Poor Law Amendment Act 1834 only gives power to the Poor Law Commissioners to direct the guardians or vestry to appoint "paid officers," which words are to include clergymen. The Poor Law Commissioners or their successors have never directed the appointment of any clergymen other than those of the Church of England. It is admitted that under the Order of 1843 the chaplain must be a clergyman of the Church of England. Then the sole question remains whether the General Order of 1867 gave the vestry power to appoint what may be called Nonconformist clergymen. The words of article 1 seem to point to persons of a lower class than clergymen. If such an im-



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portant change were intended, it would not have been made by such general words, but the Poor Law Board would have dealt with the appointment of Nonconformist clergymen specially. Neither in sect. 19 of the Poor Law Amendment Act 1834, nor in sect. 21 of the Poor Law Amendment Act 1868, which give the vestry power to allow any minister to attend in the workhouse and hold religious services there, is any payment to such ministers contemplated. Hence these payments were properly disallowed.

*French* was not called on to reply.

STEPHEN, J.—I must say that I do not feel any difficulty in deciding this question. But, as it is one of considerable importance, I wish to go through the different sections of the various Acts of Parliament, and also the Poor Law Orders. It is with great satisfaction that I give the judgment I am about to give, as it is only right and proper that those who give such religious instruction to the inmates of a workhouse should not be mere unpaid volunteers, but should receive payment for their work, and be in a recognised position responsible to the guardians or vestry. A great many sections have been referred to, and the first one is sect. 19 of the 4 & 5 Will. 4, c. 76 (Poor Law Amendment Act 1834), and that section, in effect, provides that no rules shall oblige any inmate of a workhouse to attend a religious service contrary to his conscience, and that licensed ministers may give religious assistance in the workhouse to their own people. I agree that certain privileges were given to clergymen of the Church of England in workhouses, who were called chaplains, which privileges other ministers did not possess. Then comes sect. 46, which authorises the appointment of "paid officers." I may observe that a judicial decision has been given upon this section in the case of *Reg. v. Braintree Union* (1 Q. B. 190), that the Poor Law Commissioners had power to direct the appointment of a chaplain, with a salary, under the words "paid officers," sect. 109 saying that officers are to include clergymen. The next Act that I come to is the Poor Law Amendment Act 1844, which by sect. 43 seems to recognise that the chaplain of a workhouse, and a school attached thereto, is to be a clergyman of the Established Church, but a proviso is inserted as to religious teaching similar to that contained in the earlier statute. Coming now to the Poor Law Order of 1843 as to officers to be appointed by the select vestry, I quite agree that by articles 60 and 76, taken together, the "chaplain" must be a clergyman of the Established Church, being to that extent placed on a different footing from other clergymen. Then we come to the General Order of the 19th Aug. 1867, and the question is, whether article 1 authorises the appointment of paid Roman Catholic clergymen to afford religious assistance to the inmates who profess their creed, who are not called chaplains, but who have many of the duties of a chaplain. It is clear to me that it does. The words are wide enough to include clergymen of any denomination, and I think that very probably the Poor Law Board intended that to be so, wishing to do quietly what might otherwise have created a considerable amount of feeling. I am strengthened in this view by article 3 of this order, which provides that the foregoing articles of this order (except so

much thereof as relates to their quarterly or other periodical payments) shall not apply to the following officers or persons: (amongst others) the chaplain. Why should I limit the application of article 1 as to payment to the chaplain? Why should it not also include a Nonconformist clergyman? But the case does not stop there, because the very next year the Poor Law Amendment Act 1868, drafted by persons familiar with the law, was passed, and sect. 21 of that Act provides that any inmate who has no religious service according to his own creed provided for him in the workhouse may attend some place of worship of his own denomination. If my interpretation of the Order of 1867 is correct, the guardians (in this case the select vestry) received authority by that order to appoint and pay a clergyman to hold such services in the workhouse, and it is only when they are not held there that the inmate may attend some place of worship outside the workhouse. This, moreover, was the view taken by the Local Government Board in this very case. Upon the whole, therefore, I am of opinion that the select vestry had power by article 1 of the General Order of 1867 to appoint and pay these Roman Catholic clergymen, and that the auditor having disallowed these payments, and surcharged the applicant with them, this rule for a *certiorari* must be made absolute.

WATKIN WILLIAMS, J.—I agree.

*Rule absolute.*

Solicitors for the applicant, *W. W. Wynne and Son*, for *T. J. Smith*, Liverpool.

Solicitors for the auditor, *Kennedy, Hughes, and Kennedy*.

Dec. 18 and 19, 1883.

(Before Lord COLERIDGE, C.J., STEPHEN and MATHEW, JJ.)

REG. v. MANNING AND ANOTHER. (a)

*Criminal law — Conspiracy — Joint indictment against two — Conviction of one only — New trial.*

*On an indictment against two persons jointly for conspiring together, they must both of them, if tried together, be either convicted or acquitted; and where one of them only was convicted, and the jury, being unable to agree as to the other, were discharged from giving a verdict, the Court, on the application of the convicted defendant, made absolute a rule for a new trial as to both.*

In this case a rule was obtained on behalf of the defendant Manning, calling upon the prosecutor to show cause why the verdict found for the Crown should not be set aside, and a new trial had under the following circumstances:—

An indictment having been preferred against the two defendants, Manning and Hannam, jointly for conspiracy to cheat and defraud the prosecutor, the case was removed by *certiorari* and tried on the civil side of the court, before Lord Coleridge, C.J. and a special jury, at the last summer assizes at Winchester. The facts of the case as bearing against the two defendants were, that the defendant Hannam, having bought certain cattle of the prosecutor, the owner, and given him a cheque in payment of the amount of

(a) Reported by HENRY LUSH, Esq., Barrister-at-Law

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the price (which cheque, however, was not afterwards paid), subsequently sold the cattle and paid the proceeds of such sale to the other defendant, Manning, and the cheque given to the prosecutor by Hannam was returned, marked "no assets." The case against Hannam rested, and was proved against him, mainly upon his own admission or confession, which was deemed to make the case almost conclusive against him. He however defended himself very vigorously and threw the blame of the transaction entirely upon his co-defendant Manning. The Lord Chief Justice told the jury that the confession or admission of Hannam was evidence only against him, and was not evidence against the defendant Manning; and, in answer to a question by one of the jury, his Lordship also told them that the evidence might satisfy them as to one prisoner and not as to the other, and that they might on the present indictment find one of the defendants guilty and acquit the other. Thereupon the jury returned a verdict of guilty against the defendant Manning and, being unable to agree as to the other defendant, Hannam, were discharged from giving a verdict in his case. Thereupon Hannam's trial was postponed, and the defendant Manning was bound under recognisances to surrender for judgment in the Queen's Bench Division. Subsequently the above rule was moved for and obtained on his behalf on the ground of misdirection, on the ground that one of two persons jointly charged with conspiracy, the one with the other, and both being tried together, could not be convicted alone and without the conviction of the other, and against that rule.

(*W. Mathews and B. Coleridge*, for the prosecution, now showed cause.—This application is at all events premature. Hannam, the other defendant, has not been acquitted, but has yet to be tried, and may on trial be found guilty, and then the verdict against the present defendant would be perfectly good. [*Charles*, Q.C. for the defendant.—But Manning claims to be tried again with Hannam.] The direction of the learned Lord Chief Justice was right, the question really being, was the defendant guilty or not guilty upon the evidence adduced against him? No doubt it was a joint offence, but the evidence against each defendant was separate, and might be sufficient proof of the guilt of one and yet not so of the other defendant. The confession of one prisoner may be good evidence on which to convict him, but not being evidence against the other, the latter, if there be no other evidence against him, must be acquitted. That principle has been fully recognised and acted on in the Divorce Court in two very remarkable cases. In one of them, that of *Robinson v. Robinson and Lane* (1 Sw. & Tr. 362; 29 L. J. 178, P. M. & A.) the diary of the wife containing entries relating to her adultery with the co-respondent were held to be evidence of guilt against her, but not against him. [STEPHEN, J.—That is, that she might be guilty of adultery with him, though he was not guilty of adultery with her.] That is what was there held, and the case is one of very strong authority, having been decided by the Judge Ordinary Sir C. Cresswell, Cockburn, C.J., and Wightman, J. That case was followed by *Stone v. Stone and Appleton* (11 L. T. Rep. N. S. 515; 3 Sw. & Tr. 606; 34 L. J. 33, P. M. & A.) by the learned

president of the Divorce Court, Hannen, J., in which the co-respondent was convicted on his own confession of adultery with the wife, and 1000*l.* damages given against him, whilst she was discharged. These cases are strong authorities in favour of the direction in this case. Where two persons are indicted for conspiracy, if one only appears at the trial, he may be convicted in the absence of the other who has not pleaded:

*Reg. v. Kinnerley*, 1 Str. 193;

*Reg. v. Nichols*, 13 East, 412, n.; 2 Str. 1227;

*Reg. v. Ahearns*, 6 Cox Cr. Cas. 6;

*Reg. v. Kenrick*, 5 Q. B. Rep. 40; 12 L. J. 135, M. C.

In the case of *Reg. v. Cooke* (5 B. & C. 538) four persons were indicted for conspiracy, when two pleaded not guilty, one pleaded in abatement, to which plea there was a demurrer, and the fourth man never appeared. Before the argument of the demurrer the record went down for trial, when one of the two who had pleaded not guilty was acquitted, and the other was found "guilty of conspiracy with him who had pleaded in abatement." The demurrer was afterwards argued, and judgment of *respondens oster* given, whereupon a plea of not guilty was pleaded, and it was held that the court might, before the trial of that defendant, pronounce judgment upon the one that had been found guilty. No doubt in the judgment in that case Littledale, J. said, at p. 545, "If the other defendant shall hereafter be acquitted perhaps this judgment may be reversed;" but to this there is, in Russell on Crimes (vol. 2, 3rd edit. p. 691; vol. 3, 4th edit. p. 146), the following note by the learned editor, Mr. Greaves: "*Sed quere*, for such acquittal would not necessarily show that the verdict of guilty on the former trial was wrong, as witnesses might be dead or absent who were examined at the former trial, or the one defendant might have been convicted on his own confession, which would not be admissible against the other defendant." In *Reg. v. Thompson* (16 Q. B. 832) Erle, J. said: "According to the rules of pleading the charge of conspiracy as to each individual must be construed as if he were charged solely," which strongly supports the argument on behalf of the prosecution in the present case.

*A. Charles*, Q.C. and *Warry*, for the defendant Manning, supported their rule.—The direction of the Lord Chief Justice is wrong on both principle and authority, and the defendant is entitled to a new trial, the application for which is not premature. There was no count here of conspiring with a third person to the jurors unknown. On this indictment, charging the two defendants with conspiring together, the jury were bound to find both guilty or to acquit them both. The facts in proof of the conspiracy and the overt act proved may be different in each case, but one common design between the two must be proved. In *Reg. v. Ahearns* (*ubi sup.*) the proof was that the prisoner and another conspired, and so the judgment was affirmed. The very essence of the offence of conspiracy is an agreement between two or more persons, it being impossible for one person to conspire by himself:

*Hawk. P.C. c. 27, s. 8*, 8th edit. by Curwood, p. 448;

*Harrison v. Errington*, Poph. 202.

[STEPHEN, J.—The old reports are often very imperfect, and the reason of the decision is fre-

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quently left in some doubt.] A riot is an analogous case:

*Reg. v. Sudbury*, 12 Mod. 262, Case 473.

Though a person may be alone indicted for a conspiracy, as he may conspire with a person unknown, yet it must be proved to the jury's satisfaction that the unknown person conspired with the defendant before the latter can be convicted. The record here is repugnant, and my Lord's direction might lead to repugnant verdicts against the two defendants, but there was no repugnancy in the record in *Reg. v. Cooke* (*ubi sup.*). It is laid down in 3 Chitty's Criminal Law, p. 1141, that, "If all the defendants in an indictment for conspiracy, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed on him." That applies here, and shows that Manning could not be convicted without Hannam. The difference between Erle, J. and the majority of the court in *Reg. v. Thompson* (*ubi sup.*) rested simply on a point of pleading; the authority of that case, as directly in point in favour of the present defendant, is by no means lessened by that difference. The principle underlying the decision of *O'Connell v. The Queen* in the House of Lords (11 Cl. & Fin. 165) underlies the present case, and the decision in that case is this, that where a count in an indictment against eight individuals charges one conspiracy against them to effect certain objects, a finding that three of the defendants are guilty of conspiracy to effect some of the objects, and not guilty as to the residue of those objects, is bad in law and repugnant.

MATHEW, J.—It is only after considerable doubt, and I am bound to say with much reluctance, that I have come to the conclusion that the verdict in this case cannot be supported, and therefore that there must be a new trial. It is, as I have said, with reluctance and regret that I have arrived at that conclusion, for there is no doubt that the defendant had a very fair trial, with a summing-up distinctly favourable to him, and with every care that could possibly be taken to prevent any evidence which could not legitimately be used against him being acted upon by the jury. Mr. Charles's argument, however, and the authorities cited by him in the course of them, have satisfied me of the existence of an imperative rule of law against the jury being told, as they were in this case, that it was competent for them, if the evidence satisfied them in that respect, to convict the one and to acquit the other of the two defendants. That rule of law I take to be this, that in a case like the present, where there is a charge of conspiracy against two persons jointly indicted and tried together, the issue raised and the question for the jury is, whether both of them are or are not guilty; and that if the jury are not satisfied as to the guilt of both of them, then both must be acquitted, it being impossible on such a charge to convict one of them and to acquit the other as was done here. The existence of that rule was taken for granted by the Court of King's Bench in the case of *Reg. v. Cooke* (*ubi sup.*) in Lord Tenterden's time; for, if it had not been, the judgment in that case could not have been pronounced. So again in the time of Lord Campbell, the Court of Queen's Bench treated the rule in

question as an existing rule in the case of *Reg. v. Thompson* (*ubi sup.*); and all the four judges held in that case that a failure to convict both the defendants on a charge of conspiracy would be fatal to the prosecution. Moreover, in addition to these authorities, the rule is treated as perfectly clear in the judgment in the case in the Divorce Court of *Robinson v. Robinson and Lane* (*ubi sup.*); and finally, there are the opinions of the judges delivered in the House of Lords in the case of *O'Connell v. The Queen* (*ubi sup.*), clearly implying and distinctly illustrating the existence and application of that rule. That being so, there was, in my opinion, a misdirection in the present case in my Lord's telling the jury that they might convict one of these defendants without the other, and therefore the rule for a new trial should be made absolute.

STEPHEN, J.—With the greatest possible reluctance I also have come to the same conclusion, and entirely upon the authority of the opinions of the judges in *O'Connell v. The Queen* (*ubi sup.*), affirmed by the House of Lords. I see no possible escape from the decision in that case, which is one of the highest authority, and one which shows it to be legally impossible, where two or more persons are jointly indicted and tried together for a conspiracy, that some of them should be found guilty of one conspiracy and some of another, or that some should be convicted of the whole of a conspiracy, and others as guilty in a less degree; the rule of law being definite and positive that, on such a charge, all the defendants must be convicted or acquitted of one and the same conspiracy. As to the cases of *Reg. v. Cooke* (*ubi sup.*) and *Reg. v. Thompson* (*ubi sup.*), they are not, in my opinion, so decisive of the question here as my brother Mathew seems to think them, for they seem to me to leave open the very point of the present case which *O'Connell's case*, I think, decided. With regard to the case of *Robinson v. Robinson and Lane* (*ubi sup.*), in the Divorce Court, which has been referred to, I think that as much of the judgment there as relates to criminal law is merely a dictum; but, as applicable to divorce cases, the rule seems to me to be founded on common sense, and on general principles it might be said to support the contention of the prosecution in the present case. I feel, however, that no answer can be given to the decision in the House of Lords, and fail to see any distinction between the rule in that case and that which is applicable to the present one, and yielding to that high authority I am of opinion that the jury here were misdirected, and that there must be a new trial.

LORD COLERIDGE, C.J.—During the argument of this case I have come to the conclusion that I misdirected the jury upon the point in question. The cases which have been cited before us to-day of *Reg. v. Cooke* (*ubi sup.*) and *Reg. v. Thompson* (*ubi sup.*), and which I confess I think to be more directly in point, and to have more weight upon the question now at issue than my brother Stephen does, were not before me at the trial. I had then in my mind the two cases in the Divorce Court of *Robinson v. Robinson and Lane* (*ubi sup.*) and *Stone v. Stone and Appleton* (*ubi sup.*), and it seemed to me, at the moment, difficult to recognise any distinction in principle between the rule applicable to the present case and the rule of

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practice that had been established and prevailed in that court; and which rule is based on the fact that the court could proceed only on evidence, and that what is evidence against one party is by no means of necessity legal evidence against another, and that there might be evidence against one defendant sufficient to convict him, yet not sufficient to convict the other of them; for though it was a joint offence it must be separately proved against each of the defendants. I must say that it seems to me that the principle of the practice of the Divorce Court in this respect is sound; and I am by no means prepared to say that if this matter had been *res integra*, and even as it is if there could have been an appeal from the decision of this court to some other tribunal, I might not have adhered to my view, and left the point to be settled by a higher authority; but in a criminal case, with no appeal from our decision, I feel bound by the cases that have been cited, and by what I understand to be the established rule of practice. The older cases are stated shortly, and without much detail; and it is possible that if all the facts of them were before us they might prove to be less in point than they now appear to be; but still from the time of *Thody's case* (Year Book, 14 H. 6, 25 b.; 1 Vent. 234—see note to *Res v. Cooke*, 5 B. & C. p. 541) it has been taken for granted, and laid down by the judges, that in cases of conspiracy, where two persons are jointly indicted and tried together (for different considerations would arise if they are not tried together) the inflexible rule is that both must be convicted, or both acquitted. Coming down to later times, the same rule must evidently have been present to the minds of the judges who decided the cases of *Res v. Cooke* (*ubi sup.*) and *Reg. v. Thompson* (*ubi sup.*). There are distinctions no doubt which prevent either of these cases from being directly in point here, but in the former of them, the Court of King's Bench, consisting at that time of Lord Tenterden, C.J. and Bayley, Holroyd, and Littledale, J.J., though it did not decide, yet seems to have assumed as the underlying principle of the whole matter the existence of the rule which has been contended for on behalf of the present defendant; and consequently the direction which I gave to the jury could not be right. In the other of those two cases, *Erle, J.*, although differing on a particular point from the other three members of the court, differed from them only on a purely technical point of pleading, and not as to the principle assumed and laid down by the rest of the court in that case. In fact, *Erle, J.* said not a word to the contrary of that principle, but rather assumed its existence, for he endeavoured to support the conviction there on the technical point that "persons unknown" might be construed to mean the two individuals as to whom the jury were unable to agree. Then comes the case in the House of Lords of *O'Connell v. The Queen* (*ubi sup.*), in which all the judges assumed this point to be the rule of practice, and although they differed in opinion upon some other points, they all agreed upon that one. The principle underlying that decision is, that where two or more persons are charged with conspiracy the count is a single and complete one and cannot be separated into parts. The principle is the same in the present case. Without doubt, therefore, in directing the jury as I did contrary to that rule I misdirected them, and therefore this

rule for a new trial must be made absolute. I wish to say that I have not forgotten the rule (Order XXXIX., r. 2) with regard to hearing applications for a new trial; but criminal proceedings are an exception from the operation of that rule, and this being a criminal proceeding I have thought it right to take part in this judgment.

*Rule absolute for a new trial as to both defendants.*

Solicitors for the prosecution, *Sole, Turner, and Knight*, agents for *H. R. Hooper*, Newport, Isle of Wight.

Solicitors for the defendants, *John Turner and Son*, agents for *F. P. Henry*, Newport, Isle of Wight.

## Supreme Court of Judicature.

### COURT OF APPEAL.

May 26, 27, and 28, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

REG. on the prosecution of THE ASSESSMENT COMMITTEE OF THE POPLAR UNION v. THE EAST AND WEST INDIA DOCK COMPANY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Valuation (Metropolis) Act 1869* (32 & 33 Vict. c. 67), ss. 46, 47—*Supplemental valuation list—Alteration—Dock company—Diminution of profits—Sufficiency of evidence of alteration.*

*Upon an appeal against a supplemental valuation list, under the Valuation (Metropolis) Act 1869, evidence showing a diminution in the profits of a dock company within the preceding twelve months is admissible as evidence of alteration in value, and is prima facie evidence of an alteration within the meaning of the Act.*

*Per Brett, M.R. and Bowen, L.J.: Where it is shown that there has been an alteration in value during the preceding twelve months, only the amount of such alteration, and not the present rateable value, can be inquired into.*

*Per Fry, L.J.: The present rateable value should be inquired into and ascertained.*

*Judgment of Grove and Manisty, JJ. reversed.*

THIS was an appeal by the East and West India Dock Company from the decision of Grove and Manisty, JJ. (reported 49 L. T. Rep. N. S. 363; 12 Q. B. Div. 721), where the material parts of the special case and the provisions of the Valuation (Metropolis) Act 1869, on which the question for decision depended, are set out.

Sir *H. S. Giffard*, Q.C., *Marriott*, Q.C., and *K. E. Digby* for the appellants.

Sir *F. Herschell* (S.G.), *W. H. Holl*, Q.C., and *Fullarton* for the respondents.

The arguments were similar to those used in the court below, and are sufficiently referred to in the judgments.

The following authorities were cited:

*Reg. v. Abney Park Cemetery Company*, 29 L. T. Rep. N. S. 174; L. Rep. 8 Q. B. 515;

*Reg. v. New River Company*, 4 Q. B. Div. 309;

(a) Reported by *P. B. HUTCHINS*, Esq., Barrister-at-Law.

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Reg. The Grand Junction Railway Company, 4 Q. B. 18;

Reg. v. Bristol Dock Company, 1 Q. B. 535;

Reg. v. Castleton, 10 L. T. Rep. N. S. 605.

BRETT, M.R.—In this case the Divisional Court has overruled the order of the Court of General Assessment Sessions, and has come to the conclusion that there was evidence, which was admissible and relevant, but was not *prima facie* evidence of such an alteration in value as to make it necessary to order that a supplemental list be made out. It is impossible to deal with this appeal without considering the order of the Court of Sessions as well as the decision of the Divisional Court. If we disagree with the decision of the Divisional Court, we shall have to see whether the order of the Court of Sessions ought to be altered. The question is, as to the rateable value of the East and West India Docks. The dock company say that there should be a supplemental list, because there has been an alteration in value within the last year. It is said against them that there is no evidence of any alteration in value within that period. It is clear that, unless the dock company can show that by reason of something that took place within the last preceding year the value was altered, then the quinquennial list, and the valuation then fixed, must stand, whether that valuation was right or wrong when it was fixed. The Divisional Court thought the evidence was relevant and admissible, but that it made out no *prima facie* case of an alteration in value within the year. Here it was argued on behalf of the respondents that there was no evidence of such alteration. The evidence consisted in the first place of books of accounts, and there was evidence to show that those accounts correctly showed the receipts and expenditure of the dock company during the last preceding year. Evidence was also given as to the receipts and expenditure during other preceding years, and it was urged that, as during the last preceding year there had been a falling off in receipts, the necessary inference was that there had been a diminution in the receipts of the company by reason of a less amount of tonnage having come into the docks to such an extent as to cause an alteration in value. Supposing that evidence stood alone, would it be evidence of an alteration in rateable value within the last preceding year? It is not necessary to decide this, but I am inclined to think that it would. But the dock company want to show that this falling off is not an accident, but that there has been a successive and permanent diminution in their profits. If this is so, I am of opinion that there is *prima facie* evidence of a diminution in rateable value within the last preceding year. The fact of diminution of profits may be explained; it may be shown that the diminution does not affect the rateable value, or the inference that it does may be rebutted by proof of other facts. If the diminution is a mere accident, and will be rectified in the future, it is a matter which no tenant would care for, and therefore it does not affect the rateable value. But if there is a falling revenue, and the diminution is going on, a tenant would take this circumstance into account. It seems to me therefore that the court below was right in holding that the evidence was admissible and relevant; but I differ from them as to the other question, for I think it was *prima facie* evidence of a diminution in value

within the last preceding year. This being so, the Court of Sessions should consider that evidence, and should see whether within the last preceding year there has been an alteration in rateable value by reason of the diminution of receipts. But it would be wrong to send the case back to the sessions without giving them proper directions as to how they ought to deal with it. The question is one of extreme difficulty. It has been argued on behalf of the appellants that, if it is proved that there has been an alteration in value within the last preceding year, admitting the existence of such alteration to be a condition precedent to the admissibility of a supplemental list, yet when once the existence of such an alteration has been shown, then the whole inquiry as to the rateable value is to begin *de novo* as if the property had not been valued before, and then the new valuation must be compared with the existing list, and, if it is found to be less than the value stated in the existing list, the rate must be diminished accordingly. The Solicitor-General has pointed out difficulties which will arise if this is the true view, and I agree that it would be in the power of anybody to force on an appeal against the existing list after the time for appealing had elapsed, because by making an alteration in the property he could reopen the valuation, and that is virtually an appeal. It might follow that, although the property had within the year been increased in value, yet, because the former valuation had been erroneous, the rateable value in the supplemental list would be less than it had been before. I cannot construe the statute so. I think the prior decision as to value must be taken to have been correct, and it must be ascertained whether what has occurred within the last preceding year has affected the value. If what has occurred within the last preceding year has altered the value which was previously decided, then I think this proposition is true, that the gross rateable value in the supplemental list is to be ascertained, assuming that such value in the list then in force be correct at the commencement of the year in question, and the result is to be arrived at by adding thereto or subtracting therefrom the addition to or diminution from such value resulting from the alteration arising during the year. That being so, I do not adopt the proposition that the whole inquiry is thrown open. When it has been ascertained what the alteration is, the value, as altered, should be entered in the supplemental list. The result will be, that we vary the judgment of the Divisional Court by sending the case to the sessions, that they may hear the evidence and solve the difficult proposition to which I have referred, and if there has been an alteration in rateable value within the last preceding year, a supplemental list should be made out, and the value as altered should be entered.

BOWEN, L.J.—The question is one of great difficulty. It has to be decided whether what happened within the preceding twelve months has entitled the dock company to have a supplemental list made out. The argument is divided into two branches: first, as to whether there is any evidence which, if unaltered, uncontradicted and unqualified, would amount to *prima facie* evidence of an alteration in rateable value during the last preceding twelve months. If this is so, we have to consider how far effect is to be given to such

evidence. It seems that during the last year there has been a falling off in the receipts of the company, because a less amount of tonnage has come into the docks, and, looking at that circumstance with the help of the light afforded by the previous fall in the company's profits, I think there is some evidence that the value of the property is not what it was before. We do not decide that there has been an alteration in value, but only that the figures require explanation, and furnish *prima facie* evidence of such an alteration. Secondly, to what extent is the inquiry to be pursued? Is the quinquennial list to be set aside, and the true value assessed, or is the alteration only to be taken into account? This question is difficult, and the language of the Act is not explicit. As the Solicitor-General has pointed out, the quinquennial list is part of the machinery of assessment. It is not intended that the assessment should go on according to the same valuation year by year, nor, on the other hand, that the value should be inquired into in each year. There is a compromise, by which the valuation is to be readjusted on certain conditions, and within certain limits. The preamble to the statute (32 & 33 Vict. c. 67) is not unimportant. It is: "Whereas it is expedient to provide for a common basis of value for the purposes of government and local taxation, and to promote uniformity in the assessment of rateable property in the metropolis." The first section dealing with the quinquennial list is sect. 43, which provides that the valuation list "shall last for five years, subject to any alterations that may be made by any supplemental or provisional list, as hereinafter mentioned." Then sect. 46, on the true construction of which the decision must turn, contains provisions for readjusting the valuation by means of a supplemental list. Now what is to be put on the supplemental list if the words of the Act are followed? Sect. 46 does not say that the true value shall be shown, but that the supplemental list "shall show all the alterations which have taken place during the preceding twelve months." To my mind it is intended that the supplemental list shall show the figures to which the rateable value is to be altered. There are practical difficulties in the way of adopting the other view. One is that any dissatisfied ratepayer practically could always appeal against the valuation after the time for appealing had elapsed, by altering his premises, or by taking advantage of some alteration which might have occurred, and thus could re-discuss the quinquennial list before another tribunal. It is no doubt a *reductio ad absurdum* to take the case of a man adding a story to his house, and then claiming to reopen the valuation list, but still it is an illustration of the difficulties attending the construction contended for on behalf of the appellants. It is to be observed that what sets free the ratepayer, so as to enable him to demand a supplemental list, is not merely an alteration in the rateable value, but any alteration "in any of the matters stated in the valuation list." It seems an absurd result if because any alteration, however trifling, has taken place, a valuation *de novo* should be within the reach of the ratepayer. In my opinion the broad view of the meaning of this obscure Act of Parliament, is that it is not consistent to suppose that the quinquennial list is to be thrown aside whenever an alteration takes place within the last

preceding twelve months, but that only the measure of the alteration is to be taken into account.

FRY, L.J.—There are two questions to be considered. The first is, whether a fall of profits is evidence of a diminution of rateable value. I am of opinion that it is some evidence that the rateable value has been diminished, such as might reasonably be expected to affect the mind of a yearly tenant. The fall in the profits may be casual, or it may be explained by other circumstances, or it may have been taken into account in making the previous valuation, so it is not conclusive; but I think it is some evidence. Secondly, assuming there has been an alteration within the last preceding year, is the rateable value to be ascertained *de novo* for the purpose of making out the supplemental list, or is the alteration only to be ascertained? On this point I differ from the opinion which has been expressed by the other members of the court. The Act of Parliament is intended to provide machinery for the purpose of finding out the true rateable value. The quinquennial valuation is to remain in force until an alteration takes place in some of the matters stated in the valuation list. The list is then to be amended, and two modes of doing this are provided—by a provisional and by a supplemental list. As the result of an examination of the provisions of sect. 46, I have come to the conclusion that the section contains machinery for ascertaining the rateable value, but none for getting at the amount of the alteration. I think it leaves the alteration to be ascertained by a comparison of the true rateable value, when that is ascertained, with the existing valuation list. By the terms of the section, if it is necessary to make out a supplemental list, such list is to be in the same form as the quinquennial valuation list, and no other form is given. It is said that the supplemental list may be made to show the alterations in two ways, by showing the difference between the old list and the true value, or by showing to what extent the old valuation has been affected, without showing what the real value is, but one way only will allow the list to be in the same form as the quinquennial list. Sub-sect. 3 is important, for it contains directions as to the mode in which the supplemental list is to be made out, and it contains no provision for ascertaining the difference. Then as to the arguments which have been brought forward in support of the opposite view, it is said that, under sect. 47, sub-sect. (1), the provisional list is to show "the gross and rateable value as so increased or so reduced," and that this must refer to the quinquennial valuation list as increased or reduced; but I think it means the true gross and rateable value as increased or reduced. Then it is said to be improbable that the Act should be intended to allow the true value to be ascertained after a lapse of only one year from the date of the quinquennial valuation. I think the answer is, that the quinquennial valuation is to be assumed to be right, and is to remain in force unless an alteration takes place; but if it then turns out to be wrong, I see no reason why it should not be corrected. Then it is said that the occupier might make an addition to his premises and suggest that there was an alteration, and reopen the quinquennial valuation list, and so get a reduction of his rates. I am inclined to think that, under



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such circumstances, he would not be able to prove an alteration within the meaning of sect. 46; but the case suggested is highly improbable, and extreme cases are not safe guides to the construction of a statute. Moreover, I am not satisfied that it would be unreasonable that the occupier should obtain a reduction if his property was really valued too high, for he has suffered a wrong. For these reasons I think the Act provides machinery for ascertaining the real value.

*Judgment reversed.*

Solicitors for appellants, *Freshfields and Williams.*

Solicitor for respondents, *J. W. Marsh.*

*Friday, April 4, 1884.*

(Before BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ.)

REG. v. THE OVERSEERS OF THE PARISH OF TONBRIDGE. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Burial board—District having a separate burial ground—18 & 19 Vict. c. 128, s. 12.*

*By 18 & 19 Vict. c. 128, s. 12, the vestry, or meeting in the nature of a vestry, of any parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a burial board, and from time to time supply vacancies therein, and may exercise the same powers of authorisation, approval, and sanction in relation to such burial board and such other powers as are vested in the vestry of a parish separately maintaining its own poor.*

*Held, that this section applies to a district having a separate burial ground, but not separately maintaining its own poor, which is part of a district already having a legally constituted burial board.*

*Judgment of Field and Mathew, JJ. reversed.*

THIS was an appeal on behalf of the Southborough Burial Board from the judgment of Field and Mathew, JJ. discharging a rule for a *mandamus* directing the overseers of Tonbridge to levy and pay the sum of 292l. 10s., the expenses of the said board, on the ground that the inhabitants of Southborough had no power to constitute a separate burial board for the district of St. Thomas and St. Peter.

The facts were stated in a special case, which is set out in the report in the court below, *ante*, p. 232, and 49 L. T. Rep. N. S. 170.

Sir H. S. Giffard, Q.C., *F. Meadows White*, Q.C., and *Archibald*, for the appellants.

*Charles*, Q.C., *Lumley Smith*, Q.C., and *Candy*, for the respondents.

The arguments are sufficiently noticed in the judgments.

BRETT, M.R.—The longer I sit as a judge the more strongly I come to the opinion that in construing an Act of Parliament the safest mode of interpretation is to construe the words according to their ordinary meaning and construction in the English language, as used with reference to the subject-matter with which they deal. There is hardly any Act of Parliament, certainly none in

which the language is not absolutely plain, where difficulties, inconvenience, and alleged injustice may not arise, and the moment one allows oneself to go into those considerations one inevitably gets into a state of doubt, and unless there is something which prevents one from reading the language according to its ordinary interpretation, both as to words and as to construction, interpretation, and use by people who deal with the subject-matter of an Act of Parliament, it seems to me that it ought to be so read. The section to which we are called upon to-day to give an interpretation is the 12th section of 18 & 19 Vict. c. 128. That section says that "The vestry, or meeting in the nature of a vestry, of any parish, new parish, township, or other district"—now that district is clearly a district which is distinguished from the parish or township—"not separately maintaining its own poor, and which has heretofore had a separate burial ground"—that is, before the passing of this Act has had a separate burial ground—"may appoint a burial board." Now it is admitted that those words, used in their ordinary grammatical sense, and idiom and construction, apply precisely to this district of Southborough. They apply exactly in terms. But it is urged that nevertheless we are not to apply them exactly in their terms, that they are not to be read as their terms would require one to read them if there is nothing to prevent their being so read. It was argued before us that there were two lines of consideration which obliged us to read them and to apply them otherwise than in their ordinary sense as applied to parishes, burial grounds, and burial boards. In the first place, it was urged that, if they are considered according to their ordinary grammatical construction, they would be found to be practically in contradiction to other sections in a series of Acts of Parliament which are to be read as one, and which apply to burial boards and districts. If it had been found that reading them in their ordinary sense they would contradict other enactments, but reading them in a sense which they are capable of being read, though not in an ordinary sense they would not, then I agree that the proper construction would be to read all the enactments together, so that they should not contradict each other. But I have been unable to discover that, by reading this enactment in its ordinary sense, it would be found to be practically contradictory to any other enactments. Therefore the argument comes to this, that if it is read in its ordinary sense it would produce great inconvenience; and it is also urged that if read in its ordinary sense it will produce a great injustice. Now, with regard to the question of inconvenience, I think it is a most dangerous doctrine. If an enactment is such that by reading it in its ordinary grammatical sense a palpable injustice is produced, whereas by reading it in a sense in which it is capable of being read, although not exactly its ordinary sense, no injustice is produced, then I admit at once that it must always be assumed that the Legislature intended the Act to be so read as to produce no injustice, and that it should not be read, if possible, so as to produce a palpable injustice. The question seems to me to be reduced to this, does the reading of this section in its ordinary sense as applied to the subject-matter produce any absurd inconvenience

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.



or palpable injustice? The alleged inconvenience is that there will be two burial boards, that a minor board will be dealing with this district, and a larger board can also deal with the district. But what is the inconvenience? The only inconvenience that is suggested is this, that it is inconvenient that the people living in the district should have to pay for the maintenance and construction of both grounds. Therefore the inconvenience alleged is the same thing as the injustice that has been suggested. There is no inconvenience of working. In this case it cannot be said it is inconvenient that the one board should manage one ground and the other board should manage the other ground. The inconvenience, if examined, is the same as the injustice in this case. Now, what is the injustice? The alleged injustice is, that people may be obliged to bear a double burden. Now, which people would be obliged to bear a double burden, if either? Not the people of the larger district; they do not bear any double burden. It was suggested by Mr. Charles that there was an injustice on the larger district, because it might render the people of the minor district less able to contribute to the whole. That is too infinitesimal for any practical application. There is no danger of such a thing. The alleged injustice is upon the inhabitants of the minor district. Now, of course, if the effect of allowing them to appoint a burial board of their own is, *ipso facto*, to get rid of the burial board of the larger district with regard to them, then there is no injustice at all; therefore, if we should come to the clear conclusion that by appointing a board in their own district they get rid altogether of the board of the larger district, then there would be no possible injustice. But we must decide this case on the assumption, which I think myself it is very likely will be the result, that after the appointment of a district burial board the inhabitants of the minor district will be still liable to pay rates in respect of the larger burial board for its maintenance, and for the maintenance and perhaps the charges of further purchases of burial ground for the larger district. I assume and take that to be so. Where is the injustice? It is said that there is an injustice upon these people because they will have to pay double rates. But is it not an obligation upon them? It is their own choice by their own free will. There is no injustice in allowing people to pay double rates, but there might be an injustice if they were prevented. It has been suggested during the argument that, if there be a large parish and a district at one end of it which becomes rich and populous, because there has been a board at one time appointed for the whole parish when circumstances were different, which board cannot be got rid of, therefore the rich district at one end of the parish, for its own purpose and for its own convenience clearly desiring to have a separate board of its own and a separate ground, never shall be allowed to do so; and because when the circumstances were different there was a burial board for the whole parish, the district, the circumstances of which have altered, is to be prevented from exercising its own will which otherwise it might. It seems to me that upon a balance of injustice it is more unjust to prevent people from doing what they want, without interfering with other people, subjecting themselves only at their own will and

pleasure to pay an increased amount, namely, double rates. The injustice seems to me to cut against the argument for which it has been brought forward. I can see no injustice at all which will be occasioned by reading this section in its ordinary grammatical English sense, as applied to the subject-matter. Therefore, in my opinion, we ought to stand by the golden rule, and read this section according to its ordinary sense as applied to the subject-matter. And if we do, it applies in terms and in construction precisely to this district. And, if so, this district was entitled to form a burial board, and a board so formed is a legal burial board. I do not pretend to say it is not difficult; these things are always difficult. I cannot gather from the judgment of Field, J. exactly whether he acted upon the view that there was something in the statutes inconsistent with this section read in its ordinary terms, or on the ground that this was unjust. If he came to the conclusion on the ground that it was unjust, I confess that the injustice does not strike me as it must have struck him. I cannot see that any of the cases which have been cited are at all in conflict with the decision we now come to. There are some expressions in the judgment of Blackburn, J. in *Reg. v. The Overseers of Walcot St. Swithin* (6 L. T. Rep. N. S. 325; 2 B. & S. 571) which seem to be in favour of the view that a double burial board and the results of it would be absurd, and there are some expressions of Crompton, J. in the same case that seem to show there was still a lingering doubt in his mind whether they might not be unjust. But, as I say, I cannot see the absurdity, and after due consideration I cannot entertain a doubt, and I do not think there is anything in that judgment which ought to overrule the opinion which I have formed.

BAGGALLAY, L.J.—As the other members of the court have a clear opinion that this appeal should be allowed, my dissent, even if I expressed any, would be immaterial to the decision of the case; but I feel bound to say that throughout the argument I have entertained considerable doubts, and those doubts have not been altogether removed. At the same time my doubts are not sufficient to induce me to say that I dissent from the judgment which the other members of the court think should be pronounced. I am desirous of stating what my doubts are. The original Act of Parliament (15 & 16 Vict. c. 85) had for its main object the discontinuance of burials within the metropolis, and making provision for other burial grounds. That Act of Parliament was confined to parishes in their integrity. I look to the definition of the word parish, and I find that a parish is a particular place having separate overseers of the poor, and separately maintaining its own poor. Then I also look for the definition of the word overseer. It is explained as any person authorised to collect the rate for the relief of the poor. Then came the Act 16 & 17 Vict. c. 134, which in effect extended all the provisions of the Act which previously applied to the metropolitan burial grounds. There again it was limited to parish. Then we have 18 & 19 Vict. c. 128, a provision which deals with parishes as a whole. And it is considered desirable to extend or to alter those provisions, and therefore this 12th section of the Act of 18 & 19 Vict. c. 128 provides that burial boards may be appointed for districts forming

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portions of a whole parish in such cases as where the district is not separately maintaining its own poor, and has heretofore had a separate burial ground. There can be no question at the present time that the Southborough district had its own separate burial ground, and it is not separately maintaining its own poor. If I follow the circumstances aright, from what appeared in the case of *Viner v. The Overseers of Tonbridge* (2 E. & E. 9; 28 L. J. 251, M. C.) the Southborough district had had its separate burial ground, namely, a yard adjoining the church, for twenty odd years before any of these Acts were passed, and there cannot be a doubt that it is a matter of considerable inconvenience that the inhabitants of this district should only have a burial ground two, three, or four miles from their own church away from where most of them live. I suppose they were outvoted at the meeting. Now I think it must be admitted that, if this section stood by itself, considered entirely by itself, it would be sufficient to embrace the case which has arisen, and would entitle the board actually appointed for the district to call upon the overseers of Tonbridge for the amount of the expenses of enlarging the Southborough ground. But, although in construing these provisions in Acts of Parliament I fully assent to what the Master of the Rolls has said as to giving words their simple meaning and interpretation, still where you have one Act with express provisions to be read with another, its interpretation may be affected by reference to those other Acts of Parliament. I should rather treat them together. It is argued by Mr. Charles and Mr. Smith that when a burial board is appointed for the whole of a district there is no provision for the appointment of a burial board or ground or the maintenance of a ground for a portion of an entire district. Certainly that doubt has pressed upon my mind all the way through. That doubt is to some extent removed when I come to take into consideration the 5th section of the still later Act (20 & 21 Vict. c. 81), which gives an express power of dealing with portions of a district for the appointment of a burial board. It indicates the general view of the Legislature that there was a power of dealing with portions of a district even if a board were appointed for the whole. I have to read sect. 5 of that later Act in connection with the other sections, and to some extent that removes the doubts which, if sect. 12 of 18 & 19 Vict. c. 128, and those preceding had stood alone, I should have entertained. The doubts upon my mind have not been wholly removed. They do not amount to sufficient to cause me to say I dissent. I may perhaps say that the case has been so thoroughly and completely argued that no advantage would have been obtained by adjournment for further consideration.

LINDLEY, L.J.—It is impossible to read these Acts of Parliament without saying that there are obscurities and difficulties. Now the question which we have to decide is one very easily asked, but not so easily answered. We have got this state of things: An ecclesiastical district was carved out of the old mother parish of Tonbridge under 1 & 2 Will. 4, c. 38, that is, St. Peters, Southborough. St. Peters, Southborough, has a burial ground. Southborough is subdivided for some purposes by having another district carved out of it, St. Thomas, which was

done in 1871. I do not think myself the last point is material to the question we have to solve, because, for all the purposes with which we have to deal with the district, St. Peters was a district with a burial ground, and not maintaining its own poor. Now the rest of the facts which are material are these: Tonbridge Wells is also a district which was a long time ago carved out of the same old mother parish of Tonbridge. Tonbridge Wells has a burial ground of its own. Now the Acts of Parliament which were passed before 1855 relating to these matters applied to parishes. As the Act of 1855 expressly states, it was found necessary to amend these Acts and make further provision for the burial of the dead. And provision is made in sect. 12 for districts which were not parishes. If we look only at the language of sect. 12 it is impossible to deny that this case comes within its terms. The language of that section exactly meets the present case. Tonbridge is the mother parish *minus* Tonbridge Wells. Is that any reason why a district in the mother parish of Tonbridge should not have another burial board? I can see no reason for drawing the distinction between the real old mother parish having its own burial board, and such a district as Tonbridge *minus* Tonbridge Wells. In either case it appears to me, if you once find it falls within sect. 12, that there is none. The fact that there may be two jurisdictions appears incidentally from that Act of 1860 (23 & 24 Vict. c. 64), to which Mr. Charles has referred. Sect. 5 runs thus: "Where any parish or place has been divided into two or more parts or districts for all or any ecclesiastical purposes, and any one of such parts has a separate burial ground, it shall not be lawful for the vestry, or meeting in the nature of a vestry, for such entire parish or place to appoint a burial board without the approval of one of Her Majesty's Principal Secretaries of State." I infer from this that such a thing was possible, that there could be a burial board in a district and also one for the whole parish. It is said that the Act of 1857 (20 & 21 Vict. c. 81), and the second case of *Reg. v. The Overseers of Walcot St. Swithin* (*ubi sup.*) were opposed to our construction of 18 & 19 Vict. c. 128, s. 12. It is very true that 20 & 21 Vict. c. 81, s. 5 having been passed, inconveniences were perceived, and an attempt was made to prevent certain inconveniences which might flow from the construction we put upon 18 & 19 Vict. c. 128, s. 12. But it seems strange that, if there can be a district in a parish which has a burial board under 20 & 21 Vict. c. 81, s. 5, it should not have the same privilege under 18 & 19 Vict. c. 128, s. 12. Under 20 & 21 Vict. c. 81, s. 5, possibly the inconveniences are obviated. Now let us see what the inconveniences are. The inconvenience will be this, that the inhabitants of the district of Southborough will, as regards their burial board, be subject to a double rate, they will have two burdens upon them. That will be the worst. Who imposes those burdens? They impose them upon themselves. I do not see any particular injustice in that. I cannot see that there is any sufficient reason for saying that this case is not within sect. 12. For these reasons it appears to me the true construction to be put upon the statute is that given by the Master of the Rolls.

*Appeal allowed. Order for a peremptory mandamus suspended for a month.*

CT. OF APP.] BOARD OF WORKS FOR WANDSWORTH v. UNITED KINGDOM TELEPHONE CO. [CT. OF APP.]

Solicitors for the prosecution, *Tilleard, Godden, and Holme*.

Solicitors for the defendants, *White and Sons*.

June 12 and 13, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

THE BOARD OF WORKS FOR THE WANDSWORTH DISTRICT v. THE UNITED KINGDOM TELEPHONE COMPANY LIMITED. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Telephone—Overhead wires—Injunction—Property of district board in street—Meaning of words "vest" and "street"—Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 96—Telegraph Act 1863 (26 & 27 Vict. c. 112), s. 12.*

*By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 96, "all streets being highways . . . shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate."*

*Defendants, a telephone company, fixed a telephone wire to a chimney, and stretched it across a street, which was vested in plaintiffs as the district board, at a height of about thirty feet from the ground. Plaintiffs brought an action for an injunction to restrain defendants from keeping up the wire.*

*Held, that what was vested in plaintiffs was the property in the surface of the ground together with as much space, both above and below the surface, as amounted to the area of ordinary user; and that, as the wire in question was above this area, and was not shown to be dangerous, so as to amount to a nuisance, plaintiffs were not entitled to an injunction.*

*Held, also, that defendants did not require plaintiffs' consent under 26 & 27 Vict. c. 112, s. 12, to entitle them to place the wire across the street.*

*Judgment of Stephen, J. reversed.*

*Coverdale v. Charlton (40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104) and Rolls v. The Vestry of St. George the Martyr, Southwark (43 L. T. Rep. N. S. 140; 14 Ch. Div. 785) commented on and explained.*

*THIS was an action tried before Stephen, J., without a jury, in which the learned judge reserved judgment.*

*The facts and arguments are sufficiently stated in the judgment.*

*Philbrick, Q.C., Wilkinson, and R. O. B. Lane for the plaintiffs.*

*B. E. Webster, Q.C., Coxens-Hardy, Q.C., and Moulton for the defendants.*

*Cur. adv. vult.*

*May 13.*—STEPHEN, J.—This case was argued before me on the 8th and 9th inst., and I reserved my judgment on account of the importance of the points involved in it. The facts were as follows: The United Kingdom Telephone Company is a joint-stock company not incorporated by any private Act of Parliament. They lately erected for a private person in Putney a telephonic wire connecting two of his places of business in Putney, and supplied it at each end with proper telephonic apparatus. The wire and the instruments are the property of

the company, and are maintained by them, their use being regulated by a contract between them and their customer. The wire is attached at eleven different points to chimneys, and is carried at several places for a considerable distance over highways in the district. At one place it passes over the High-street of Putney at a very obtuse angle, its height from the ground being thirty feet, and its total length from the point of attachment on the east side to the point of attachment on the west side, and thence to a third point of attachment on the east side, being 430 feet, or 143 yards or thereabouts, the greater part of which is over the street. The plaintiffs are the Wandsworth Board of Works, and, by the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 96, all streets being highways are vested in them, and are under their management and control. The action was for an injunction to restrain the defendants from retaining the wire without their consent in the position in which it was placed. They put their case on three distinct grounds. In the first place, they contended that the defendants were a company subject to the provisions of the Telegraph Act of 1863 (26 & 27 Vict. c. 112), s. 12, and were, as such, forbidden to place a telephone over or along or across a street or public road except with the consent of the body having the control of it. In the second place, the plaintiffs said that, as owners of the soil, they had an absolute right to prevent the defendants from suspending wires over their road, upon the principle that the air above the road was as much theirs as the road itself. In the third place, the plaintiffs said that the overhead wire was in fact a nuisance to the road, exposing the persons using it to danger. The first of these arguments turns upon the construction of the Telegraph Acts, and was put as follows:—The Telegraph Act of 1869 (32 & 33 Vict. c. 73) is by sect. 2 incorporated with the Telegraph Act of 1868 (31 & 32 Vict. c. 110.) The Telegraph Act of 1868 (31 & 32 Vict. c. 110) is by sect. 2 incorporated with the Telegraph Act of 1863 (26 & 27 Vict. c. 112.) Therefore the Telegraph Act of 1869 is incorporated with the Telegraph Act of 1863. But in the Act of 1869 "telegraph company" is defined to mean "any company, corporation, or persons for the time being engaged in transmitting, or by any instrument incorporating the same authorised to transmit, telegrams within the United Kingdom;" and in *The Attorney-General v. Edison Telephone Company* (43 L. T. Rep. N. S. 697; 6 Q. B. Div. 244) it was held that a telephonic message is a telegram. Therefore the telephone company is a telegraph company within the Act of 1869; therefore it is a company under the Act of 1863; and therefore the 12th section applies to it. To appreciate this argument it is necessary to look at the objects of the three Acts. The Act of 1863 is an Act intended principally to abbreviate legislation respecting telegraph companies authorised by Parliament, by providing a general constitution to be applied to each special case by reference, in the same way as the Lands Clauses Act and the Railways Clauses Act fulfil similar purposes for other classes of companies. The Act of 1868 gives the Postmaster-General all the powers of a telegraph company under the Act of 1863, and enables him to purchase on terms set forth in the Act the undertakings of telegraph companies. The Act

(a) Reported by W. P. EVERSOLEY and P. B. HUTCHINS, Esqrs., Barristers-at-Law

of 1869 gives the Postmaster-General a monopoly of telegrams (which has been held to include telephonic messages), and makes provision in reference to certain contracts and purchases then effected or in negotiation; and no doubt this Act would operate to restrain the defendants from sending telephonic messages, if they had not been licensed to do so by the Postmaster-General. But it does not put private companies for telegraphic purposes into the position of telegraphic companies authorised by Parliament. On the contrary, the short result of all the Acts read together is to make the Postmaster-General the only telegraph company in England (exceptions excepted), and to give him all the powers for the erection of telegraphs which were by the Act of 1863 intended to be conferred on private telegraph companies incorporated by private Acts. The defendants are simply a joint-stock company licensed by the Postmaster-General to carry on a business from which they would, but for his licence, be restrained by the Act of 1869. But it is clear to me that they have none of the powers of a company under the Act of 1863. The only parts of the three incorporated Acts which apply to them are those which forbid them to carry on their business without licence from the Postmaster-General and possibly those which authorise him, if he thinks fit, to buy their undertaking. I think, therefore, that the first argument used by the plaintiffs fails. The second argument is that the effect of the Metropolis Management Act of 1855 is to give them the sole right to prevent a wire from being stretched across the roads at any height which a private person would have to prevent such a wire being suspended over his field or garden. This argument depends upon the effect given to the words of the Metropolis Management Act of 1855 (18 & 19 Vict. c. 120), s. 96. The words are: "All streets being highways, and the pavements, stones, and other materials thereof . . . shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate." The interpretation of words almost identical with these has been considered in several reported cases, particularly in *Coverdale v. Charlton* (3 Q. B. Div. 376, and on appeal, 40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104). This case is recognised, followed, and carefully explained in *Rolls v. St. George's, Southwark* (43 L. T. Rep. N. S. 140; 14 Ch. Div. 785). The words on which that case turned were: "All streets being, or which at any time become, highways . . . shall vest in and be under the control of the urban authority." They were held both in the Queen's Bench Division and in the Court of Appeal to vest the streets in the vestry in such a sense as to enable them to let the pasturage in a green lane which fell within the definition of a street. The effect of the decision appears to me to be that the words used in the Public Health Act (which in all important particulars are identical with those in the Metropolis Management Act) give to the district board not merely the control and management of the street, but property in the street itself. Moreover, it decides what is meant by the word "street." Brett, L.J. says (4 Q. B. Div. 121): "'Street' means more than the surface; it means the whole surface, and so much of the depth as is or can be used not unfairly for the ordinary purposes of a street. It comprises a depth which

enables the urban authority to do that which is done in every street, namely, to raise" (the Master of the Rolls, in *Rolls v. St. George's*, 14 Ch. Div. at p. 789, says this is a misprint for 'pave') "and to lay down sewers—for at the present day there can be no street in a town without sewers—and also for the purpose of laying down gas and water pipes. 'Street,' therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used as streets are used. It does not include such a depth as would carry with it the right to mines, neither would 'street' include any buildings which happen to be built over the land, because that is not a part of the street within the meaning of such an Act as this." Lord Bramwell, after minutely considering the language used, concludes thus: "That would show that 'street' comprehends what we may call the surface; that is to say, not a surface bit of no reasonable thickness, but a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets; and to that extent they had a property in it." This limited view of the effect of the word "vest" is contrasted by Lord Bramwell with the wider view in which "it may mean that a man acquires the property *usque ad coelum*, and to the centre of the earth." It seems to me that the present case must be decided upon the principle here laid down. In the first place, it is to be observed that the case of *Coverdale v. Charlton* does not directly decide anything as to the extent of a street upwards. It only limits its extent downwards. It does so, however, upon grounds which seem to me to apply equally in each direction. If it can be shown that the management and care of the street require some degree of control over the air immediately above it as well as over the ground immediately below it, it seems to follow that the vesting of the street itself in the district board must involve property in part of the air above the surface of the street as well as property in part of the ground below it. Now, it is self-evident that in many cases the air immediately above the street may be dealt with in such a manner as to affect the safety or comfort of the street, as, for instance, if an electric wire passed across the street at such a height as to interfere with the traffic. Such a case might be dealt with as a nuisance at common law; but might it not, apart from the law of nuisance, be treated as a trespass on the property of the district board? So long as the wire is at a height which actually interferes with the traffic, the question is of no practical importance, but when it is suspended at such a height and in such a manner that it does not interfere with the traffic of the street, except possibly in some extraordinary case, the question becomes one of great importance; and, in order to illustrate this, I proceed to give my opinion as to the third ground on which the plaintiffs claim their injunction. It is that the overhead wire in question is a nuisance to the highway, and that, as such, they are entitled to have it removed. This, it was agreed, was a pure question of fact. The evidence given on both sides appears to me to show that the wire in question is nearly new, that it is properly taken care of, and has been lately examined and found to be in perfect con-

dition, and likely to last for many, or, at all events, for several years without becoming perceptibly weaker than it now is. In the common course of things it is likely to cause no perceptible danger to the public, though it is, no doubt, possible that a violent storm might blow it down, just as it might blow down the chimneys to which it is in most places attached. There was, however, evidence that, on two occasions, wires of a similar character had, in violent storms, been blown down in such a manner as to become a source of some degree of danger to persons or carriages passing along the highway. Upon the whole, though I cannot say that absolutely no danger arises from the position of the wire, I do not think that, apart from the question of trespass, it would form an indictable nuisance. If it had been erected with the consent of the district board, and had been indicted by some inhabitant of the neighbourhood as a nuisance at common law, I should not have hesitated to direct a jury that there was no evidence of such a nuisance as would justify a conviction. This being the state of things, the question upon which the case turns appears to me to be whether the street vested in the district board extends to such a height above the ground that the suspension of the wire over it is a trespass which entitles them to an injunction. I was at first of opinion that it was not, and that the case resembled that of *The Wandsworth District Board v. London and South-Western Railway Company* (8 Jur. N. S. 691). In that case the present plaintiffs applied to Kindersley, V.C. for an injunction to restrain the South-Western Railway Company from widening a bridge over a highway called Falcon-lane vested in the plaintiffs by the same section as the one on which they rely in the present case. There are expressions in his judgment which at first might look as if he meant to say that, as the vesting of the soil in the district board was "purely for the purpose of promoting the convenience of the public," the question to be considered was, whether the way in which they proposed to exercise the rights given to them by the Act would promote the public convenience or not; but this does not appear to me to be the real meaning of the judgment, or at least its full meaning. The railway company in that case had power under an Act of Parliament to widen the bridge, and the substantial question appears to have been whether their powers did not authorise the interference with the soil of the plaintiffs (vested in them solely for public purposes) which the railway company had to make. Upon the best consideration which I can give to the present case, it seems to me that Parliament intended to give the district board proprietary rights over the street, including in that word a certain space upwards as well as downwards, in order that they (the district board) might form a judgment as to the expediency on public roads of permitting or refusing to permit various acts which, without being actual nuisances in such a sense as to be indictable, might nevertheless be regarded as undesirable innovations. Suppose, for instance, the owner of two houses on opposite sides of the street wished to connect them by a bridge carried at a considerable height over the street, he might inflict no injury at all on the public, but, if his right to do so were unconditional, so long as he

caused no positive danger or diminution of light, others might imitate his example, and the aggregate result might be injurious to the public, though it would be difficult to say at what point the nuisance began. So with regard to telegraph or telephone wires. A single wire may be no nuisance, but, if no one has a definite right, in the interests of the public, to object to its erection, such wires might be multiplied to any extent, and might collectively constitute a very appreciable nuisance. I do not suppose that the Legislature or any member distinctly thought of this when the streets were vested in the district board, yet I think that the object of the enactment was to invest the district boards with the character of owners, in order that they might use for the public convenience rights which a prudent private owner would use in his own interest and in the interest of his tenants. I am much strengthened in this view by the provisions of the Telegraph Act of 1863 already referred to. If private persons had at common law a right to suspend wires over streets, subject only to the general law of nuisance, I do not see why the Legislature should in express terms have authorised telegraph companies to do so (26 & 27 Vict. c. 112), s. 6 (2), but compelled them to obtain the consent of the body having control of the street (sect. 12). If they already possessed the power at common law, there was no need to give it. For these reasons I give judgment for the plaintiffs in the terms of their statement of claim with costs; but, as the case is one of great importance, and will no doubt be carried further, and as I think the wire causes no appreciable actual danger to the highway which it crosses, the injunction is not to issue until after the hearing of the appeal, if the defendants appeal from this judgment.

#### *Judgment for the plaintiffs.*

The defendants appealed.

June 12 and 13.—The appeal was argued by Webster, Q.C. and Cozens-Hardy, Q.C. (*J. F. Moulton* with them) for the defendants, and by Philbrick, Q.C. (*T. L. Wilkinson* and *B. O. B. Lane* with him) for the plaintiffs.

BRETT, M.R.—This case depends on the true construction of the Metropolitan Management Act 1855 (18 & 19 Vict. c. 120), s. 96. A telephone wire fixed to a chimney passes diagonally across the street. The owners of the houses raise no objection, and the question is, can the local board object to the wire passing across the area of the street, and obtain an injunction to prevent the telephone company from keeping their wires there? The solution of this question depends on the Act of Parliament which gives powers to the local board (18 & 19 Vict. c. 120, s. 96). Whatever may be the extent of their powers, it is clear that if the wire were to interfere with the user of the street they would be entitled to an injunction; if it were dangerous then it would be a nuisance, and the local board would be entitled to an injunction. Whether the wire is dangerous, so as to be a nuisance, is a question of fact, as to which there is evidence on both sides. There is strong evidence that these wires, when put up with ordinary care, and made of the usual material, would not begin to deteriorate for five years, and after that a further period would have to elapse before they could become dangerous. Stephen, J. who saw

the witnesses, and had an opportunity of weighing the value of the evidence, came to the conclusion that there was no appreciable danger now, and for some time to come; that amounts to saying that in law and in fact there is no danger. We cannot say that these wires interfere with the traffic; therefore there is no ground for granting an injunction, unless there is a trespass on the property of the local board. Stephen, J. decided in favour of the plaintiffs on that ground. The case raises the question whether there is a trespass. What belongs to the plaintiffs is given to them by the Act of Parliament, which is similar in its terms to the Act on which *Coverdale v. Charlton* (40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104) depended. The Act (18 & 19 Vict. c. 120, s. 96) vests the street in the local board; therefore the same question arises as arose in *Coverdale v. Charlton*, namely, what is the meaning of the words "vest" and "street," and what is the effect of the Act? As to the judgment of Bramwell, L.J. in that case, I have some difficulty in following his exact view on each point. The question there was how far the property passed, and in what was the property vested in the local board. Bramwell, L.J. was of opinion that the Act of Parliament gave the local board so much property in the grass on the surface of the road which was vested in them that they could give the right to the plaintiff to pasture cattle along the side of the road. My own view then was that the Act passed the property in the street, so as to enable the local board to do what any other owner of property might do, subject to the rights of the public, and so long as they did not infringe their duty of keeping the street as a street. It was not necessary to decide there whether the property vested for ever or only for a time; but in the case of *Rolls v. The Vestry of St. George the Martyr, Southwark* (43 L. T. Rep. N. S. 140; 14 Ch. Div. 785), the question was raised as to the length of time for which the right of property was conferred, and the Court of Appeal said that it lasted only while the place in question was a street. Agreeing with this second case, my opinion of the effect of the decision in *Coverdale v. Charlton* (*ubi sup.*) is this, that the property in the street passes to the local board, and remains vested in them while it is a street. Then the question arises, what is the meaning of the word "street?" for that is what is vested in the local board. It was suggested in *Coverdale v. Charlton* (*ubi sup.*) that the word "street" only meant the right of way, but the whole court went further than that. Then it was suggested that it was confined to the surface, but we went further than that, and came to the conclusion that the property of the local board went below the surface. That is the foundation of the judgment. I am inclined to think that the real judgment of Bramwell, L.J. is contained in the passage at page 118 of 4 Q. B. Div., where he is reported as saying: "That would show that 'street' comprehends what we may call the surface, that is to say, not a surface bit of no reasonable thickness, but a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets; and to that extent they had a property in it." The report in the *Law Journal* makes it still more clear that this was his real judgment; the

corresponding passage in that report is as follows: "On the whole, I think that the word 'street' includes so much of the surface, and so much of the thickness or depth, as is usually needed for the ordinary works which the local authority would need to execute in or upon a street:" (48 L. J., at page 131, Q. B.) That seems to me to show that the property passes to a certain depth; that is, that it includes what may be called the area of user, not accidental, but ordinary user, such as is usually needed for the ordinary works which are done in the street. I did not differ from that view. I said: "The words of the private Act in that case (*Brumfitt v. Roberts*, 22 L. T. Rep. N. S. 301; L. Rep. 5 C. P. 224) were that the fee simple of the pew should be vested in the subscribers or proprietors; the court held that those words did not vest the land over which the pew was. So here, the words of this section vest the property in the street, and the street does not include the houses by the side of the street: it includes the space between the houses which is used as the footway and roadway. 'Street' means more than the surface; it means the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street and to lay down sewers—for at the present day there can be no street in a town without sewers—and also for the purpose of laying down gas and water pipes. 'Street,' therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used as streets are used. It does not include such a depth as would carry with it the right to mines, neither would 'street' include any buildings which happen to be built over the land, because that is not part of the street within the meaning of such an Act as this. If the enactment gives the local board that property in so much of the land, it gives them the absolute property in everything growing on the surface of the land. The Legislature have, because the right of owners in the soil of a 'street' is of so little value, intentionally taken away that right, and have given it to the extent I have mentioned, to the local board." (4 Q. B. Div. at page 121.) I think Cotton, L.J.'s judgment is to the same effect. Therefore the groundwork of the judgment in that case is that, as to depth, where the word "street" is used, we must give it the popular meaning which it had when the Act passed. With regard to depth, it includes the area of ordinary user, and nothing beyond or below. We have to apply that principle to the present case, for I think the case of *Coverdale v. Charlton* (*ubi sup.*) is binding as an authority, with regard to the principle on which it was decided, and I think the interpretation there given to the word "street" was and is right, and was the only interpretation which could be given. Therefore "street" is that which contains the area of ordinary user. We have now to apply that principle to the space which is above the surface of the ground. It has been argued that, because the surface passes, therefore everything above it also passes *usque ad caelum*. I will not question the rule laid down by Coke, which is to the effect that where land is granted by the Crown, or conveyed by one subject to another, under the term of land, every right



passes, down to the centre of the earth, and *usque ad cælum*. These are fanciful phrases, but they are the phrases commonly used to express the extent of the right which passes. By the common law a grant or conveyance of land passed all that, but it does not follow that the word "street" would have the same effect; I am not clear as to how this might be, but, supposing it would have the same effect in a grant or conveyance, here the word occurs in an Act of Parliament. We have to consider why the Act was passed, and with whom and what it is dealing; it deals with streets, of which the public have the use, and with the local authorities, who are the guardians of the streets. If the street includes only the area of user below the surface of the ground, why should it include anything but the same above? The logical conclusion is, that if it includes this below it should include the same above; that is, it should include that area of air which is the subject of ordinary user. I cannot say that the limit would be higher or lower according to the height of the particular carts or fire-escapes which might happen to pass. The height would be sufficient to allow the ordinary use of the streets by the things which use the streets as streets. I doubt whether it would be limited to the present height of any fire-escape which may happen to be in use, but I will not attempt to measure it in this way, for in the present case we have to apply the principle to the case of wires fixed to the tops of chimneys. Now, people do not use the street as a street at the tops of the chimneys; the chimney tops are not in the street, but over the street. I am of opinion that the Act does not pass the property in that which is over the street, but only the property in the street, and, therefore, that no property passed to the local board in the air in which these wires were placed. If the wires were dangerous, an injunction would be granted; but, in the absence of danger, the plaintiffs' case rests solely on the ground of trespass. I am of opinion that, although the property in the street is vested in the local board, these wires are not in the street, but are only passing over the street, and therefore Stephen, J. has construed the word too largely, and was not entitled to grant an injunction on the ground of trespass. Another point was raised by Mr. Philbrick, that, by 26 & 27 Vict. c. 112, s. 12, these wires could not be placed across the street without the consent of the plaintiffs. If we were to give effect to that contention, we should be applying the words "any company" in 31 & 32 Vict. c. 110, s. 3, to an Act which says "the company." I think it would not be right to apply that interpretation. Therefore, on neither point have the respondents been able to show that the judgment of Stephen, J. is right. On the authority of *Coverdale v. Charlton* (*ubi sup.*), and agreeing with the decision in *Rolls v. The Vestry of St. George the Martyr, Southwark* (*ubi sup.*), I am of opinion that, according to the principle laid down in *Coverdale v. Charlton*, these wires are not on the property of the plaintiffs, and, as there is no nuisance, there ought to be no injunction, and the judgment ought to be reversed.

BOWEN, L.J.—I have no doubt that if any appreciable danger were shown the court would interfere. If the plaintiffs had proved any substantial risk to the public, it would have been the

duty of the court to grant an injunction. It does not, however, appear on the evidence that there is any appreciable danger to the public, and the question therefore is whether, where no appreciable danger exists, the local board are entitled to put their veto upon stretching a wire across the street. Have the local board such powers as to enable them to interfere with a wire which causes no danger to the street, or to the traffic, and no interruption to the traffic? This is an important question, because, if the plaintiffs are right, the Act of Parliament confers on local boards a power to levy tolls in the air, for they are not restricted to acting in the interest of the public if the view contended for on behalf of the plaintiffs is correct. If a similar question were to arise in the case of an owner of land, I should be unwilling to suggest that the landowner had not the right to object to anyone putting anything over his land. It is not necessary to say on what theory that doctrine is founded, for this is not the case of a conveyance of land, but the local board have what the Act of Parliament (18 & 19 Vict. c. 120, s. 96) gives them, and the question is whether they have the right to insist that nothing shall be placed above what is given them by the Act. That depends on the construction of the Act. There are two rules of construction to be observed: first, that the words are to be taken in their popular sense, unless there is something to show a contrary intention; and, secondly, that, if the words are capable of two constructions, that one ought to be adopted which makes the words mean that the Act gives enough power to enable the local board to carry out their duties under the Act, and gives no unnecessary power. The street is vested in the local board, and the Act shows that the Legislature was not dealing with a simple easement, but with something material. This was the basis of the decision in *Coverdale v. Charlton* (40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104). We have to construe the words "vest" and "street," and it is impossible to take the word "vest" first, and then the word "street," and construe them separately, without seeing whether any light is thrown on the meaning of one word by the other. We must deal with the combined expression. The ordinary meaning of such an expression, in the case of land, is that a freehold estate vests, but the words may have a different meaning according to what the property is which vests. There are two views which may be suggested: first, that the Act of Parliament definitely plants in the local board something analogous to a freehold interest; or, secondly, that a statutory interest is given, so as to enable the board to carry out the purposes of the Act. I think the case of *Coverdale v. Charlton* (*ubi sup.*) decides only one thing, but the authority of that case goes beyond the actual decision. All that it decided I think is this: that the Act of Parliament vested in the local board such a statutory interest as to give them the surface of the ground and the right to the herbage. I am not quite sure that all the judges took the same view in that case. As to the judgment of Bramwell, L.J., I have some doubts as to how far he meant to go. The Master of the Rolls has just explained his own judgment, but I doubt whether Cotton, L.J. meant to say that the statute gave anything more than enough to transfer the right to the grass. In the subse-



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quent case of *Rolls v. The Vestry of St. George the Martyr, Southwark* (43 L. T. Rep. N. S. 140; 14 Ch. Div. 785), the court had to consider the duration of the right, and had also to consider the effect of the decision in *Coverdale v. Charlton* (*ubi sup.*). Cotton, L.J. explains (14 Q. B. Div. at page 798) that he meant that some right vested, but that nothing had been decided as to the duration or extent of the right; and Thesiger, L.J. said (speaking of *Coverdale v. Charlton*): "The effect of that case is substantially this; that sect. 96 has given to these bodies, over and above the mere easement of passage which the public possess, and over and above the right of control and management of the roads which the old surveyors of highways possessed, some right of property, some possessory right which would enable the district boards or the vestries to maintain actions in respect of that property or possessory right, and the decision of the court does not seem to have gone one step beyond that." (14 Ch. Div. at p. 802). I do not think the decision in *Coverdale v. Charlton* went beyond that, although the language of the present Master of the Rolls in that case did. Now, what is the meaning of the word "street"? In *Coverdale v. Charlton* it was not necessary to say how far down the street went; therefore, on that point, the case is not binding, though it is a great authority. I think the word "street" covers the area, or zone, of user. A statutory interest of a proprietary character in and below the surface is conferred, so far as it is necessary, for carrying out the purposes of the Act. As to the space above the surface of the street I am satisfied that the local board has no proprietary interest above the street beyond what is necessary in order to enable them to protect the street, and carry out the duties imposed upon them by statute. I say this without derogating from the authority of the proposition *Cujus est solum ejus est usque ad cælum*, for the local board have not the land, but the street; and it is not within the meaning of the word "street," or within the purview of the object of the Legislature, to give more than is actually necessary for carrying out the duties of the local board. I think, therefore, that the judgment of Stephen, J. was wrong, and ought to be reversed. On the second point, as to the statutes, I agree with the Master of the Rolls. If any appreciable danger were shown, I am clearly of opinion that an injunction could be obtained.

Fry, L.J.—The plaintiffs in this case ask for an injunction on one or other of three grounds: first, on the ground of danger; secondly, on the ground of interference with their proprietary rights; and, thirdly on the ground that they have given no statutory consent to the putting up of the wire, and they contend that such consent was required before the wire could lawfully be put up. I think no appreciable danger is shown. This depends on the evidence, and the judge before whom the case was tried saw the witnesses, and heard their evidence, and came to the conclusion that no danger was made out. I think we ought not to interfere with this finding, and I do not differ from the conclusion at which he arrived on this point. Secondly, is there any interference with the plaintiffs' proprietary right? The object of 18 & 19 Vict. c. 120, s. 96, was to give the local board something more than a mere control over the street, as is shown by the use of the word

"vest." A difficulty arises because "street" is a word which is used rather in a popular than in a legal sense. The Act is silent as to the duration of the interest and the nature of the property. If there were no authority on the point I am not certain that I should not think the safer view would be to hold that the Act meant to vest the street in the local board as land, with all the rights incidental to land in the area of the street; but this was not argued, because the case of *Coverdale v. Charlton* (*ubi sup.*) is inconsistent with such a view. That case has placed a definition on the word "street." No doubt some part of what was said in the judgment was not necessary for the decision of the case, but still I think it is binding, for it is not the right way to treat a judgment to consider whether all that was said was absolutely necessary for the decision of the case. According to the judgments in *Coverdale v. Charlton*, the word "street" would include the surface of the ground, and an undefined area below and above; that is, the area, or zone, of ordinary user. The suggestion that it was the intention of the Legislature to vest in the local board the area of possible interference is answered by the case of *Coverdale v. Charlton* (*ubi sup.*). The reasons given by two of the judges who decided that case show that the street which is vested in the local board includes the area of ordinary user only; for they have given a definition which we ought not to overrule, and which has excluded the idea of the area of possible interference. I am of opinion, therefore, that the local board have some proprietary right in the area of ordinary user, and nothing more. Then, is this case within that rule? I am of opinion that it is not, and therefore that the plaintiffs must fail. I wish to throw out no doubt as to the ordinary rights of a proprietor of land, the question as to which is not before us. I think a proprietor of land may remove an obstruction at any height above his land. I say nothing as to the rights of proprietors of adjacent land. For these reasons I have come to the conclusion that no injunction ought to be granted. It is contended that the plaintiffs had power by sect. 12 of the Telegraph Act 1863 (26 & 2 Vict. c. 112) to refuse their consent to the putting up of the wire; but it seems plain to me that the section in question applies only to companies constituted by that Act. It is contended that, because the Act of 1863 is incorporated by the Telegraph Act 1869 (32 & 33 Vict. c. 73), therefore every company that is within the terms of the Act of 1869 is brought within the Act of 1863. I have great difficulty in following that line of argument. In my opinion the learned judge in the court below has erred, because, intending to follow *Coverdale v. Charlton* (*ubi sup.*), he has extended the area which he held to be vested in the local board to the area of possible interference.

*Judgment reversed.*

Solicitors for plaintiffs, *Corse & Son*, and *Mossop*.

Solicitors for defendants, *Waterhouse, Winterbotham, and Harrison*.

Q.B. Div.]

REG. v. PHILLIMORE AND OTHERS (Justices) AND PILLING.

[Q.B. Div.]

## HIGH COURT OF JUSTICE.

## QUEEN'S BENCH DIVISION.

Wednesday, April 2, 1884.

(Before Lord COLERIDGE, C.J., WILLIAMS and CAVE, JJ.)

REG. v. PHILLIMORE AND OTHERS (Justices) AND PILLING. (a)

*Practice—Refusal of justices to hear case—Rule to show cause—Mandamus—11 & 12 Vict. c. 44, s. 5.*

By the 5th section of 11 & 12 Vict. c. 44, it is enacted that, "whereas it would conduce to the advancement of justice, and render more effective and certain the performance of the duties of justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a court of competent jurisdiction, and such justices enabled and directed to perform it without risk of any action or other proceeding being brought or had against them; therefore in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done."

An information having been laid against P. under the 51st section of the Highway Act 1864 (27 & 28 Vict. c. 101) for encroaching on a highway, the justices decided on evidence given that a claim of right set up by P. to the land alleged to have been encroached upon by him was *bonâ fide*, and thereupon refused to hear the case on the ground of want of jurisdiction.

The complainant having applied under the 5th section of 11 & 12 Vict. c. 44, for a rule for the justices to show cause why they should not hear and determine the case:

Held, that the application was properly made, the statute not being limited to cases in which the justices need protection in the performance of their duties.

Reg. v. Percy (L. Rep. 9 Q. B. 64) overruled.

This was a rule calling upon justices and one Pilling to show cause why they should not hear and determine a certain information which had been laid against Pilling under the 51st section of the Highway Act 1864 (27 & 28 Vict. c. 101) for encroaching upon a highway.

On the hearing of the information, it appeared on evidence that Pilling had inclosed certain pieces of land by the side of a highway, which, previous to the inclosing, were separated from land admitted to belong to him by a fence, but were not separated from the highway. It was contended on the part of Pilling that the land belonged to him, and had never been dedicated to the public.

The justices upon the evidence given decided that the claim set up by Pilling was a *bonâ fide* claim of right, and thereupon refused to hear the case further upon the ground of want of jurisdiction.

A rule *nisi* was then obtained under the 5th section of 11 & 12 Vict. c. 44, calling upon the justices and Pilling to show cause why they (the justices) should not hear and determine the matter, and this was the rule which now came on for argument.

The 5th section of 11 & 12 Vict. c. 44, is:

And whereas it would conduce to the advancement of justice, and render more effectual and certain the performance of the duties of justices, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him; be it therefore enacted, that in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and, if after due service of such rule, good cause shall not be shown against it, the said court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices, upon being served with such rule absolute, shall obey the same, and shall do the act required, and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule and done such act so thereby required as aforesaid.

Pitt-Lewis, for Pilling, showed cause against the rule.—This section is applicable only in cases where the justices need protection. In *Reg. v. Percy* (L. Rep. 9 Q. B. 64) Blackburn, J. lays this down in terms. "The generality," he says, "of the words 'where justices shall refuse to do any act relating to the duties of their office' is controlled by the recital of the section, and it is only where the justices need protection that the enactment applies;" and Quain, J. says, "The last clause in the section confirms that view." In this case it cannot be said that the justices need protection, and therefore the section does not apply, and the court will not grant a rule.

Bullen in support of the rule.—The decision in *Reg. v. Percy* was at variance with that of Wightman, J. in *Reg. v. Aston* (1 L. M. & P. 491), which was apparently not brought to the knowledge of the court which decided *Reg. v. Percy*. *Reg. v. Aston* was the case of a rule under this section calling upon justices to show cause why they should not take Aston's recognisances in a penal sum on condition that he prosecuted with effect an appeal against a conviction made against him by them, and Wightman, J. there held that the remedy under this section is not simply for the benefit of justices, nor confined to cases in which their jurisdiction is doubtful, but extends to all cases in which they refuse to do an act relating to the duties of their office. "I will not," he said, "say what the object of the statute generally is, but that section substitutes a rule in lieu of *mandamus*, in order to prevent expense, 'in all cases, where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office.' These words seem large enough to embrace the present matter." The view so taken by Wightman, J. is the correct view of the object of the section, which is clearly applicable to the present case.

Lord COLERIDGE, C.J.—We are not prepared to lay down any exclusive rule as to what class of

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cases come within the operation of this section, and what are rather the subject of *mandamus*, these two methods being, of course, in many cases, co-ordinate. But we are prepared to say that we do not think that the case of *Reg. v. Percy* was rightly decided, in so far as it held that this section only applies to cases in which the justices need protection. We think that this view narrows the statute too much, and does not rightly interpret its meaning.

WILLIAMS and CAVE, JJ. concurred.

Williams, J. then left the court, and, the facts having been discussed,

Lord COLERIDGE, C.J. and CAVE, J. held that, on the authority of *Williams v. Adams* (5 L. T. Rep. N. S. 790; 31 L. J. 109, M. C.) and other cases, the justices had jurisdiction to decide, and ought to have decided, whether the land in question was highway or not, and thereupon made the rule absolute, with costs against the defendant Pilling.

*Rule absolute.*

Solicitors for the applicant, *Pickett and Mytton*.  
Solicitors for the defendant, *Stocken and Jupp*.

July 2 and 3, 1884.

(Before MATHEW and DAY, JJ.)

LANCASHIRE AND CHESHIRE TELEPHONIC EXCHANGE COMPANY (apps.) v. OVERSEERS OF MANCHESTER (resps.) (a)

Poor rate—Telephone wires, poles, and attachments  
—Occupation—Rateability.

A telephone company were the owners of certain overhead wires, which were supported by poles fixed in the ground, and by attachments to the roofs and chimneys of buildings. The consent of the owners and occupiers of the land and

buildings was in every case first obtained in written agreements, by which the company undertook to pay an annual sum as an acknowledgment, to make good any damage that might be done to the property, and to remove the wires, attachments, and poles, upon notice to that effect. The only access to the wires and attachments on the buildings was through the interior of the buildings by the permission of the owners or occupiers, and then only during business hours, the company having no key or other way of obtaining admittance thereto. Similarly the only access to the poles was by the permission of the owners or occupiers of the land.

Held, that the telephone company had such an "exclusive occupation" of those parts of the buildings to which the wires were attached, and of the land in which their poles were fixed, as would render them liable to be rated, and that consequently they were rateable in respect of their wires, attachments, and poles taken as one entire system. *The Electric Telegraph Company v. Overseers of Salford* (11 Ex. 181) followed.

THIS was a special case stated by consent for the opinion of the court under 12 & 13 Vict. c. 45, s. 11, pursuant to a judge's order.

The material parts were as follows:—

The appellants were a company incorporated under the Companies Acts 1862 to 1880 for the purpose of establishing telephonic exchanges and communications in Lancashire and Cheshire, their principal office being at 38, Faulkner-street, Manchester.

In a rate or assessment for the relief of the poor made by the respondents on the 22nd June 1883, the appellants were inserted as occupiers of land, telephone posts, and wires in the township of Manchester, and rated in respect of such occupation. The following is a copy of the rate so far as it relates to the matters in question:

Dr.			No. 8 District.			Polling District, No.						
Progressive Number.	Number of House.	Name of Owner.	Owners assessed under the Manchester Overseers Act 1858, instead of the occupiers.	Name of Occupier.	Number of Votes.	Description of Property.	Estimated Extent.	Rent per Week.	Gross Estimated Rental.	Rateable Value.		Poor Rate at in the £.
										At £10 and under per annum.	Above £10 per annum.	
3153A.			The Lancashire and Cheshire Telephonic Exchange Limited.			Land, Telephone posts and wires.			£2400		£2000	

In the rate the appellants were rated in respect of the whole of the telephone posts, standards, or other supports or attachments for wires herein-after mentioned, and all the wires thereto attached, taken as one entire system.

In the rate or assessment the appellants were also rated as occupiers of No. 38, Faulkner-street, but no addition was made to such rate in respect of any telephone posts, standards, or other supports or attachments for wires, or wires thereto attached. The appellants paid this latter rate.

The business carried on by the appellants within the township of Manchester was of two kinds:—(A) The establishment and maintenance of a telephonic exchange by means of which any one subscriber to the exchange could communicate

privately by telephone with any other subscriber.

(B) The supply and erection generally of wires and telephonic apparatus (not in connection with the telephonic exchange) for the private use of firms and individuals paying a rent for the same.

For the purposes of their telephonic exchange business (A) the appellants from time to time laid wires within the respondents' township from the central office of the appellants to the business premises respectively of their subscribers. A wire was so laid from the central office (the centre of the exchange system) to the business premises of each subscriber, and was furnished at either end with telephone and all other necessary telephonic apparatus, thereby enabling any subscriber to be placed in telephonic communication with any other subscriber through the central office.

(a) Reported by W. F. EVERSOLEY, Esq., Barrister-at-Law.

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For the purpose of the other branch (B) of their business the appellants from time to time laid in the respondents' township other wires, and affixed thereto telephones and all other necessary telephonic apparatus. These wires and apparatus were used exclusively by the renters thereof.

In both branches of the business, by agreement with the subscribers and renters, the appellants kept the wires and apparatus in working order, and for that purpose had free access to the subscribers' and renters' premises, the wires and apparatus remaining the property of the company, and the subscriber or renter paying an annual sum for their use.

All the wires laid by the appellants were overhead wires. Those laid for the (A) branch of their business were carried up through the roof of the appellants' central office, thence over buildings, streets, yards, and plots of land not built on in the respondents' township, to the respective premises of the subscribers, where they were for the most part led through the roofs to the interior of the premises. The wires laid for the (B) branch of the business were in the same way carried over buildings, streets, yards, and plots of land not built on in the respondents' township, and were led down at either end into such premises of the renters as it was desired to connect.

These overhead wires were supported and steadied either by poles fixed in the ground, or more generally by being attached to the roofs, chimneys, or walls of some of the buildings over which they passed.

The attachments to buildings were made, in the case of a single wire, by an iron spike driven into the building, or by a bolt screwed into the lead of the ridge, or by an iron bracket nailed to the corner of the chimney, to one of which the wire was attached; and in the case of a number of wires, by means of standards or ridge saddles attached to the roofs of the buildings, the standards being fixed by iron bolts and stayed by wire stays, the ridge saddles being made to fit the lead ridge and fastened by stays.

All these attachments could be easily removed without damage to the buildings, and the appellants did, from time to time, change them from one point of attachment to another on the same building.

The consent of the owners or occupiers of land into which poles were fixed, or buildings to which attachments were made, was, in all cases, given in agreements, mostly in printed forms, called "wayleaves," by which the appellants undertook to pay a small annual sum to the owners or occupiers as rent or acknowledgment, to make good any damage done to the property, and to remove the wires and attachments upon a certain notice.

The majority of the buildings to which the attachments were made were several stories high, some of them warehouses, and the appellants obtained access to the roofs by ascending through the interior of the buildings, permission being in all cases first obtained from the owners or occupiers. The outer doors of the various buildings were locked and fastened except in the usual business hours, and the appellants' servants were then unable to get into or on to the buildings from the interior, as they were in no single instance furnished with a key of the outside door of the buildings, or any other way of obtaining

admittance thereto. Similarly the practice of the appellants when wishing to have access to the poles fixed in the ground was to obtain permission from the owners or occupiers.

The questions for the court were:

1. Were the appellants' telephone posts, standards, ridge saddles, and other attachments and supports for wires, and the wires thereto attached, or any and which of them, rateable to the poor, and, if so, who was liable for the rate?

2. If they were rateable, did they, or any of them, constitute a separate rateable tenement, or did they add to the rateable value of the premises respectively to which they were attached?

3. If the appellants were rateable to the poor in respect of any land, telephone posts, and wires in the respondents' township, how was the proper amount at which they ought to be assessed to be ascertained?

*B. E. Webster, Q.C. (Henn Collins, Q.C. and Bradbury with him)* for the appellants. — The question is, Is there any exclusive occupation of land by the appellants? The wires are only attached to the houses, and the poles fixed in the ground by the permission of the owners or occupiers. The owner did not part with the exclusive occupation of any part of his house; there was no tenancy created. The appellants must remove them whenever called upon to do so. Hence there is no exclusive occupation; it is an exclusive use or enjoyment by the licence of the owners and occupiers, but it is not such an occupation as will render the appellants liable to be rated. As to the wires, they only occupy the land by means of the posts, as accessories to the posts; therefore there is no occupation of land apart from attachment. This case is like *Smith v. Lambeth Assessment Committee* (9 Q. B. Div. 585; on appeal, 48 L. T. Rep. N. S. 57; 10 Q. B. Div. 327), where it was held that Smith and Sons' bookstalls were not rateable on the ground that only a right to an exclusive enjoyment passed by the agreement with the railway company. There is no demise by the owners and occupiers to the appellants; they have merely granted a licence to the appellants to place the poles in the ground and to attach the wires to the roofs of the houses. There are other cases in which the distinction between occupation and mere enjoyment has been recognised:

*Watkins v. Milton-next-Gravesend*, 18 L. T. Rep. N. S. 601; L. Rep. 3 Q. B. 350;  
*Grant v. Oxford Local Board*, 19 L. T. Rep. N. S. 378; L. Rep. 4 Q. B. 14.

At first sight the case of *The Electric Telegraph Company v. Overseers of Salford* (11 Ex. 181) may seem to be against this view. But there the telegraph company owned the posts and wires, and the posts were put into the ground and carried the wires from point to point, and that was held to be an occupation of the soil. This was pointed out by Lord Blackburn in *Watkins v. Milton-next-Gravesend*, where he said: "There the Electric Telegraph Company occupied the land by means of their posts, but that does not decide that an easement can be rated." Further, the respondents have rated the telephone works as one entire system; whereas the proper mode of rating them is to rate the different works separately, having regard to their annual value under the statute of Elizabeth. He also cited

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*Cory v. Bristol*, 36 L. T. Rep. N. S. 594; 2 App. Cas. 262;

*Willing v. Assessment Committee of St. Pancras*, 37 L. T. Rep. N. S. 126; 2 Q. B. Div. 551;

*Smith v. St. Michael, Cambridge*, 3 L. T. Rep. N. S. 687; 3 E. & E. 383;

*London and North-Western Railway Company v. Buckmaster*, 31 L. T. Rep. N. S. 835; L. Rep. 10 Q. B. 70.

*Ambrose*, Q.C. (*Smyly* with him) for the respondents.—What is to be rated in this case is not any particular wire or attachment taken by itself, and separate from the rest of the system, but the whole system of wires. The whole system belongs to the company, and must be rated together. There is here an exclusive occupation of land by the appellants for the purposes of their telephonic business. It may be that for the purpose of exercising their extraordinary right of going on to the roofs of houses where the attachments are fixed they are only entitled to go at reasonable hours; it may be that this right is a mere easement. But still the wires and attachments are there, and are being used night and day; the whole telephonic system belonging to the appellants is being used night and day; the use of them is permanent and exclusive, as none of the owners or occupiers can interfere with their use. Hence the appellants, for the purposes of carrying on their business, exclusively occupy the land over which the wires run and on which the attachments are fixed. This case is very much like the case of gas and water pipes passing along streets, which are rateable; the gas and the water being sent by one means of communication, the telephonic messages by another. [He was stopped.]

MATHEW, J.—The third question asked of us in the case is not a question that we should answer, and so we must decline to answer it. As to the two other questions, it appears to me that the case is concluded by the decision in *The Electric Telegraph Company v. Overseers of Salford* (*sup.*). In that case the question was whether the property which was sought to be made the subject of assessment was capable of occupation within the law as to rating; and the point was made, which has been made here, that it was not property of a character capable of occupation. The court held that it was, and that it was assessable on that ground, and I am wholly unable to distinguish that case in principle from the present. What is sought to be assessed here is a system of wires used for an analogous, though it may be a different, purpose to the wires in the Salford case, and I am unable to distinguish the property in question here from that in question in that case. Mr. Webster referred to cases where it was held that there was no occupation, but merely enjoyment, and he argued that, looking at the way in which this property is used, there was here a series of *quasi-easements*, of enjoyments by licence only, and not that which was the subject of occupation. Our attention was called to the modes of attachment and the modes of support for the wires and other apparatus of the company, but I think that the answer to that argument is, that there is not here a mere licence to use in a particular case, but an exclusive occupation, limited in character I admit, but exclusive in each case. Where the wire is attached to a roof, that part of the roof where the wire is attached is used exclusively for

the purpose of the support. Where the ridge-saddle is fitted on the roof, that part of the roof where the ridge-saddle is fitted on is used exclusively for the purpose of maintaining the wires by that ridge-saddle, and so, where the wire is upon a post, the post and the land in which it is fixed are used exclusively for supporting that wire. The occupation is not casual or occasional, but exclusive and permanent, though the character of the occupation is reduced in each case almost to a minimum. Now the first case that Mr. Webster relied upon was *Watkins v. Overseers of Milton-next-Gravesend*, where the person who enjoyed the right of mooring a barge to permanent moorings in the river was sought to be rated as the occupier of the river. It was held that he was not the occupier of the moorings, having only a licence to use them, but that the owner of the moorings was the occupier, and that he ought to be rated. *Cory v. Bristol* enunciated the same principle, but with a different result. There the same sort of property was used; but the person who used it was also the owner, and he was held to be properly assessed. Then Mr. Webster relied on the recent case of *Smith v. Lambeth Assessment Committee*, and no doubt that is a case where enjoyment is within a hair's breadth of occupation. In that case, although there was no legal right to the exclusive use of any part of the platform, there was practically an exclusive use; but the fact that there was no legal right to an exclusive use was held sufficient to determine that the property was not rateable. Now, is the use of the different supports and attachments here meant to be exclusive or not? It seems clear that it was intended by the parties that no part of this complicated structure should be interfered with by the owner or tenant of any one of those houses. It is true the company did not have the right to constant access to see that everything was in order; it was not necessary that they should have that right. But the company was permanently using the whole structure. The attachments and supports are, by the different instruments, declared to be the property of the company. Mr. Webster very properly referred us to the agreements—the way-leaves—to show that the enjoyment here was enjoyment by way of easement, and was not occupation. But really the question is not what is contained in those different documents, but what is actually going on under those documents. What is going on under those documents appears to me to be an occupation of the whole of this system for the purpose of conveying telephonic messages. The case is undistinguishable in my judgment from the Salford case, and on that ground the respondents are entitled to our judgment.

DAY, J.—I concur.

*Judgment for respondents; leave to appeal.*

Solicitors for the appellants, *Pritchard, Englefield, and Co.*, for *Grundy, Kershaw, and Co.*, Manchester.

Solicitors for the respondents, *Johnson and Weatherall*, for *A. Lings*, Manchester.

Q.B. DIV.]

REG. v. THE LICENSING JUSTICES OF PIREHILL NORTH, STAFFORDSHIRE.

[Q.B. DIV.]

Thursday, July 3, 1884.

(Before MATHEW and DAY, JJ.)

REG. on the prosecution of HOOLEY v. THE LICENSING JUSTICES OF PIREHILL NORTH, STAFFORDSHIRE. (a)

*Practice—Mandamus—Return of unconditional compliance—Plea to—Rules of Supreme Court 1883, Order LIII., r. 9; Order LXVIII., r. 1; Order LXXII., r. 2.*

Where a return is made to a writ of mandamus of unconditional compliance therewith, the prosecutor can still plead to the return, notwithstanding the provisions of Order LIII., r. 9, as the former practice is kept alive by Order LXVIII., r. 1, and Order LXXII., r. 2.

THIS was a motion to strike out or set aside a plea to a return to a writ of mandamus.

A writ of mandamus was issued to the defendants commanding them within a reasonable time to hold a further adjournment of the adjourned general annual licensing meeting for the division of Pirehill North, and to cause notice to be given of the time and place for holding such further adjournment, and at such further adjournment to proceed to hear and determine an application by Samuel John Hooley, for the renewal of a licence or certificate to hold excise licences to sell by retail beer, cider, or wine, to be consumed on the premises.

The defendants in their return to the writ of mandamus stated that they did within a reasonable time after service of the writ hold a further adjournment of the adjourned annual general licensing meeting, after due notice given, and did in due form of law proceed to hear and determine the application for the renewal of the said licence, and did hear and determine the matter of the said application.

To this return the prosecutor pleaded that the defendants did not in due form of law hear and determine the application, and that they had illegally refused to renew the licence or certificate. The plea further went on to state the circumstances connected with the hearing and refusal of the application both at the annual general licensing meeting and the adjournment thereof, and also at the further adjourned meeting held in pursuance of the writ of mandamus, and the prosecutor therein alleged that, under the circumstances so stated, "the defendants did not in due form of law proceed to hear and determine, and did not hear and determine the matter of the application pursuant to the statute in that behalf, and in obedience to the writ of mandamus."

The defendants thereupon moved that the plea to the return to the mandamus be struck out or set aside upon the grounds that no pleading was allowed by law to the return (being a return of unconditional compliance), and that it was irregular and embarrassing.

Order LIII., r. 9:

Where any return is made to a writ of mandamus, other than an unconditional compliance therewith, the applicant may plead to the return within such time and in like manner as if the return were a statement of defence delivered in an action; and, subject to these rules, this pleading, and all subsequent proceedings, including pleadings, trial, judgment, and execution, shall proceed, and may be had and taken as if in an action.

(a) Reported by W. P. EVERSOLEY, Esq., Barrister-at-Law.

H. D. Greene for the defendants.—Before the statute of the 9 Anne, c. 25, when a return was made to a writ of mandamus which was false, the prosecutor had a remedy open to him by bringing an action for a false return. Then two statutes were passed (9 Anne, c. 25, s. 1, and 1 Will. 4, c. 21, s. 3) which allowed pleas to a return to a writ of mandamus. In 1883, by the Statute Law Revision and Civil Procedure Act (46 & 47 Vict. c. 49), these two statutes were repealed upon this point, and in their place was put rule 9 of Order LIII. The effect of that repeal is to leave the law as it was before the statute of Anne, except in so far as it is affected by Order LIII., r. 9. That rule allows pleas to a return in all cases except where the return is that of unconditional compliance. Here the justices have made a return of obedience, and so there is no provision allowing the prosecutor to plead to it. His remedy is to bring an action for a false return, or he might, in the first instance, have appealed to quarter sessions against the refusal of the justices to renew the licence. This plea ought, therefore, to be struck out as not warranted by any statute or rule of court. Again, the plea is embarrassing, because alleged facts are stated in it which are inconsistent with the finding of the justices. The justices are the sole judges of the facts, and if this plea is allowed to stand the justices will have to fight over these allegations which it is not the province of the jury to determine. No question of law can be raised upon this plea.

Jelf, Q.C. (Rose with him) for the prosecutor.—As to the last point, that this plea is embarrassing, the facts are stated there to enable the defendants to know what case they are to meet, and to traverse any facts they please, and to raise any question of law upon it. The plea sets out the facts of the case, which facts did not justify the defendants in refusing the licence, and show that the defendants did not *bonâ fide* hear and determine in accordance with the writ of mandamus. [MATHEW, J.—Speaking for myself, I should not have thought that this pleading could be treated as embarrassing. There is, first, a traverse; and then a statement of the grounds upon which that traverse is intended to be maintained. I cannot see that it is so embarrassing that we ought to strike it out.] Then, as to the first objection, this is one of some difficulty. However, Order LXVIII., r. 1, says that, "subject to the provisions of this order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters. . . . Proceedings on the Crown side of the Queen's Bench Division." This rule saves the existing practice, namely, the practice under the statutes of 9 Anne, c. 25, and 1 Will. 4, c. 21, as the rules do not anywhere expressly provide for this particular case. [MATHEW, J.—Order LXXII., r. 2, may further assist you. It enacts that, "where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." No provision has been made for pleading to a return of unconditional compliance, and therefore does not the then existing practice—that is, the practice under the statutes of Anne and Will. 4—apply?] It is submitted that it does apply. The rules came into operation on the 24th Oct. 1883, and at that date the "existing procedure and practice" was

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the procedure and practice under those statutes. Hence, as there is no express provision in the rules dealing with this particular case, the old practice still remains in force, and this plea is good.

*Greene replied.*

MATHEW, J.—I am clearly of opinion that this application must be refused. Mr. Greene relies, in the first instance, on an objection which he makes under Order LIII., r. 9. He says that there has been here a return of obedience to this writ of *mandamus*, and that the effect of Order LIII., r. 9, is to terminate the proceedings and to prohibit any plea to that return. He says that that was the meaning, and that was the intent of the rule. Why any such provision as that should have been introduced into the rule it is impossible to conjecture, and Mr. Greene has not been able to supply any motive for the extraordinary change in the practice and procedure which he alleges has been made, though no doubt the terms of the rule would appear to omit the case of a plea to a return of obedience. The argument that he puts forward is that there is expressly omitted from the provisions of the rule the case of a return of unconditional compliance to a writ of *mandamus*, and that there are consequently no means now of pleading to such a return. Under the old procedure it could have been done, because there were two statutes that provided for it, namely, the statute of 9 Anne, c. 25, s. 1, and the statute of 1 Will. 4, c. 21, s. 3. Those statutes, however, have been repealed, and nothing has been put in their place with respect to a return of unconditional compliance, the rule in question omitting, whether by oversight or not, to provide for such a case as this, and so it is said that the plea that has been put in is unwarranted by any statute or rule of court, and must be struck out. Upon turning, however, to a subsequent order, I think that words are to be found there that will save us from terminating the action in the peremptory manner suggested. It is Order LXVIII., r. 1, applying to cases on the Crown side of the Queen's Bench Division, and by that rule it is provided that "subject to the provisions of this order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters (*inter alia*): Proceedings on the Crown side of the Queen's Bench Division." It seems to me that that rule saves the proceeding in question, because nowhere else is there contained in the rules any express provision as to what shall be done in the particular case now before us, namely, the case where the return is a return of unconditional compliance to the writ of *mandamus*. That being so, this plea is allowable, and the then existing procedure is applicable, and the then existing procedure applicable was that regulated by the Common Law Procedure Act 1854, which has also been repealed as to this by the 46 & 47 Vict. c. 49. Upon that ground this application must fail. Upon the other ground I think that, for the reasons I have given in the course of the argument, there is no embarrassment here. A plea is either good or bad. If bad, it can be met by what is equivalent to a demurrer; if good, it will have to be proved. This plea is merely an argumentative denial that the return is true, an issue which must have gone to the jury under the

old practice. This application, therefore, must be refused.

DAY, J.—I concur, and I only wish to add that the practice of pleading to a return to a writ of *mandamus* is a practice which had originated, no doubt, under the statutes of Anne and Will. 4, but which had become a well-known and well-established practice and procedure, and was well known and well established on the 24th Oct. 1883. It is quite true that upon that day the statutes of Anne and Will. 4 had been repealed; that is, they were repealed by the statute which took effect on that day, but I do not think that it necessarily follows that the well-known and well-established practice and procedure which originated under them were thereby put an end to. (a) On the contrary, I think, with my brother Mathew, that they are preserved by those words to be found in the rules which preserve the existing practice and procedure. I also agree that the existing procedure applicable is that under the Common Law Procedure Act 1854. I also agree with my brother Mathew as to the second objection taken by Mr. Greene, and I think that this application should be refused.

*Motion dismissed.*

Solicitors for the prosecutor, *Robinson, Preston, and Stow*, for *Hollinshead and Moody, Tunstall*.

Solicitors for the defendants, *Thomas White and Sons*, for *Hand, Blakiston, and Everett, Stafford*.

Thursday, Feb. 28, 1884.

(Before DAY and SMITH, JJ.)

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Poor law—Delay in going to trial—Proceedings prosecuted with due diligence—Poor Law Boards (Payment of Debts) Act 1859 (22 & 23 Vict. c. 49), s. 4.

An action was brought by an engineer, within the time limited by sect. 1 of the Payment of Debts Act 1859, for services rendered to the defendants, who were a rural sanitary authority acting under the Public Health Act 1875. After issue joined the plaintiff took out a summons to refer the matter to arbitration; this summons was opposed by the defendants, and was dismissed. The plaintiff then allowed two assizes at Leeds (where the action was to be tried) to pass without giving notice of trial; the defendants then took out a summons to dismiss the action for want of prosecution, after which the plaintiff gave notice of trial for the assizes then coming on. At the trial, the learned judge, with the consent of the parties, ordered the matter to be referred to an arbitrator, who found for the plaintiff for a certain sum.

In an action for a *mandamus* to the defendants to levy a rate to satisfy the award:

Held, granting the *mandamus*, that, as the action was a proper one to be referred to arbitration,

(a) As to the effect upon an existing practice of the repeal of a statute under which that practice originated, by the Civil Procedure Acts Repeal Act 1879, containing words identical with those in the Statute Law Revision and Civil Procedure Act 1883, see the judgment of Watkin Williams, J. in *The London Scottish Permanent Benefit Society v. Chorley* (50 L. T. Rep. N. S. 265).

(b) Reported by HENRY LEIGH, Esq., Barrister-at-Law.



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*and as the plaintiff had taken out a summons to refer, which the defendants opposed, the plaintiff had not, under the circumstances, failed to prosecute the proceedings in the action "with due diligence" within the meaning of sect. 4 of the Poor Law Boards (Payment of Debts) Act 1859.*

SPECIAL case stated in an action for a *mandamus* to the defendants to levy a rate for the payment of a judgment recovered by the plaintiff under the following circumstances:—

1. The plaintiff is a civil engineer carrying on business at Leeds. The defendants are the rural sanitary authority of the Pateley Bridge Union, in the county of York, constituted by and acting under the Public Health Act 1875.

2. On the 17th Nov. 1881 the plaintiff commenced an action against the defendants, claiming the sum of 252*l.* 2*s.* 1*d.* for professional services as engineer rendered to the defendants as such rural sanitary authority, and for work and labour done and money paid for the defendants at their request. The statement of claim was delivered on the 10th Dec. 1881, stating the place of trial at Leeds. The statement of defence was delivered on the 30th Dec. 1881, and the pleadings were closed by issue being joined on the 11th Jan. 1882. After issue joined the plaintiff took out a summons to refer the matter to arbitration, which was opposed by the defendants and dismissed. The next assizes held at Leeds for the trial of civil causes was in the month of February 1882, and the last day for giving notice of trial for such assizes was the 21st Jan. 1882. The next following assizes held in Leeds for the trial of civil causes was in the month of May 1882, and the last day for giving notice of trial for such assizes was the 21st April 1882. No notice of trial was given by the plaintiff for either of those assizes. Notice of trial was given by him on the 14th July 1882 for the then next assizes to be holden at Leeds. The action came on for trial on the 25th July 1882 at the assizes held at Leeds before Cave, J., without a jury, when it was ordered by the court, with the consent of both parties, that a verdict should be entered for the plaintiff, subject to the award of William Bruce, Esq., stipendiary magistrate of Leeds.

3. The arbitrator sat to hear evidence on the 17th Aug., 27th and 28th Oct. 1882, and the 31st Jan. 1883, and by his award, dated the 20th March 1883, found in favour of the plaintiff for the sum of 112*l.* 19*s.* 9*d.*, and directed that the defendants should pay to the plaintiff his costs of and incidental to the reference, and the costs of the award, and that the defendants should bear their own costs of the same.

4. In pursuance of the award, on the 19th April 1883, judgment was entered for the plaintiff for the sum of 112*l.* 19*s.* 9*d.* and costs to be taxed. On the 3rd Aug. 1883 the costs were taxed and allowed at 217*l.* 0*s.* 11*d.*, which sum, together with the sum of 112*l.* 19*s.* 9*d.*, amounts to the sum of 330*l.* 0*s.* 8*d.* due by the judgment to the plaintiff, and on the same day the plaintiff's solicitors applied for payment.

5. On the 27th Aug. 1883 an *elegit* was issued directed to the sheriff of Yorkshire, for the amount of the judgment debt, and on the 5th Sept. 1883 a return was made that there were no lands or goods belonging to the defendants within the bailiwick.

6. The defendants have no property whatsoever capable of satisfying the judgment debt, and the same remains unsatisfied.

7. On the 6th Sept. 1883 the plaintiff commenced this action against the defendants.

The question for the opinion of the court was, whether the plaintiff was entitled to a writ of or order for a *mandamus* ordering the defendants to make the necessary apportionments, if any, between the several contributory places, and to issue their precept to the overseers of each such contributory place, requiring such overseers to pay, within a reasonable time to be limited by such precept, the amount specified in such precept to the defendants as the rural sanitary authority within the provisions of the Public Health Act 1875, and further ordering the defendants, out of the moneys so paid to them, to pay to the plaintiff the amount of the said judgment debt, together with interest and the costs of the special case; or to some other and what writs or order for the purpose of enforcing payment by the defendants to the plaintiff of the sums adjudged to be due from the defendants to the plaintiff.

If the court should be of opinion that the plaintiff was entitled to a writ of or order for a *mandamus*, then such writ should issue or such order be made, and the plaintiff should be entitled to all proper remedies for enforcing the same, and all proper costs of obtaining and enforcing such remedies.

If the court should be of opinion that the plaintiff was not entitled to such writ of or order for a *mandamus*, nor to any other writ or order, the judgment to be entered for the defendants with costs.

It also appeared that, after the pleadings had been closed, the plaintiff had taken out a summons to refer the matter to arbitration, which was opposed by the defendants and dismissed on the 18th Jan. 1882, and that notice of trial was not given by the plaintiff until he had been served by the defendants in July 1882 with a summons to dismiss for want of prosecution.

Sect. 1 of the Poor Law Boards (Payment of Debts) Act 1859 (22 & 23 Vict. c. 49) provides that all debts and claims against the guardians of any union or parish shall be paid within the half-year within which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards.

Sect. 4 of the same Act enacts:

If any person claiming any debt or demand shall have commenced, or shall hereafter commence, proceedings in any court of law or equity, or before any justice or other competent authority, within the time hereinbefore limited or within the time within which the Poor Law Board may grant extension, and shall, with due diligence, prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians or managers against whom, or against whose officer, the same may be brought, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period hereinbefore provided, and all proceedings taken by *mandamus* or otherwise for the enforcing of such judgment without delay shall be deemed to be within the operation of this section.

Vaughan Williams for the plaintiff.—There has been no unnecessary delay on the part of the plaintiff. The case was a proper one to be referred to arbitration, and the plaintiff had taken out a

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summons for that purpose, but the defendant opposed it and compelled the plaintiff to set down the cause for trial, but when it came on for trial it was referred by the judge to an arbitrator.

*Forbes, Q.C.* (A. Glen with him) for the defendants.—This action has not been prosecuted with due diligence within the meaning of the 4th section of the Payment of Debts Act 1859. In *Baker v. Guardians of Billericay Union* (9 L. T. Rep. N. S. 486; 9 Jur. N. S. 1201; 33 L. J. 40, M. C.) it was held that this Payment of Debts Act 1859 operated as a Statute of Limitations with respect to claims made after the prescribed time. In the present case the plaintiff allowed two assizes to go past, and did not give notice of trial until more than six months after the commencement of the action, and then only after the defendants had taken out a summons to dismiss the action for want of prosecution.

*DAY, J.*—In this case the plaintiff had a claim against the defendants in respect of which he began proceedings within the time limited by statute, and he finally succeeded in establishing his claim against the defendants, and obtained judgment for 330l. 0s. 8d., and I am of opinion that he is entitled to be assisted in enforcing that judgment. It has been said, and very properly said, that he is only to be paid if he has urged on his proceedings with due diligence, and it is contended that he did not prosecute his claim with such due diligence as would entitle him to succeed in the present case. I do not stop now to inquire on whom the burden of proof lies in proving the prosecution of the claim, with or without due diligence. It is sufficient now to say that I am satisfied that the plaintiff has proceeded with due diligence. It is quite true he might have given notice of trial for the winter assizes of 1882, or he might have given notice of trial for the following spring assizes, but he failed to give notice for either; he did give notice of trial for the summer assizes, but that was only after a summons had been taken out by the defendants to dismiss the action for want of prosecution. Upon these bare facts, I should have thought that the plaintiff had failed to prosecute his claim with due diligence, had the subject-matter of the action been of such a nature as to have been properly tried at assizes; it was clearly, however, a case which never could or never would have been tried at Nisi Prius, and the defendants must have known that it would have been sent to a reference the moment it was mentioned at the assizes. Having regard to the nature of this claim, the defendants acted very recklessly and wrongly in opposing the summons to refer; it would clearly have been a waste of costs to urge the plaintiff to try the action at Nisi Prius. When the summons to refer was heard, the plaintiff had only three days within which to get ready for trial at the winter assizes of 1882. He did not set down the action for trial at those assizes, and I am of opinion that there was no want of due diligence in that. On the 10th July 1882 the defendants actually take out a summons to dismiss the action for want of prosecution, and the plaintiff then says, "If you insist on going to the assizes, I must give notice of trial," and he accordingly does so. I must say, having regard to the character of this action, that it was not an action which the defendants should have insisted on having tried

at Nisi Prius, and I think that the plaintiff has prosecuted the proceedings in this case to judgment or final settlement "with due diligence," within the meaning of the 4th section of the Payment of Debts Act 1859. I am of opinion, therefore, that the plaintiff is entitled to judgment on this special case.

*SMITH, J.*—I am of the same opinion. We have here a case in which the plaintiff is entitled to be paid the amount of his judgment for 112l. 19s. 9d. and costs. That being so, it is said he is not to have the fruits of this judgment, on the ground that he has not prosecuted his action with due diligence. Now we find that the plaintiff began his action within the proper time in Nov. 1881, and upon issue being joined he did what an ordinary person would have done in such a case, he took out a summons to refer. What did the defendants do? Relying, no doubt, on *Clow v. Harper* (38 L. T. Rep. N. S. 269; 3 Ex. Div. 198), they thought that they could successfully oppose the matter being referred to an arbitrator. What does the plaintiff then do? He sees that, if the action comes on for trial, a reference is obvious, and he tries, if possible, to avoid the expense of taking all his witnesses and preparing for trial at the assizes, and he undoubtedly does let one assize go past. I do not think it is reasonable to say that he was bound to give notice of trial within the three days after his summons to refer failed; and again he is still holding back to avoid the expense of going to a trial at Nisi Prius, when the defendants take out a summons to dismiss the action. What does he do then? Well, he says, "if you insist on incurring all this expense, I will go to trial at the assizes," the result being that the whole matter is referred to arbitration. On that arbitration he succeeds, and issues a writ of *elegit*, to which there was a return of *nulla bona*; and now he comes here and asks for the remedy to which he is entitled, and the defendants say he is out of time. I think, taking into consideration the nature of his claim, that he has prosecuted that claim with due diligence, and that he is entitled to the *mandamus* asked for.

*Judgment for plaintiff. Mandamus granted.*

Solicitors for the plaintiff, *Bolton, Robbins, and Bush.*

Solicitors for the defendants, *Ullithorne and Co., for Bateson and Hutchinson, Harrogate.*

March 7, 8, and 14, 1884.

(Before Lord COLERIDGE, C.J. and CAVE, J.)

REG. on the prosecution of JOHN ABBOTT v. THE COMMISSIONERS OF SEWERS FOR THE LEVELS OF FOBING. (a)

*Sewers, commission of—Liability to repair a wall—Damage caused by extraordinary tide—Evidence of liability—Presentments—3 & 4 Will. 4, c. 22, ss. 13, 46.*

*The prosecutor was the owner of certain lands in the county of Essex, on the shore of the river Thames, known as Curry Marsh Farm, and within the jurisdiction of the Commissioners of Sewers for the Levels of Fobbing. All the land lies below the level of the river at high water, and is protected from inundation at every flood tide by sea walls constructed for that purpose.*

(a) Reported by H. D. BONSEY, Esq., Barrister-at-Law.

*The sea walls were ancient, and the date of their construction was not known, and the wall in front of Curry Marsh Farm, belonging to the prosecutor, formed part of the southern boundary of the levels.*

*On the 18th Jan. 1881 there occurred an extraordinary storm and high tide, and the sea wall fronting Curry Marsh Farm, and almost all the sea walls on the banks of the Thames in that neighbourhood, were breached by the water from the river, which flowed through and over the walls of the level generally, and submerged a large portion of the lands.*

*Previously to the 18th Jan. 1881 the sea wall fronting Curry Marsh Farm was in a good state of repair, and sufficient to resist the flow of ordinary tides.*

*Immediately after the 18th Jan. 1881 the marsh bailiff, by direction of the clerk to the commissioners, gave notice to the prosecutor to repair the wall, which he did, and on the 15th Feb. 1881, at a general court of sewers, the commissioners ordered the prosecutor to do certain further repairs to the sea wall, and which were rendered necessary by the extraordinary tide of the 18th Jan. 1881. This order, which was based on a presentment made many years previously, was complied with by the prosecutor.*

*The prosecutor then obtained a writ of mandamus directed to the commissioners, commanding them to reimburse the expenses incurred by him in repairing the damage done to the sea wall fronting Curry Marsh Farm by the storm of the 18th Jan. 1881, and all expenses incurred in complying with the orders of the commissioners, and to make rates and do all such acts as might be necessary for such reimbursement.*

*The prosecutor contended that he was not liable to repair damage caused to the wall by extraordinary weather or tides; and, on the other hand, the commissioners contended that his liability extended to all repairs, whether rendered necessary by ordinary or extraordinary weather or tides, and they endeavoured to prove this liability by certain presentments of juries and other documents found among the papers and books of the commissioners.*

*Held, that the burden of proof was on the commissioners to establish the extent of the prosecutor's liability, and that they had failed to prove that he was liable to make good all damage however caused; that the prosecutor was only liable to make good damage which could in some way be traced to his or his predecessors' negligence; and that the damage to the wall mentioned in the case was not such as he was bound to repair.*

*Held, also, that the prosecutor was entitled to a mandamus to be reimbursed the expense of repairing the wall under the direction of the marsh bailiff, but not the expense of repairing the wall under the orders of the commissioners, because those orders were equivalent to a verdict after trial of a presentment, and, until they were reversed on appeal or quashed by the court on certiorari, the prosecutor was bound by them, and therefore he was not entitled to a mandamus to reimburse him the expense he had incurred in obeying them.*

*On the 9th June 1882 the prosecutor, John Abbott, obtained a rule for a mandamus directed to the Commissioners of Sewers within certain*

*parishes in the county of Essex, commanding them to reimburse the said John Abbott the expenses incurred by him in repairing the damage done to the sea wall fronting Curry Marsh Farm by the storm of the 18th Jan. 1881, and all expenses incurred in complying with the orders of the said commissioners made on or about the 15th Feb. 1881 and the 9th March 1882, and to make and levy such rates and do all such acts as might be necessary for such reimbursement, and it was further ordered by consent of counsel on both sides that a special case should be stated on the mandamus. At the same time it was agreed between the parties that an application by the prosecutor to bring up the orders of the 15th Feb. 1881 and 9th March 1882 by certiorari, in order that they might be quashed as being invalid, should stand over until after the argument of the special case.*

#### SPECIAL CASE.

1. The said John Abbott (hereinafter called the prosecutor) is the owner of certain freehold lands and hereditaments in the parish of Stanford-le-Hope, in the county of Essex, comprising about 122a. 1r. 13p., and known as Curry Marsh Farm. The said land and hereditaments are situate on the Essex shore of the river Thames in Sea Reach, and form part of the levels within the limits of the parishes of Fobbing, Corringham, Stanford-le-Hope, Mucking, Laindon, Dunton, Little Warley, and Pange, and they are within the jurisdiction of the said Commissioners of Sewers, who are appointed by Her Majesty's Commission of Sewers, issued for the limits of the said parishes on the 19th Nov. 1860, under the Great Seal of Great Britain, pursuant to the statute relating to sewers.

2. Similar commissions have from time to time been issued for a considerable number of years past to the commissioners for the same district. The records of the commissioners begin from the year 1729. It is not known when the first commission for the district was issued. The commission of the 19th Nov. 1860 has continued in force to the present time, under the provisions of the Land Drainage Act 1861 (24 & 25 Vict. c. 133), s. 14.

3. The said levels are bounded on the south by the river Thames. All the lands within the said levels, comprising in extent about 3442 acres, lie below the level of the river at high water, and are protected from inundation at every flood tide by sea walls constructed for that purpose. Of the 3442 acres, 2592a. 2r. 12p. are protected by the sea wall along the length of the southern boundary of the levels of which the Curry Marsh wall forms part. Some part of the said lands is owned by persons who have no frontage to the river, and have no sea walls on or abutting on their own land, but are protected by the sea walls on or fronting the lands of the others. The sea walls are ancient, and the date when they were first constructed is not known.

4. The evidence as to the liability of owners of land alongside the river to repair the sea walls fronting their respective lands will be found set out in paragraphs 33 to 52 of this special case.

5. One of the said sea walls fronts Curry Marsh Farm. The owners of that farm who preceded the prosecutor from time to time repaired the said wall. The prosecutor bought under a condition of sale, which will be found set out in the

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appendix thereto.(a) There is no evidence that repairs were ever done to the said wall otherwise than by or at the expense of the owners of Curry Marsh Farm.

6. At a court held by the commissioners on the 18th Aug. 1880 their then marsh bailiff reported that all former orders of the commissioners had been complied with, and at a court held on the 26th Jan. 1881 he stated that he had on the 14th Jan. 1881 inspected the sea walls throughout the level, and that they then were (except part of a sea wall not fronting Curry Marsh Farm) in a proper state to resist ordinary tides. In fact, at the time of the happening of the storm hereinafter mentioned the wall fronting Curry Marsh Farm was in good substantial repair, and in a proper condition to resist the flow of ordinary tides and the force of ordinary storms. There was at the time of the said storm no default on the part of the prosecutor as regards the state of repair of the said sea wall, unless it was a default on his part that the wall was not, as was proved by the event, sufficient to keep out the water on the said 18th Jan. 1881.

7. On the 18th Jan. 1881 there occurred a concurrence of storm and high wind, which I find, as a fact, for the purposes of this case, was extraordinary. The sea wall fronting Curry Marsh, and almost all the sea walls on the banks of the Thames in that neighbourhood, were breached by the water from the river which flowed through and over the walls of the level generally and submerged a large portion of the lands usually protected by the walls.

8. In consequence of the damage and the destruction of part of the said sea wall fronting Curry Marsh, and of the apprehended recurrence after a short interval of unusually high tides, the marsh bailiff, by direction of the clerk to the commissioners, gave notice to the prosecutor that it was necessary that measures should be at once taken for the repair of the said sea wall. Such measures were accordingly taken by the prosecutor, and previously to the 15th Feb. 1881 he had expended on the repairing of the said wall a sum which, for the purpose of the argument of this case, is to be taken to be 301*l.* 1*s.* 8*d.*

9. On the 26th Jan. 1881 and the 15th Feb. 1881 sessions and general courts of sewers were held by the commissioners, and a copy of so much of the record of the proceedings at the said courts as is material to this case is set out in the appendix. At the court of the 15th Feb. 1881 an order was made on the prosecutor to do certain repairs to the wall, a copy of which order is also in the appendix. (b)

(a) Condition of sale: "The property is believed and shall be taken to be correctly described as to quantity and otherwise, and is sold subject to all chief and other rents, rights of way, water and other easements (if any) charged or subsisting thereon, and to such liability to repair, maintain, and cleanse the river wall, sluices, creeks, drains, and watercourses bounding or intersecting the property as the property may be subject to, or by prescription or otherwise, but the vendor shall not be required to show the nature or extent of such liability, or to furnish any other information with reference thereto."

(b) This order was founded on the presentment made on the 1st Aug. 1861 and was as follows: "1st Aug. 1861.—At a session and general court of sewers then held for the said levels. The jurors aforesaid, upon their oath aforesaid, do further say and present, that the several persons and bodies corporate mentioned and

10. Subsequently to the service upon him of the said order the prosecutor continued the works which he had before commenced, and by the 18th Aug. 1881 all the works required by the said order to be done had been done by him to the satisfaction of the marsh bailiff, and of the engineers of the commissioners, with the exception of a small portion at the western corner. The cost of the repairs up to this date is to be taken at 575*l.* 10*s.* 6*d.* Work was subsequently done by the prosecutor to the portion of the western corner, and that portion was in course of completion when the further slip happened as herein-after mentioned.

11. The whole of the work done and expense incurred as mentioned in paragraphs 8, 9, and 10 was rendered necessary by the extraordinary storm and high tide of the 18th Jan. 1881.

12. The prosecutor did not appeal from the order of the 15th Feb. 1881, nor did he make any protest against his liability to do the said work without reimbursement for the costs thereof.

13. In the months of January, February, and March 1882 the part of the said wall opposite the farm buildings at Curry Marsh Farm subsided for a length of about 300 yards. This part had been breached on the occasion of the storm of the 18th Jan. 1881, and had been repaired as before mentioned. The subsidence did not extend to the portion at the western corner mentioned in paragraph 10 as incomplete.

14. The nature of the subsidence, which was gradual, was as follows. In Jan. 1882 slight subsidence and cracks in the top of the wall were observed, showing that movement was going on. Proper temporary measures to prevent further mischief were had recourse to by the prosecutor, but the subsidence continued, and on the 8th March 1882 the said portion of the wall subsided altogether. In the language of the sea wallers, the wall sat down bodily, kicking out at the toe of the wall into the river the stuff of which the core of the wall was composed.

15. The immediate cause of the subsidence was

described in the second part of each of the schedules hereunder written, or hereunder annexed, being the owners of the several lands and hereditaments set opposite to such their respective names and descriptions in the second part of each such schedule, and their ancestors and predecessors, owners of the same lands and hereditaments, have from time immemorial been used and accustomed to support, maintain and repair, and of right ought to have supported, maintained and repaired, at their respective costs and charges, the several respective quantities of walling within the limits and jurisdiction aforesaid mentioned and set forth in the second part of the same several schedules opposite their respective names and descriptions and the said several persons and bodies corporate named and mentioned in the same part of the said several schedules respectively are now the owners of the lands and hereditaments therein set opposite to such their respective names and descriptions, and by reason of the tenure of the same lands and hereditaments respectively are now liable, and ought of right to support, maintain and repair, and keep in good and sufficient repair, at their own respective costs and charges, the several and respective quantities of walling within the limits and jurisdiction aforesaid mentioned and set forth in the said second part of the several schedules respectively opposite their respective names and descriptions, and at the respective parts and places therein also mentioned and described, so as to prevent the influx of the water from the rivers and creeks surrounding and near to the levels aforesaid (in all of which said rivers and creeks the tides, and the water of the sea do flow and reflow.)

the giving way of a stratum of soft mud, which, when borings were made, after litigation had arisen or was imminent between the prosecutor and the commissioners, was found to underlie the wall. But what caused the stratum to give way after supporting the wall for so many years was matter of dispute between the parties, and much scientific evidence on the subject was given before me.

In paragraphs 16 to 20 the facts were set out upon which the parties based their contentions as to the cause of the subsidence.

21. The contention on behalf of the prosecutor is, that it must be inferred that when the wall was first made it sank within the clay immediately below it into the soft mud until it came to a position of equilibrium compressing the mud from 15 feet to 9 feet, and squeezing the water out of it so as to make it sufficiently dry and firm to carry the weight of the wall, and that the water which submerged the marsh and which percolated into the ground as mentioned in paragraph 19 soaked under the wall and wetted the mud below it and gradually reconverted it from its dry into its original wet oozy condition, and so rendered it unfit to sustain the weight of the wall. He therefore contends that the subsidence resulted from the effects of the said storm.

22. The contention on the part of the commissioners is, that no water, or at any rate very little, and not sufficient in any way to account for the subsidence of the wall, soaked from the marsh into the ground, and that the subsidence did not result from the effects of the said storm, and they suggested that the nature of the foundation was, and had always been, unstable, and that the gradual changes referred to in the first part of paragraph 17, operating through a long series of years, coupled with a gradual increase in the weight of the wall in the successive repairs which it had undergone, ultimately caused the subsidence.

23. Neither party proved their contention, nor so far as could be judged was either contention capable of proof, but was matter of conjecture or inference to be drawn from the facts and dates.

24. The existence of the mud must have always made the place a dangerous one for a wall, but no evidence was given of any circumstances from which it ought to be inferred that if the storm of the 18th Jan. 1881 had not taken place the wall as it then existed could not have continued to stand to the present day, or that the work and expenses mentioned in paragraphs 8, 9, 10, and 27 would have been necessary.

25. The nature of the soil under the wall could not till the subsidence began have been discovered without boring, nor would it be apparent to persons making an examination of the wall in the usual and proper way for the purpose of seeing if it required ordinary repairs.

26. On the 9th March 1882 the commissioners held a session and general court of sewers. The prosecutor, who had notice of the holding of the court, attended with his solicitor and submitted that the very heavy costs of the works necessitated by the storm of the 18th Jan. 1881 ought to be borne by the level, and he applied to the commissioners to make a rate for this purpose, but he did not then make any formal demand on them to do so, and they at such session made a further order upon him to repair the wall.

27. The subsidence of the wall was such as to endanger the lands of the prosecutor, the lands of other persons lying within the levels, and the public safety, and the prosecutor before attending the said court had instructed his engineer to see to the state of the wall. The repairs required to be done by the said order of the 9th March 1882, as varied by agreement as mentioned in paragraph 28, were done by the prosecutor after giving notice to the commissioners that he thereby in no way prejudiced his right to appeal against the said order, and that he proposed to claim reimbursement for the outlay. In complying or endeavouring to comply with such order he has expended a sum which is to be taken at 6972l. 16s. 10d., which is in addition to the sum mentioned in paragraph 10 of this case.

28. After the order mentioned in paragraph 26, and after the nature of the soil had been investigated, and after the order for a writ of *mandamus* to issue had been made, it was agreed between the prosecutor and the commissioners, without prejudice to their respective legal positions, that it would be less difficult and less costly and more secure to build an inset curvilinear wall more inland, than to further attempt to reinstate and maintain the wall on the exact site of the portion which had subsided. And it was agreed that the prosecutor should build such inset wall, and that for the purposes of this case the cost of so doing should be treated as part of the costs of repairing the wall pursuant to the said order. The said inset wall has been so built, and the cost thereof has been 3300l. 6s. 10d. or thereabouts, which sum forms part of the sum of 6972l. 16s. 10d. mentioned in paragraph 27.

29. The sums of 3014l. 1s. 8d. mentioned in the 8th paragraph, 5752l. 10s. 6d. mentioned in the 10th paragraph, 6972l. 16s. 10d. and 3300l. 6s. 10d. mentioned in the 27th and 28th paragraphs, have not been conclusively assessed by me, and the commissioners are to be entitled, in the event of their being held to be liable to reimburse the prosecutor all or any of the said sums, to question the amounts thereof by a reference back to me or some other person as may be directed by the court.

30. On or about the 1st April 1882 the prosecutor, by a demand in writing, bearing date the 31st March 1882, addressed to the commissioners, and to certain of them by name, required the commissioners to reimburse him for his expenditure in repairing the damage to the sea wall by the extraordinary storm and unusually high tide of the 18th Jan. 1881, and for the money expended and to be expended by him in complying with the orders of the 15th Feb. 1881 and the 9th March 1882, and to make a rate or rates for that purpose, and to take all such steps as might be necessary for charging the money so expended and to be expended rateably on the lands benefited thereby, and he requested the commissioners to summon a court for the said purpose. The commissioners held a session and special court of sewers on the 18th April 1882 for the purpose of taking into consideration the demand of the prosecutor, and at the said court the prosecutor attended by his solicitor, and made a formal demand which the commissioners refused to comply with. A copy of the record of the proceedings of the said court is set out in the appendix.

31. On the 1st May 1882 the rule nisi for a

*mandamus*, which was afterwards made absolute on the 9th June 1882, was obtained by the prosecutor.

32. On the 1st June 1882 he gave notice of appeal to the Midsummer Quarter Sessions for the county of Essex against the order made on the 9th March 1882, which appeal has from time to time been respited pending the decision of this special case.

33. An examination of the records of the commissioners shows the following facts:

34. Between the year 1729 (being the date of the earliest record of the commissioners now forthcoming) and the year 1831 there were no presentments of grand juries finding specially any custom or prescription as to the repair of the walls, and no presentment stating in words what was the liability of the frontagers, that is to say, the persons on whose lands the sea walls abutted. The usage was for a jury to view the walls a few days before the meeting of the court of commissioners and to present at such court the repairs which they found at such view to be required, specifying, in the case of each work, a penalty in case the work should not be done. At the court such presentments were made orders of the court. The presentments were in the form of which the following is a specimen:

That A. B. do back and cope a hundred rods of their wall by Christmas next on penalty, by the rod, sixteen shillings.

The orders followed the form of the presentments.

35. The records show instances of orders on all the owners within the levels whose lands were bounded by the sea wall, and there is nothing in them to indicate any difference in the extent of the liability of the owners of the different lands so bounded as to the repair of the wall bounding their respective lands.

36. In case of emergency, the marsh bailiff was empowered to do the work, but the amount expended by him was claimed as a debt due from the owners to the commissioners, and the records show instances of the marsh bailiff recovering sums expended by him by distress from the owners who were liable to repair. In some cases it does not appear from the records whether the money expended was claimed or recovered or not, but there are no cases where it appears that it was not so claimed, or that any such claim was contested. From the small amount of the rates levied, it is apparent that no extensive repairs to the walls can have been done at the expense of the level.

37. Rates were made at the courts. They were usually made for the general purposes of the expenses of the commissioners, but sometimes for special purposes.

37 A. It is agreed between the parties that reference may be made to the records of the commissioners upon the argument for the purpose of further explaining or illustrating the matters referred to in paragraphs 33 to 37.

38. No instance appears in the records of a rate made for the special purpose of paying the expenses of repairing walls or of reimbursing any frontager for expenses incurred by him in repairing walls.

39. Except so far as the facts and documents or extracts mentioned in this special case prove or warrant an inference to the contrary, there is

no evidence to show that any of the repairs ordered to be done were other than ordinary repairs, or that any extraordinary accident happened to the walls before the storm of the 18th Jan. 1881.

40. On the 31st Jan. 1791 the then existing commission expired. A petition was presented by the commissioners to the Lord Chancellor in the usual way for a warrant for a new commission. The next commission, though dated the 13th Jan. 1791, was not issued till the 15th Aug. 1791.

41. There are found in a room at the office of the clerk to the commissioners, which is and has been for very many years devoted to the custody of the books and documents of the commissioners, the following papers relating to the last-mentioned commission, the admission in evidence of which papers in the present case is objected to by the prosecutor, and which are printed in the appendix, subject to his objection. The first is the draft or copy of an affidavit in the handwriting of and purporting to have been sworn by Edward Gepp, the then clerk of the commissioners, under the expired commission on the 3rd March 1791, for the purpose of obtaining a new commission. The second, which was found with it, is a draft or copy of a petition of the commissioners, or some of them, dated the 28th June 1791. The third is a bill of costs of the said Edward Gepp against the commissioners for works done in 1791, amounting to 32*l.* 1*s.* 2*d.*, and bearing the indorsement:

10th October 1791 allowed.

E. BAKER.  
W. RUSSELL.

R. Baker and W. Russell were, on the 10th Oct. 1791, commissioners under the then existing commission.

42. At a court held by the commissioners on the 10th Oct. 1791 it was ordered that the marsh bailiff should pay to the said Edward Gepp his bill for soliciting a new commission of sewers for the said levels, amounting to 32*l.* 1*s.* 2*d.*

43. It appears from this order and these documents that the petition for a fresh commission presented to the Lord Chancellor by the commissioners in the usual way was neglected in the Lord Chancellor's office, and a supplemental petition, supported by the affidavit of the said Edward Gepp, was presented by the commissioners, and that the said Edward Gepp was paid by the commissioners for his work and labour in respect of the said affidavit and petition and the presentation thereof.

44. Search has been made in all reasonable places for the originals of the said affidavit and supplemental petition, but they have not been found.

45. At the court held on the 10th Oct. 1791, mentioned in paragraph 42, about seventy orders for the repair of walls were made. The entry in the book relating thereto can be referred to by either party on the argument of this case.

46. At a court held on the 5th Dec. 1831 a presentment was made respecting the dangerous state of the sea wall belonging to the Oil Mill Farm, the property of Francis Kensitt, upon evidence taken in the presence of the court and jury. In this presentment the liability of the owner to repair is stated to be by ancient custom. This is the first instance in which there appears any entry upon the records of the commissioners



stating in terms the liability of any owner to repair, or the existence of any custom relating thereto. An extract from the records showing the circumstances under which the presentment was made, the depositions of the witnesses, and the orders of the court, are set out in the appendix. Further extracts from the records of the commissioners relating to the same farm or parts thereof, including entries relating to damage done by unusual high wind and tide, and to a search for precedents of repairing rendered necessary by storms, will be found in the appendix.

47. Extracts from the records of courts held on the 13th July 1832 and 13th July 1833 are also printed in the appendix for the purpose of showing the statement of the customary liability contained therein.

48. The first court at which any presentment was made, held after the passing of the statute 3 & 4 Will. 4, c. 22, was held on the 26th Feb. 1836. At that court the jury made a presentment which is set out in the appendix. (a)

49. From that date until the passing of the Land Drainage Act 1861 (24 & 25 Vict. c. 133), by which commissions of sewers were made perpetual until superseded, presentments in substantially similar form were made at the commencement of each commission. The presentment at the court held on 1st Aug. 1861 will be found in the appendix. The Robert Wharton mentioned in the extract from the schedule thereto was the predecessor in title of the prosecutor, and the lands mentioned therein are those referred to in the first paragraph of the case.

50. In March 1874 a tide occurred higher than any before then recorded (though lower than the

tide of 18th Jan. 1881), and caused serious breaches in the sea walls of the level. At a court held on 27th Aug. 1874, orders were made on all the frontagers in the level (whether the walls fronting their respective lands had been damaged by the said tide or not) to raise their walls to a height one foot above the line of the said high tide. These orders were carried out, and the damage to the walls occasioned by the said tide was repaired at the expense of the owners. The orders relating to Curry Marsh are set out in the appendix. The other orders were in similar form.

51. After the storm of Jan. 1881 orders were made on all the frontagers respectively, in a form similar to that of the 15th Feb. 1881 before mentioned, to repair the damage caused to their walls by the said storm. These orders were not appealed against, and the works were done at in many cases considerable expense. It must not be assumed from this that in some cases the expense to a frontager of repairing his own wall was greater than his contribution to a general rate would have been in case the repairs had all been defrayed out of such a rate. No claim for reimbursement has as yet been made except by the prosecutor. The facts stated in this paragraph are objected to on behalf of the prosecutor as not being admissible in evidence or relevant to this case, and they are stated subject to this objection.

52. During the period to which living memory extends, so far as oral testimony is forthcoming, the walls have always been repaired by or at the expense of the owners of the land which the walls respectively front without reimbursement by the commissioners. The market value of the lands fronting the river is considerably diminished by reason of the liability to repair.

53. The appendix to this special case forms part thereof.

54. The commissioners contend that: (1) The facts and documents stated and referred to in this case establish that the prosecutor was under a general liability to repair the sea wall fronting his land, and that by reason of such liability he was bound to do the repairs referred to in the case, although the necessity for such repair arose from an extraordinary storm and tide, or any other cause. (2) That the said facts and documents show that there is no liability upon the level or any other person to repair the said wall, or to reimburse the prosecutor for the whole or any part of the moneys expended by him in such repairs. (3) That the prosecutor is debarred from obtaining the relief sought for in the present proceedings by the existence of the orders of the 15th Feb. 1881 and the 9th March 1882, unless and until they or either of them be varied or reversed by the quarter sessions under the provisions of the Land Drainage Act 1861, s. 47, or otherwise set aside.

55. The prosecutor contended that: (1) Even if any liability is shown on him to do any repairs to the sea wall, such liability is at most an ordinary liability to repair by prescription, and does not extend to repairing damage caused by extraordinary floods or storms, or to reinstating such wall after such damage, but in such case the cost should be borne by the level, according to the statute of Hen. 8, as interpreted in *Keighley's case* (10 Coke, 139), and assuming the prosecutor to be liable

(a) The presentment was as follows: "26th Feb. 1836. And the jurors aforesaid, upon their oath aforesaid, further say and present, that the several persons and bodies corporate named and mentioned in the said second schedule hereunder written or hereunto annexed, and their ancestors or predecessors, being owners of the several farms and quantities of land within the levels and jurisdiction aforesaid set opposite to such their respective names and descriptions in the same schedule, have, by reason of the said farm and lands so by them respectively owned and of their being the owners thereof from time immemorial, been used and accustomed, at their own costs and charges, to support, maintain, and repair, and the said several persons and bodies corporate so named and described in the said second schedule, by reason of the said farms and lands so by them respectively owned, and of their being the owners thereof, are now liable and ought still of right to support, maintain, and repair, and keep in good and sufficient repair, at their own respective costs and charges, the several and respective quantities of walling within the levels and jurisdiction aforesaid mentioned in the said schedule, and situate, standing, and being in and upon such their respective farms and lands, so as to prevent the influx of the waters from the rivers and creeks surrounding and near to the said farms and lands (in all which said rivers and creeks the tides and waters of the sea do flow and reflow); and that the several persons and bodies corporate so named and mentioned in the same schedule are now the owners of the particular farms and lands therein also mentioned and set opposite to such their respective names and descriptions, and are situate within the levels and jurisdiction aforesaid, and as such owners, and in respect of such farms and lands, are now liable, and, by reason of such immemorial custom and usage aforesaid, ought of right to repair and keep in good and sufficient repair the said walling, at their own respective costs and charges, in the proportion mentioned and set forth in the same schedule opposite to such names and descriptions respectively, and at the respective parts and places therein also mentioned and described."



in the first instance to pay the cost of such repair and reinstating he is entitled to be reimbursed. (2) If the subsidence in 1882 was not due to the storm of 1881 it was due to a latent defect for which he was not responsible. (3) The orders of the 15th Feb. 1881 and the 9th March 1882 are not, nor is either of them conclusive against the prosecutor, and assuming them to bind him to do the repairs in the first instance, they are not inconsistent with his right to be reimbursed.

56. The questions for the opinion of the court are: (1) Whether the cost of repairing the sea wall fronting Curry Marsh subsequent to the 18th Jan. 1881 under the circumstances hereinbefore mentioned, or any and what part thereof, ought to be borne by the prosecutor or by the level rateably. (2) Whether the prosecutor is entitled to be reimbursed by the commissioners the whole or part, and what part, of the said cost, and to have a rate or rates made for that purpose. (3) Whether, in case the prosecutor is not entitled to be reimbursed by the commissioners the whole or any part of the said cost, it is by reason of the orders of the 15th Feb. 1881 and the 9th March 1882, or either or which of them.

57. If the court shall answer either of the first two questions in favour of the prosecutor, judgment is to be entered for the prosecutor on the special case, and such order for a peremptory *mandamus*, or for a reference or otherwise as the court may direct, is to be made.

If the court shall answer the first two questions in favour of the commissioners, judgment is to be entered for the commissioners.

If the court shall answer the third question in the affirmative, the prosecutor is to be at liberty to proceed with his motion for a *certiorari*, and with his appeal to quarter sessions or with either of such proceedings.

Charles, Q.C. (Channell with him) for the prosecutor.

Meadows White, Q.C. (Finlay, Q.C. and Kenelm Digby with him) for the defendants.

The following cases and statutes were referred to:

- Hudson v. Tabor*, 36 L. T. Rep. N. S. 492; 2 Q. B. Div. 280;  
*Rea v. The Commissioners of Sewers for Somerset*, 8 T. R. 312;  
*Reg. v. Keighley*, 10 Coke, 139;  
*Rea v. Commissioners of Sewers for Essex*, 1 B. & C. 477;  
*Reg. v. Leigh*, 10 Ad. & E. 398;  
*Reg. v. Warton*, 2 B. & S. 718; 31 L. J. 265, Q. B.;  
*Reg. v. Greenhow*, 1 Q. B. Div. 703;  
*The Nitro-Phosphate Company v. St. Katherine's Docks*, 37 L. T. Rep. N. S. 380; 9 Ch. Div. 503;  
*Nugent v. Smith*, 33 L. T. Rep. N. S. 731; 1 C. P. Div. 423;  
*Henly v. The Mayor of Lyme*, 5 Bing. 91; 3 B. & Ad. 77; 1 Bing. N. C. 222;  
 3 & 4 Will. 4, c. 22, ss. 13, 15, 47;  
 24 & 25 Vict. c. 133, ss. 33, 47.

May 3.—The judgment of the court (Lord Coleridge, C.J. and Cave, J.) was delivered by

LORD COLERIDGE, C.J.—The principal question in this case is, whether the prosecutor, who is the owner of certain lands within the jurisdiction of the commissioners, on which is a sea wall, is liable to repair damage done to that wall by the combined effects of a storm and high tide which occurred on the 18th Jan. 1881. The burden of proof is on the commissioners, who must establish

the extent of the prosecutor's liability, and must then show that the damage they allege the prosecutor is bound to repair is damage which falls within the ambit of the liability so established. The extent of the liability of a frontager to repair a sea wall, whether arising by tenure, prescription, or custom, can only be ascertained by usage. In this case there is no living testimony as to the usage, but we have been referred to certain documents from which we have been asked to infer that the liability of the prosecutor is absolute, so as in fact to make him an insurer of the wall. These documents are presentments of juries and other papers found among the books and papers of the commissioners. The first in date is a copy or draft of an affidavit in the handwriting of and purporting to be sworn by Edward Gepp, the then clerk of the commissioners, on the 3rd March 1791, for the purpose of obtaining a new commission in the place of one which had then lately expired. It appears that the petition for a fresh commission had been neglected by the then Chancellor (Lord Thurlow), and the commissioners had presented a supplemental petition supported by the affidavit in question, which alleges that by reason of the inundation occasioned by the extraordinary high tide which happened on the preceding 2nd Feb. several breaches and other injuries had happened to the sea walls, banks, &c., and that it was absolutely necessary for the safety and preservation of the land and marsh grounds within the levels that immediate attention should be had for the reparation and amendment of the said sea walls, &c., and that until a new commission was issued no surveys could be taken or orders made to enforce such necessary reparations and amendments. The commission was ultimately issued, and at a court held on the 10th Oct. 1791 about seventy orders for the repairs of the walls were made. There is nothing in the nature or extent of these repairs (which are of the usual character) to lead to the conclusion that the damage so repaired was other than such as might, with ordinary prudence and foresight, have been guarded against, and we are unable to infer from the language of the clerk, anxious for the renewal of the commission under which he held his office, that the tide spoken of by him was so high that it could not reasonably have been foreseen and guarded against, or that the damage so repaired was caused without negligence on the part of the frontagers. In 1831 it appears from the report of one of the commissioners that the marsh bailiff had reported that the sea wall belonging to Oil Mill Farm was in an alarming and dangerous state from the neglect of the owner to repair pursuant to a previous presentment, and that in consequence of such neglect serious apprehensions were entertained that a breach and inundation might take place. Thereupon there was a presentment by a jury that the sea wall in question was in a ruinous and defective state and condition for want of due reparation and amendment thereof, and that such state and condition had arisen from the neglect and default of the owner of the Oil Mill Farm in repairing and amending the same as he ought to have done, and that the court ordered that the works presented to be done by the jury should be made an order and decree of the court. It appears from a record of the court of the 13th July 1833 that these works were afterwards done by the owners of Oil Mill Farm, but it is clear

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from the report, and from the evidence of Richard Hill Dalton given before the jury, that these repairs were rendered necessary by the neglect of the owner, and not by any extraordinary flood or accident, and consequently this presentment is no authority whatever for the existence of any such liability as that now in dispute. On the 26th Feb. 1836, after the passing of the statute 3 & 4 Will. 4, c. 22, there was a general presentment of the jury, which was much relied on by Mr. White. This presentment appears to have been made under the combined operation of sects. 13 and 46 of that Act, but it does not appear that at this time the sea wall was out of repair, and we are of opinion that that section does not warrant a presentment of the liability to repair only where the wall is not alleged to be out of repair, and that if the wall is out of repair in part it only warrants a general presentment of such part as may be out of repair. There is no power to traverse a presentment where no default is alleged, and it is obvious that a trial of a traverse of any such presentment where no default was alleged would impose an intolerable burden on the persons supposed to be affected by such presentment, as it might happen that no default would occur while they continued owners. We are also of opinion that, assuming the presentment to be good, it does not warrant the conclusion that the liability to repair extended to damage done by the act of God. In 1843 the wall upon the Oil Mill Farm was again reported to be in a very dangerous and alarming state, the same having been recently in part much reduced in height, and otherwise damaged by an unusual high wind and tide, in consequence whereof imminent danger was apprehended to the level, and at a court subsequently held it was found that the wall in question was at a part called Steep Toe Point in a ruinous and defective state and condition for want of due reparation and amendment thereof, and by reason of the default of the owners in not having repaired and amended the same, and it was ordered that the wall should be repaired at the expense of the owners. It appears from the clerk's bill of costs that, previous to this order being made, a question had arisen whether the proprietors of the wall were liable to repair it after a storm if it previously had been in a sufficient state to resist the tide, &c.; but, as it appeared that the wall in question was not previously in a fit state to resist ordinary occurrences, the question was not gone into, and it follows that the records of 1843 do not establish the existence of any liability such as that now contended for. The entries in the bill of costs are very strong proof that the presentment of 1836 was not in 1843 understood to have the effect now suggested. The records of the court held on the 8th June 1854 do not carry the commissioners' case any further. On the 1st Aug. 1861 another general presentment was made, which is open to the objections already taken to that of 1836, and to which, therefore, the observations previously made equally apply. On the 6th Aug. 1861 the Land Drainage Act 1861 was passed, which, by sect. 33, enacts: "That the Commissioners of Sewers, acting within their jurisdiction, may, without the presentment of a jury, make any order in respect of the execution of any work, the levying of any rate, or doing any act which they might but for this section have made with

such presentment, subject to this proviso, that any person aggrieved by any such order made by the commissioners without the presentment of a jury may appeal therefrom in manner hereinafter mentioned." In March 1874 a tide occurred higher than any other before then recorded (though lower than the tide of the 18th Jan. 1881), and caused serious breaches in the sea walls of the level. At a court held on the 27th Aug. 1874 orders were made on all the frontagers in the level (whether the walls fronting their respective land had been damaged by the tide or not) to raise their walls to a height of 1ft. 6in. above the line of the last high tide. It is obvious that, as soon as it was shown by experience that a tide of the height of that recorded in March 1874 might occur, the danger of this recurrence was a danger that could be foreseen in the future, and might be guarded against whether it could have been seen in the past or not, and consequently that the owners of the sea walls were bound to foresee and provide against it. It is also found in the case that the damage to the walls occasioned by this tide was repaired at the expense of the owners, but we have no such evidence as to the height of the tide, or of the nature or extent of the damage done by it, as in our opinion would justify us in finding as a fact from the usage proved that the owners of this sea wall are bound to repair damage done by the act of God. Mr. White relied upon the fact that, as far as can be gathered from the records which extend back to 1729, no repairs have been done at the general expense of the level from that time to the present, and he contended that there must have been damage caused by the act of God during that period which must therefore have been repaired by the frontagers. But it seems equally clear from the records that no repairs have been done by the frontagers of such a nature as to satisfy us that they were rendered necessary by damage arising from the act of God, and the expression being confined to events which cannot be foreseen, or which, if they could be foreseen, cannot be guarded against, points to events which are *prima facie* likely to be of very unusual occurrence, and it is quite as reasonable to conjecture that nothing of the kind has happened between 1729 and 1881 as to suppose that it has taken place and has been repaired by the frontagers without leaving any trace upon the records. Moreover, we ought not to presume anything against the prosecutor, who is virtually defending himself from an attempt to impose upon him a large and indefinite liability, and we ought to be satisfied with nothing less than would have satisfied a jury of reasonable men upon the trial of a traverse of a presentment. As for the argument attempted to be drawn from the fact that the prosecutor did not appeal against the first order made upon him, and that the other frontagers obeyed the orders made on them to repair damage caused by the same storm, we only notice it to show that we have not overlooked it. In our judgment the commissioners have failed in proving that the prosecutor is liable to make good all damage however caused, and we find as a matter of fact that the prosecutor is only liable to make good damage which can in some way or other be traced to his or his predecessors' negligence. The next question is, whether the commissioners have proved that the

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damage in this case arose from the prosecutor's negligence, for here, as before, the onus of proof is on the commissioners, as it would be if there had been a presentment of a jury which the prosecutor had traversed. It cannot surely be contended that the damage in this case can be traced to any such negligence. It is found as a fact that before the storm the wall was in good substantial repair and in a proper condition to resist the flow of ordinary tides and the force of ordinary storms, and that on the 18th Jan. 1881 there was a concurrence of storm and high tide which was extraordinary. As to the subsidence of the wall, the cause of it is in dispute; but whether the contention of the prosecutor or that of the commissioners be adopted it is not proved that the subsidence could have been foreseen, or that if foreseen it could have been prevented, and the case expressly finds that no evidence was given of any circumstance from which it ought to be inferred that if the storm on the 18th Jan. 1881 had not taken place the wall as it then existed would not have continued to stand to the present. It is also a circumstance not without weight, that previous to the storm in question the commissioners, whose duty it is to watch over the sea wall in question, did not suggest that anything required to be done to the wall to enable it to withstand the force of tides and storms. We are, therefore, compelled to come to the conclusion that the damage to the wall mentioned in the case was not such as the prosecutor was bound to repair. There is, however, another question yet to be disposed of. It has been contended that, assuming the prosecutor was not bound to repair the damage in question, yet, as he has in fact repaired it under two orders of the commissioners, he is entitled to a *mandamus* to the commissioners to reimburse him so long as these orders stand. One of them is under appeal, and the other will be brought before this court on *certiorari*, and it may be that both will be upset. But the point we have now to dispose of is, whether the *mandamus* can go while these orders stand. Now, by sect. 33 of the Land Drainage Act 1861, already quoted, the commissioners, acting within their jurisdiction, may, without a presentment, make any order to execute any work which they might have made with such presentment. The commissioners did, by the orders in question, made respectively on the 15th Feb. 1881 and 9th March 1882, order the prosecutor to do certain repairs, which he has done. It was not contended by Mr. Charles, nor in our opinion could it have been successfully contended, that the commissioners, in making these orders, were acting outside their jurisdiction, for it is clear that if a jury had found as a fact that Mr. Abbot's liability was of the extensive nature contended for by the commissioners, they could, and ought, under the old system, to have made a presentment which would have warranted the orders in question. The extent of the liability of the frontager is one of the matters which would necessarily have had to be proved before a jury on the trial if the presentment had been traversed, and in *Reg. v. Leigh* (10 Ad. & Ell. 398) the Court of Queen's Bench granted a new trial, because the judge had misdirected the jury upon this very question on the trial of a presentment which had been removed into that court by *certiorari*. Mr. Charles did not contend

before us that the orders were bad (not that he admitted them to be good, but that the argument on this point was reserved for this court when the orders are before it on *certiorari*), but he submitted that, notwithstanding the orders, Mr. Abbott was entitled to dispute his liability and to have this *mandamus* made absolute to reimburse him for the expenses he has incurred in obeying the orders. Under the former system the question of the liability of the frontager was put in issue by a traverse of the presentment and verdict found against the frontager it is impossible to conceive that, so long as that verdict stood, the frontager could dispute the liability so found against him. Mr. Charles's industry could not produce any authority to that effect, and it would be strange if the elaborate machinery of a presentment by a jury, a traverse of that presentment, and a finding of a jury upon such traverse, had been absolutely of no effect. Nor is it possible to understand why a frontager who had not traversed the indictment, and had thereby confessed it, should be in a better position than one who had traversed it unsuccessfully. The order of the commissioners is, by the section already quoted, to have the same effect as if it had been preceded by the necessary presentment, and an appeal to the quarter sessions is substituted for the traverse to the presentment. In our judgment, the prosecutor is bound by these orders until they have either been reversed on appeal or quashed by this court on *certiorari*. We are therefore of opinion that, although the liability of the prosecutor does not extend so far as to make him repair damage caused as this was, yet that, so long as the orders in question stand, he is not entitled to a *mandamus* to reimburse him the expenses he had incurred in obeying them. It appears, however, that the repairs mentioned in paragraph 8 of the special case were not done under the order of the commissioners, but by the direction of the marsh bailiff, and, as to the expenses of doing these last-mentioned repairs, we hold, following *Reg. v. The Commissioners of Sewers for Somerset* (8 Term Rep. 312), that the level must be at the cost of making them good, and that the prosecutor is, to that limited extent, entitled to his *mandamus*.

Solicitors for the prosecutor, *Thomson, Son, and Brooks*.

Solicitors for the defendants, *Paterson, Snow, Bloxam, and Co.*, agents for *Gepp and Son*, Chelmsford.

Tuesday, March 25, 1884.

(Before COLERIDGE, C.J. and STEPHEN, J.)

JAMES (app.) v. WYVILL (resp.). (a)

*Public Health Act 1875* (38 & 39 Vict. c. 55), ss. 157, 159—*Bye-laws*—*Notice of intention to erect new buildings and send plans*—*Conviction for erecting new buildings without notice*—*Question of fact*.

*Bye-laws were made for the borough of S. under the powers given by sect. 34 of the Local Government Act 1858. This Act was repealed by the Public Health Act 1875, but by sect. 326 of the latter Act, all bye-laws duly made under any of the Sanitary Acts by this Act repealed, and not inconsistent with any of the provisions of this Act, shall be deemed to be bye-laws under that Act.*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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*The 27th bye-law provided that every person who intended to erect any new building should give one month's notice of such intention, and send in a plan of the works to the surveyor for the urban sanitary authority.*

*The 31st bye-law provided that, if the owner or person intending to construct any new building fail to give the required notices, or construct, or cause to be constructed, any buildings contrary to the provisions of any of the said bye-laws, he shall be liable for each offence to a penalty not exceeding 5l., and he shall pay a further sum not exceeding 40s. for each day such buildings shall continue or remain contrary to the said provision. The appellant contended that he was not bound to give notice or send a plan of alterations he proposed to make in his house, as the alterations merely consisted in raising the old walls a story higher, but he sent a plan, as he said, as a matter of courtesy. This plan was disapproved of, and notice of such disapproval was sent to the appellant, but he went on with the buildings. He was then summoned by the respondent, who was the surveyor for the urban sanitary authority, for neglecting to give notice and send plans as required by the bye-laws.*

*The learned magistrate found that the structure was in fact a comfortable, good-looking dwelling-house, which previously it was not. He also found as a fact that the old building was partly pulled down to the ground floor, and that the buildings erected on the site thereof formed a new building intended for occupation, and that they were not adapted for personal occupation previously, and that they were a "new building" within sect. 159 of the Public Health Act 1875.*

*The appellant was convicted and fined 40s. and costs, and a further sum of 20s. for each day the work should continue or remain contrary to the provisions of the said bye-laws.*

*Held (affirming the conviction), that the question whether the alterations constituted a "new building" was a question of fact for the magistrate to decide, and that he had decided as a fact that they did constitute a "new building," and that the penalty of 5l. was payable in addition to the penalty of 40s. a day, though the information laid against the appellant was only for not having given the notice and plans under the 27th bye-law.*

CASE stated under 42 & 43 Vict. c. 49, by the stipendiary magistrate for the borough of Swansea:—

1. Upon the hearing at the police court at Swansea, on the 31st Jan. 1884, of a certain summons, upon an information laid on the 23rd Jan. 1884, by the respondent, who is the surveyor for the urban sanitary authority of the district of the borough of Swansea, against the said appellant under the bye-laws made by the local board of health for the district of Swansea, under the Local Government Act 1858, s. 34, that the said appellant, on the 23rd Nov. 1883, at the town of Swansea, in the said borough, had not given one month's notice to the urban sanitary authority for the borough of Swansea of his intention to erect a certain new building, situate in Dynevor-place in Swansea aforesaid, by writing delivered to the local surveyor, or left at his office, and at the same time had not left, or caused to be left, at the said office a plan and section of the whole

of the ground belonging to such new building, and of the ground and cellar floor of such intended new building, drawn to a scale of not less than one inch to every eight feet, showing the position, form, and dimensions of the several parts of such buildings, and of the water-closet, privy cesspool, ashpit, well, and other appurtenances, accompanied by a description of the intended mode of drainage and means of water supply, and had not at the same time left a block plan drawn to a scale of not less than one inch to every forty-four feet, showing the position of the properties immediately adjoining, the width and level of the street in front of the intended building (such street being previously approved by the said authority), the level of the lowest floor of the intended building, and of the yard or ground belonging thereto.

2. I convicted the said appellant, and fined him 40s. and costs, and a further sum of 20s. for each and every day during which such work should continue or remain contrary to the provisions of the bye-laws.

3. It was proved before me that the premises in question were used and occupied as a public-house, known by the sign of the "Old Swan Inn," and were situate on the corner of Gower-street, facing south, and to Dynevor-place facing west. The inn itself fronted to and opened into Gower-street. The longer frontage, namely, to Dynevor-place, comprised the side wall of the inn itself, and beyond it a line of outbuildings running farther up that place northwards.

4. It was proved by the respondent, who is the official surveyor for the borough, that in November last he saw alterations and building in progress on the said premises belonging to the Old Swan; that an old garden wall between those premises and the houses in Dynevor-place had, in some places between, been taken down to the foundation and rebuilt, and a suite of rooms erected above it, through which and the Old Swan premises there was an internal communication, and that an old lean-to facing Gower-street had been raised and a room erected above it.

That on the 23rd Nov. the respondent wrote the appellant a letter, of which the following is a copy:

Swansea, Nov. 23rd, 1883.—Sir, I beg to inform you that no plans having yet been approved by the works committee for the alterations, &c. you are now carrying out at the Old Swan public-house, Dynevor-place, I must request that all building operations be suspended until such plans have been approved by the said committee.—Yours truly, E. H. WYVILL, Borough Surveyor.

That on the 27th Nov. he (the respondent) received a reply to that letter, of which the following is a copy:

Swansea, Nov. 27th, 1883.—Sir, In reply to your letter I beg to state that, had I thought you were entitled to a plan, I would at once have supplied it, but from past experience of the same nature, and from a careful study of the borough bye-laws, I was, and am still, under the impression that you are not entitled to a plan, because the work I am carrying on is raising the old walls a story higher. I however, as a matter of courtesy, send you the plan you desire, and as the alterations are an undoubted improvement, I trust that no unnecessary obstacles will be created.—Yours truly, T. M. JAMES.

5. That on the 5th Dec. notice was served upon the appellant from the urban sanitary authority disapproving the plan deposited by him.

6. That no notice of intention to erect the

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buildings was given by the appellant as required under the bye-laws.

7. That before I gave my decision I viewed the said premises, and found a great and material difference and alteration was to be, and indeed had been, made between the old buildings and the present ones.

8. There was, according to the plan, an office at the north end, a fruiterer's store where there had been stables; there was a first floor with bedrooms where there had been none, and also a sitting-room, and that the former water-closet had been taken down, and the uses of the area occupied by the old buildings extensively altered and diverted to other uses.

9. That after the plan had been disapproved, the construction had been modified, and the ground floor somewhat more resembled what it previously had been, but is still substantially and materially altered.

10. And I find that the structure is an expensive one, and is in fact a comfortable good-looking dwelling-house, which previously it was not.

I find, as a fact, that the old building was partly pulled down to the ground floor, and the buildings erected on the site thereof form a new building intended for occupation by men and women, and that they were not adapted for personal occupation previously, and that they now come within the definition of a new building as enacted by sect. 159 of the Public Health Act 1875.

11. By sect. 157 of the same Act power is given to make bye-laws with respect to the structure of walls, roofs, and chimneys of new buildings, and for securing stability, and the prevention of fires, and for purposes of health.

And by sect. 326 of the same Act the bye-laws duly made prior to that Act are to be deemed to be bye-laws under that statute, provided they are not inconsistent with any of its provisions.

12. The solicitor who appeared for the appellant contended that the buildings, though new in fact, were not new from a legal point of view, and were not erected in contravention of the said bye-laws, inasmuch as they were erected on the lines of the old walls and on the old foundations, and did not extend or protrude farther into the street than they did before, and he adduced the case of *Shiel v. Mayor of Sunderland (ubi infra)* in support of his contention. But I held that, though the said bye-law was made prior to the passing of the Public Health Act 1875, it is to be read and interpreted by the light of the interpretation clause therein contained, and that that clause and the case of *Hobbs v. Dance (ubi infra)* warranted me in so construing the bye-law, and that, being made *pro bono publico*, I was bound to put thereon a liberal construction, in conformity with the latest statutory definition and the most recent judgment of the High Court on the same subject-matter. I therefore convicted the appellant in the penalty above mentioned.

If this honourable court should be of opinion that I was right in so holding and convicting the appellant as aforesaid, the said conviction is to stand; but, if wrong, the said conviction is to be quashed.

Bye-law No. 27 provided that every person who intended to erect any new building should give one month's notice to the surveyor for the urban

authority of such intention, and at the same time should leave at his office detailed plans and sections of such new building.

Bye-law No. 31 provided, amongst other things, that, if the owner or person intending to construct any new building fail to give the required notices, or construct, or cause to be constructed, any buildings, &c., contrary to the provisions of any of the said bye-laws, he shall be liable for each offence to a penalty not exceeding 5*l.*, and he shall pay a further sum not exceeding 40*s.* for each day such buildings shall continue or remain contrary to the said bye-laws.

*Lawrence* for the appellant.—This is a case in which the appellant was charged with constructing a new building without complying with the provisions of the 27th bye-law. I submit that the magistrate had no power to convict in this case. The building does not infringe the bye-law in any way. By the 27th bye-law, under which this information is laid, one month's notice is required to be given to the local board by any person about to erect a building. There is nothing in this bye-law, except that the person should send a notice and plan of the proposed building. Then bye-law 31 provides penalties for the constructing of any buildings contrary to the provisions of any of the said bye-laws; so that if a person constructs works which infringe these provisions he is liable to a penalty of 5*l.*, and a fine of 40*s.* a day; but the magistrate has here sentenced a man, who is only charged with the one offence of not having given notice, with the penalties provided for the two offences. [STEPHEN, J.—What the magistrate has done is equivalent to putting a rent of 365*l.* a year on the appellant.] Yes, and he must either pay this or pull his house down. [The learned counsel then read sect. 158 of the Public Health Act 1875.] Bye-laws made under these powers are bad, which authorise the pulling down of houses unless notice is sent in:

*Hattersley v. Burr*, 14 L. T. Rep. N. S. 565; 4 H. & C. 523;

*Hall v. Nison*, 32 L. T. Rep. N. S. 87; L. Rep. 10 Q. B. 152;

The construction of the 31st bye-law is much to the same effect. I submit there was no power nor jurisdiction in the magistrate to convict a man of two offences when the information is for but one offence. Sect. 10 of Jervis's Act (11 & 12 Vict. c. 43) provides that every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences. The conviction goes on to say, "I convicted him in a further sum of 20*s.* a day for every day during which such work should continue or remain contrary to the provisions of the said bye-laws." I submit that, according to *Shiel v. Mayor of Sunderland* (6 H. & N. 796; 30 L. J. 215, M. C.), this is not a new building; but even if this is not so, I submit that the conviction is bad, as the appellant was charged only with the one offence.

*Lanley Smith*, Q.C. and *Brynmor Jones* for the respondent.—The appellant contended that he was not bound to send in a plan, as the building was not a "new building." By sect. 159 of the Public Health Act 1875 the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the framework

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is left down to the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, shall be considered the erection of a new building. There is nothing to show that a new building added to an old building is not a "new building" within this section. The mere fact that the building is on the old lines is not sufficient to prevent its being a "new building." The magistrate, having before him the cases of *Shiel v. Mayor of Sunderland* (*ubi sup.*) and *Hobbs v. Dance* (29 L. T. Rep. N. S. 687; L. Rep. 9 C. P. 30; 43 L. J. 62, C. P.; 22 W. R. 90), said that he found as a fact that the building was a "new building":

*Rea v. Gregory*, 5 B. & Ad. 555.

It is entirely a question of fact for the magistrate to decide what is or is not a "new building":

*Rea v. Fullford*, 10 L. T. Rep. N. S. 346; 10 Jur. N. S. 523; 33 L. J. 122, M. C.; 12 W. R. 715;

*Reg. v. Dayman*, 7 E. & B. 672; 26 L. J. 128, M. C.

In *Baker v. Mayor of Portsmouth* (37 L. T. Rep. N. S. 822; 3 Ex. Div. 157; 47 L. J. 223, Ex.) the Court of Appeal, held (affirming the judgment of the Exchequer Division), that the power to make provision as to removing, altering, or pulling down buildings was not confined to bye-laws relating to structure, but might be extended to and incorporated in bye-laws as to notice and deposit of plans. In the first place, this is a new building in fact; in the second place, it is a new building within the meaning of the 159th section of the Public Health Act 1875.

COLERIDGE, C.J.—These are strong powers, but to carry out the objects of the Act strong powers are necessary. I agree with the opinion expressed by the judges in the Divisional Court and in the Court of Appeal in the case of *Baker v. Mayor of Portsmouth* (*ubi sup.*). When a structure is turned from an old into a new building, then the powers given by these bye-laws apply. The bye-laws themselves were made under the powers given by the 34th section of the Local Government Act 1858, and, though that Act was repealed by the Public Health Act 1875, it was provided by sect. 326 of the latter Act that all bye-laws made under any Sanitary Act repealed by that Act shall be deemed to be bye-laws under that Act. Men may build in the country as much as they like, but in towns, where considerations of health and other things have to be taken into account, there must be strong measures adopted for the purpose of compelling them to perform their statutory obligations. With regard to the facts of this particular case, the appellant was summoned for not having given one month's notice in writing to the urban sanitary authority for the borough of Swansea of his intention to erect a certain new building, and also for not having sent a plan and section of the proposed alterations as required by the bye-laws of the borough. It appeared that on the 23rd Nov. 1883 the respondent sent a letter to the appellant, stating that no plans had been sent in by the appellant; in answer to this the appellant wrote that, inasmuch as he was merely raising the old walls a story higher, he did not think that he was bound to send in a plan, but at the same time he sent in a plan, as he said, out of courtesy. This plan was disapproved of, and notice of such disapproval was served on the appellant. In spite of this disapproval, and in defiance of the

local board, the appellant went on with the building, and then he is summoned by the local board for not having given a month's notice as required by the 27th bye-law. Then bye-law 31 provides that if the owner or person intending to construct any new building fail to give the required notices, or construct, or cause to be constructed, any buildings contrary to the provisions of any of the said bye-laws, he shall be liable for each offence to a penalty not exceeding 5l., and he shall pay a further sum not exceeding 40s. for each day such buildings shall continue or remain contrary to the said provision. In the present case the appellant omitted to send plans, and he is summoned for that omission. The questions which arise in the case are, first, was this a new building? and secondly, if so, was the appellant liable to the penalties imposed by the 31st bye-law? Now the question, whether a building is a new building or not, has been decided over and over again to be a question of fact; it is a question of degree. For instance, if a building were nearly all taken away and then rebuilt, it clearly would be a new building; on the other hand, it is quite clear that by a small addition of, say, a door, the building would not thereby become a new building. Between these two extreme cases there may be thousands of cases, and it would be impossible to give a definition in each particular case as to what is, or is not, a new building; and it must be left to the discretion of each judge to decide for himself what is a new building. So that the question is and must be a question of fact; there are several decisions to this effect. Now what has the magistrate found here? In paragraph 10 of the case he finds, as a question of fact, that the alterations in question constituted "a new building" within the meaning of the 159th section of the Public Health Act 1875. (a) To my mind it is clear what the magistrate intended to do. He has set out the facts of the case, which raise the question of degree, and he says that on these facts he finds "as a fact" that the building was a "new building," and that being so, then the 31st bye-law applies, and the judgment is sustainable. Mr. Lawrence has contended that this 31st bye-law is to be broken up, that if a man does build without depositing plans, he commits only one offence, and renders himself liable to only one penalty. The word "further" in the bye-law identifies the sum to be paid with the foregoing penalty, therefore the penalty of 5l. is to be paid in addition to the penalty of 40s. a day; and in the case of *Baker v. Mayor of Portsmouth* (*ubi sup.*) it was decided that the power to make provision as to removing, altering, or pulling down buildings was not confined to bye-laws relating to structure, but might be extended to and incorporated in bye-laws as to notice and deposit of plans. For these reasons I am of opinion that the judgment of the learned magistrate was right.

STEPHEN, J.—I entirely agree with my Lord's

(a) Sect. 159 of the Public Health Act 1875 provides that "for the purposes of this" Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the frame work is left down to the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building.



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judgment, and I should only repeat what he has said if I were to deliver a separate judgment.

*Judgment for respondent. Conviction affirmed with costs.*

Solicitors for the appellants, *Smith and Lawrence*.

Solicitors for the respondent, *Sharpe, Parker, and Co.*

March 10 and May 30, 1884.

(Before Lord COLERIDGE, C.J. and MATHEW, J.)

THE MERSEY DOCKS AND HARBOUR BOARD v.  
THE OVERSEERS OF LLANEILIAN. (a)

*Lighthouse — Poor - rate — General lighthouse authority — Part of tower used as telegraph station — "Beneficial occupation" — Adjoining buildings—Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 430.*

*The appellants appealed against a poor rate made by the respondents in accordance with a supplemental valuation of rateable hereditaments in the parish of Llaneilian, wherein the appellants were assessed in respect of a lighthouse, telegraph station, houses, buildings, and land at Point Lynas, at the gross estimated value of 305l., and rateable value of 244l.*

*The appellants were incorporated as a body of public trustees by the Mersey Docks and Harbour Act 1857, and the property, powers, rights, and privileges of the Liverpool Dock Trustees, including the right to levy certain harbour and light dues on vessels entering the port of Liverpool, were vested in the appellants. The tolls were so fixed that with the other receipts of the appellants applicable to conservancy purposes they should not be higher than necessary for conservancy expenditure, and therefore no profits were receivable by the appellants from the occupation of any of the property.*

*The lighthouse consisted of a tower and a dwelling-house adjoining. In the tower there was the light-room, which contained the flash-light with clock-work for regulating the flashes, and also a room used for working a telegraph wire which was one of the connections of the wire from Birkenhead to Holyhead, maintained by Her Majesty's Postmaster-General for the exclusive use of the appellants under an agreement. The dwelling-house adjoining the tower and the other premises were occupied by the light-keepers as servants of the appellants.*

*The tower of the lighthouse had no occupation value except as a lighthouse and as a telegraph station.*

*The appellants contended that it was not rateable, on the ground that it was exempted by the 430th section of the Merchant Shipping Act 1854, and that it was not and could not be the subject of any beneficial occupation, and they contended that the premises other than the tower ought to be assessed upon their value to be let from year to year, supposing they were not used for the light or telegraph, but were disconnected therefrom and applied to any other purposes for which they might be available.*

*The respondents contended that the whole of the premises ought to be assessed upon their existing value to the existing occupiers.*

*Held, that the tower was incapable of profitable occupation as a lighthouse, but it being also used as a telegraph station, it was in that respect capable of a beneficial occupation, and therefore rateable, and that, with respect to the adjoining houses, it having been found as a fact that their value was enhanced from being used in connection with the tower, the assessment made on that footing was correct.*

*Held, also, that the 430th section of the Merchant Shipping Act 1854 did not apply, and was applicable only to lighthouses under the control of general lighthouse authorities.*

CASE stated under 12 & 13 Vict. c. 45, s. 11, the material part of which is as follows:—

1. In Aug. 1879 the respondents made a supplemental valuation list of rateable hereditaments in the parish of Llaneilian, in the county of Anglesey, and therein assessed the appellants in respect of a lighthouse, telegraph station, houses, buildings, and land, at Point Lynas, at the gross estimated value of 305l., and a rateable value of 244l. The assessment committee of the Anglesey Union confirmed the assessment.

2. On the 19th May 1882 the respondents made a poor rate for the said parish, in accordance with the said supplemental valuation list. The appellants gave notice of appeal to the quarter sessions for the county of Anglesey against the rate, whereupon this case was stated by the consent of the parties and by order of one of the judges of the Queen's Bench Division.

3 and 4. Prior to the year 1857, the docks at Liverpool were vested in the corporation, under the name of the Trustees of the Liverpool Docks, who were empowered to levy certain dues on vessels entering the port of Liverpool, and amongst others, certain harbour and light dues. The appellants were incorporated as a body of public trustees by the Mersey Docks and Harbour Act 1857, and amongst other matters the property powers, rights, and privileges of the Liverpool Dock Trustees, including the right to levy dues as aforesaid, were transferred to the appellants, who are now regulated by the said Act of 1857; the Mersey Dock Acts Consolidation Act 1858; the Mersey Docks (Ferry Accommodation) Act 1860; the Mersey Docks (Various Powers) Act 1867; the Mersey Docks (Liverpool River Approaches) Act 1871; the Mersey Docks Act 1874, and other statutes.

5. By sect. 54 of the said Act of 1857:

The following account shall be kept separately, and shall be dealt with as distinct sources of income and expenditure (that is to say):

(1.) An account of all sums received and disbursed by the board in respect of the following matters, and hereinafter called "conservancy receipts" and "conservancy expenditure;" that is to say, in respect of the maintenance of buoys, landmarks and telegraphs, the expense of lights and lifeboats, the expense of the marine surveyor, the expenses to be incurred as hereinafter mentioned, with the consent of the Commissioners for the Conservancy of the River Mersey, in improving of the port of Liverpool, or the navigation of the river Mersey, the expenses to be incurred in the exercise of the jurisdiction hitherto vested in the corporation of appointing a water bailiff and removing sunken vessels and other impediments to the navigation.

(2.) An account of all sums received and disbursed by the board in the exercise of the powers hitherto vested in the Liverpool Pilotage Commissioners, hereinafter called "pilotage receipts" and "pilotage expenditure."

(3.) An account of all other sums received and disbursed by the board in pursuance of this Act, and here-

(a) Reported by H. D. BONNEY, Esq., Barrister-at-Law.



inafter called "general receipts" and "general expenditure."

By sect. 55 of the same Act:

The board may, with the consent of the Conservancy Commissioners, apply any portion of their general receipts, after providing for the expenses and charges incidental to the Mersey Dock estate, in improving the port of Liverpool or the navigation of the river Mersey; they may also increase or diminish and again increase any rates or dues leviable by them in pursuance of this Act, either generally or in respect of any particular articles.

And by sect. 56 of the same Act:

The following rules shall be observed by the board with respect to the moneys received by them under this Act (that is to say):

(1) The conservancy expenditure shall be defrayed out of the conservancy receipts.

(2) The pilotage expenditure shall be defrayed out of the pilotage receipts.

(3) No portion of the conservancy receipt or pilotage receipts shall be applied in aid of the general expenditure.

(4) No sums shall be payable in respect of docks by any vessel that does not use the same.

(5) Save as by this Act provided no moneys receivable by the board shall be applied to any purpose, unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes.

6. Certain lighthouses, lightships, buoys, beacons, landmarks, seamarks, and lifeboats, and lifeboat-houses became vested in the appellants on their incorporation. By sect. 104 of the said Act of 1858, the appellants were empowered to purchase land in convenient situations for the erection of lighthouses, and by sect. 156 of the same Act they were empowered to establish and to alter or remove floating lightships in or near the sea channels within or near the port of Liverpool, subject as to the erection or removal of lightships, and the placing or removal of lightships, to the sanction of the Trinity House. Under the said Acts, and the Merchant Shipping Act 1854, s. 394, the appellants may not discontinue any of their lighthouses without the sanction of the Trinity House.

10. By sect. 238 of the said Act of 1858, certain rates called harbour rates, specified in schedule D. to that Act, were made payable to the appellants in respect of all vessels coming into or going out of the port of Liverpool, and not entering into the docks, according to their tonnage, burthens, and to their respective voyages. By sect. 3 of the Mersey Docks Act 1874 the harbour rates set forth in the schedule to that Act were substituted from and after 1st Oct. 1874 for the said rates in schedule D. to the Act of 1858, and it was provided that the appellants might when and as they should deem it expedient so to do from time to time lower and again advance these rates, but so that the same should never exceed the amounts mentioned in the schedule to that Act, and so that the same when so lowered or advanced should not be with the other receipts of the board applicable to conservancy account higher than was necessary for the purposes of conservancy expenditure. The harbour rates actually levied have been about one half of those mentioned in the said schedule.

11. By sect. 230 of the said Act of 1858, certain dock tonnage rates shown in schedule B. to that Act were made payable to the appellants on all vessels entering into or leaving the docks, accord-

ing to their tonnage, burthens, and according to their respective voyages. These rates included dock dues, lighthouse dues, and floating-light dues, as shown in the said schedule. By sect. 270 of that Act the appellants were empowered from time to time to lower all or any of the rates mentioned in the said schedule B., and again to advance them. The lighthouse dues and floating-light dues included in the dock tonnage rates were kept separate from the dock dues and were carried to conservancy account and applied for conservancy purposes, but by sect. 5 of the said Act of 1874 it was provided that they should no longer be so dealt with, and should be deemed part of the receipts applicable to the general expenditure.

12. By sect. 6 of the said Act of 1874:

From and after the passing of this Act, all sums received by the board in respect of harbour rates and the conservancy portion of the dock tonnage rates, whether under the Act of 1858 or under this Act, and all sums disbursed by the board in respect of conservancy expenditure as defined by sect. 54, sub-sect. 1 of the Act of 1937, shall be deemed to be conservancy receipts or conservancy expenditure as the case may be, and shall be accordingly thenceforward included in the separate account of conservancy receipts and conservancy expenditure which by that section the board are required to keep, and such account shall be called the conservancy account.

14. All the accounts of the appellants are annually audited by a special auditor appointed for the purpose by the Board of Trade under sect. 8 of the Mersey Docks Act 1867.

15. With the consent of the special auditor a sum of 500*l.* is annually debited to the conservancy account in respect of a portion of certain general expenses of the appellants, which the appellants allege are partly incurred on conservancy account, such as the salaries and office expenses of the general secretary, treasurer, accountant, solicitor, and auditor, and their clerks. There is no permanent debt incurred on conservancy account, though the account is occasionally in arrear owing to larger expenses than usual being incurred in the erection of lighthouses and the undertaking of other structural works. On the 1st July 1881 there remained in hand a surplus of conservancy receipts over conservancy expenditure, amounting to 22,875*l.* The conservancy expenditure for the year preceding was 26,294*l.*, and the receipts 44,430*l.* (including a balance of 5782*l.* carried forward on 1st July 1880). The surplus or deficit on the account in any year is carried forward to the same account in the year following.

16. The lighthouse at Point Lynas, on the north coast of the island of Anglesey, in respect of which the appellants have been assessed as aforesaid, is one of the lighthouses which were maintained by the trustees of the Liverpool Docks and the lease of which for a term of twenty-one years expiring in 1863 became vested in the appellants on their incorporation as aforesaid. The appellants have always since worked and maintained the lighthouse for the convenience and safety of ships frequenting the port of Liverpool, but the light is also of use to other vessels navigating the eastern ports of the Irish Channel.

17. Prior to 1872 poor rates were paid in respect of the lighthouse and lightkeeper's house upon an assessment of 12*l.*, and from 1872 to 1877

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(when the present dispute first arose) upon an assessment of 20*l.*, and from 1877 to 1879 upon an assessment of 50*l.* net rateable value. None of the private Acts by which the appellants are regulated contain any express provision exempting the lighthouse or the other assessed premises from the payment of poor rates.

18. Between Nov. 1877 and Aug. 1879 the appellants purchased the freehold of the site of the said lighthouse and of some adjoining land, together about sixteen acres, at a cost of about 3000*l.*, and they spent a sum of about 5600*l.* in structural improvements of the lighthouse in constructing new lighting apparatus, and in erecting two four-roomed houses for the lightkeepers, and a stable. The two houses are in an exposed situation, and partly on that account and partly with a view to making a handsome group of buildings they were built more substantially and expensively than ordinary dwelling-houses with similar accommodation usually are. The said houses, stable, and land, if not used in connection with the lighthouse, might be let by the appellants to other tenants at a rent.

19. The lighthouse consists of a tower and a dwelling-house adjoining. In the tower is the light-room, which contains the flash-light, with clockwork for regulating the flashes, all fitted on cast-iron columns, and on a circular cast-iron base for the light attached to the freehold, and also a room used for working a telegraph wire, which is one of the connections of the wire from Birkenhead to the south stack, Holyhead, maintained by Her Majesty's Postmaster-General for the exclusive use of the appellants, as mentioned in paragraph 8. The said room is one of the telegraph stations of the appellants within the meaning of the agreement referred to in paragraph 8, and the telegraph wire therefrom is worked by them as mentioned in paragraphs 7 and 8. The dwelling-house adjoining the tower and the other premises are occupied by the lightkeepers as servants of the appellants.

21. The tower of the lighthouse has no occupation value except as a lighthouse and as a telegraph station, and the appellants under the present circumstances are the only persons to whom it is of value for those purposes. The appellants contend that it is not rateable on the grounds that it is exempted by the 430th section of the Merchant Shipping Act 1854, and that it is not and cannot be the subject of any beneficial occupation, and they contend that the premises other than the said tower ought to be assessed upon their value to be let from year to year, supposing they were not used for the light or telegraph, but were disconnected therefrom and applied to any other purposes for which they might be available.

22. The respondents contend that the whole of the premises ought to be assessed upon their existing value to the existing occupiers.

23. If this court shall be of opinion that the appellants are rateable in respect of the tower and the other premises as used at present for and in connection with the light and telegraph, the present assessment of the appellants' premises is to stand. If in respect of the tower as a telegraph station only, and not as a lighthouse, and the other premises at their value as now used and occupied, the gross estimated rental is to be reduced to 95*l.*, and the rateable value to 76*l.* But

if the appellants are rateable in respect only of the premises other than the tower upon their value supposing they were not used for the light or telegraph but were disconnected therefrom, then the gross estimated rental is to be reduced to 45*l.*, and the rateable value to 40*l.*

*Carver (Bigham, Q.C. with him)* for the appellants.—The lighthouse belongs to the appellants in their capacity of harbour authority, and it is not capable of a profitable occupation; they are expressly restricted by statute from making any profit. In *Reg. v. The Metropolitan Board of Works* (19 L. T. Rep. N. S. 348; L. Rep. 4 Q. B. 15) it was held that the sewers were not rateable to the poor rate, on the ground that they were not the subject of a beneficial occupation; and that case was followed in *The Metropolitan Board of Works v. The Overseers of West Ham* (L. Rep. 6 Q. B. 193). The tower of the lighthouse is incapable of having a beneficial occupation, even if the adjoining buildings are. It is submitted that the lighthouse is exempt from rates by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 430. (a)

The following cases were also cited:

*Mersey Docks v. Cameron*, 12 L. T. Rep. N. S. 648; 11 H. of L. 443;

*Corporation of Worcester v. The Droitwich Assessment Committee*, 34 L. T. Rep. N. S. 288; 2 Ex. Div. 49;

*The Mayor of Lincoln v. Holmes Common*, L. Rep. 2 Q. B. 482;

*Hare v. Overseers of Putney*, 45 L. T. Rep. N. S. 337; 7 Q. B. Div. 223;

*Lewis v. Churchwardens of Swansea*, 25 L. J. 33, M. C.

*Marshall (McIntyre, Q.C. with him)* for the respondents.—Sect. 430 of the Merchant Shipping Act 1854 applies only to lighthouses under the general lighthouse authorities, and not to a lighthouse under a local authority as in this case; the fact that the property is used for public purposes is no ground of exemption:

*Greig v. The University of Edinburgh*, L. Rep. 1 H. of L. Sc. App. 438.

There is nothing to prevent a tenant renting the whole of the Mersey Docks estate, and the lighthouse would increase the value of the estate; it is one of the means by which they obtain dues. This case is distinguished from the cases of *Reg. v. The Metropolitan Board of Works* and *The Metropolitan Board of Works v. The Overseers of West Ham* (*ubi sup.*) because, as payment was made for the use of the sewers, there is no suggestion that a profit could have been made out of the whole system in the sewers cases. It does not follow that, because you cannot get a hypothetical tenant, the property is not rateable.

May 30.—The judgment of the court (Lord Coleridge, C.J. and Mathew, J.) was delivered by

MATHEW, J.—The assessment appealed against

(a) 17 & 18 Vict. c. 104, s. 430: All lighthouses, buoys, beacons, and light dues, and all other rates, fees, or payments accruing to or forming part of the said fund, and all premises or property belonging to or occupied by any of the said general lighthouse authorities, or the Board of Trade, which are used or applied for the purposes of any of the services for which such dues, rates, fees, and payments are received, and all instruments or writings used by or under the direction of any of the said general lighthouse authorities, or the Board of Trade, in carrying on the said services, shall be exempted from all public, parochial, and local taxes, duties, and rates of every kind.

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seems to have been made on a calculation of what a landlord might charge by way of rent for the premises rated, and not upon an estimate of the rent at which the premises might reasonably be expected to let from year to year, and we are of opinion that the assessment cannot be maintained. It appears from the statement in the special case that the funds out of which the lighthouse and adjoining premises have been acquired and are maintained are chiefly obtained from tolls levied by the appellants under their statutory powers upon vessels using the Mersey Docks or entering the port of Liverpool. These tolls are directed to be so fixed that with the other receipts of the appellants applicable to conservancy purposes they shall not be higher than is necessary for conservancy expenditure. No profits are therefore receivable by the appellants from the occupation of any of the property in question, and if none of the property rated were capable of being used except upon the conditions imposed on the appellants, it would seem that no assessment could be made: (see *Corporation of Worcester v. Droithwich*, 2 Ex. Div. 49.) But, as has been settled by the well-known decisions cited in the course of the argument (the *Mersey Docks v. Cameron*, 11 H. of L. Cas. 443; *The Governors of St. Thomas's Hospital v. Stratton*, L. Rep. 7 H. of L. 477; *Greig v. University of Edinburgh*, L. Rep. 1 H. of L. Sc. App. 348), the fact that profits are not earned by the appellants would not extinguish the rateable character of the premises in question if it could be shown that the property was capable of being beneficially occupied in the hands of a tenant from year to year. The question, therefore, seems to be whether any, and if any what, portion of the property is thus capable of a beneficial occupation. With respect to the tower, even if the tolls were received in Liverpool as part consideration for the maintenance of the lighthouse, it would seem that the payment would not be a ground for treating this part of the property as rateable: (see *Ree v. Coke*, 5 B. & C. 797.) But the tolls are not so receivable. The lighthouse is a charge upon the funds created by the appellants' statutes. It represents not income but expenditure. In the hands of an ordinary tenant it would yield no return, and would be incapable of profitable occupation as a lighthouse. That it represented an outlay of capital would not render it assessable any more than the property of an analogous character held not to be rateable in *Reg. v. The Metropolitan Board of Works* (L. Rep. 4 Q. B. 15), and in *The Metropolitan Board of Works v. The Overseers of West Ham* (L. Rep. 6 Q. B. 193). But the lighthouse is also used as a telegraph station, and for that purpose it seems to have been found as a fact that it is capable of beneficial occupation. In this respect, upon the authority of the decisions last referred to, it would seem to be rateable, and the rateable value we gather has been fixed at 96l. We see no reason for differing from this conclusion.

Then with respect to the adjoining houses, it seems also to have been found as a fact that their value is enhanced from their being used in connection with the tower, and we think that the assessment made on this footing should stand at the rateable value of 76l. It remains to deal with the point which was made, but not much insisted upon by the learned counsel for the appellants,

viz., that the property was exempted from being rated under sect. 430 of the Merchant Shipping Act. It seems clear that the Act only applies to lighthouses in charge of the general lighthouse authorities referred to in the statute, and not to those which like the lighthouse at Point Lynas are under the control of a local authority. We direct the rate to be amended in accordance with our judgment, without costs.

Solicitors for the appellants, *F. Venn and Co.*, agents for *A. T. Squarey*, Liverpool.

Solicitors for the respondents, *Ravenscroft and Co.*, agents for *William Fanning*, Amlwch.

Tuesday, March 25, 1884.

(Before COLERIDGE, C.J. and STEPHEN, J.)

SEAGER (app.) v. WHITE (resp.). (a)

*Licensing Acts—Selling liquor at an unlicensed place—Transaction in the nature of a sale—Wife licensed—Husband taking spirits to an unlicensed house to be raffled for—Whether husband an admissible witness—Licensing Act 1872 (35 & 36 Vict. c. 94), ss. 3, 51, 62. (b)*

The appellant, Mrs. S., a married woman who had a licence to sell intoxicating liquor, was convicted under the 3rd section of the Licensing Act 1872 of selling intoxicating liquor at a place where she was not authorised by her licence to sell the same. The husband of the appellant was about to be called as a witness for the respondent, but it was objected that he was not a competent, or if competent, not a compellable witness, and the objection was allowed. Evidence, however, was given by a constable of a statement made to him by the husband, in the wife's presence, to the effect that "on the 24th Dec. 1883 he took spirits from the licensed house of the appellant to the house of one B.; the drink was then raffled for, and he was present during the raffle; the money was put in a basin on the table, and it was afterwards brought to the inn and put on a table there; one or other of them, the landlady or the husband himself, took it from the table; during the time of the raffle he took some spirits up to B.'s house; he took it all." Other witnesses proved that the liquor brought from the appellant's house by her husband was raffled for at B.'s house, the husband himself being present at the time.

The justices convicted the appellant of selling the liquor at B.'s house.

Held, that what took place at B.'s house was a transaction in the nature of a sale within the meaning of sect. 62 of the Act, and that, as the appellant

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

(b) Sect. 3 of the Licensing Act 1872 provides that, "Any person selling or exposing for sale any intoxicating liquor at any place where he is not authorised by his licence to sell the same, shall be subject to certain penalties."

Sect. 51, sub-sect. (4) provides that "In all cases of summary proceedings under the Act the defendant and his wife shall be competent to give evidence."

Sect. 62 provides that, "In proving the sale or consumption of intoxicating liquor for the purpose of any proceeding relative to any offence under this Act, it shall not be necessary to show that any money actually passed, or any intoxicating liquor was actually consumed, if the court hearing the case be satisfied that a transaction in the nature of a sale actually took place, or that any consumption of intoxicating liquor was about to take place."

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*was a competent witness and did not contradict the statement made by her husband, there was sufficient evidence to support the conviction.*

*Quære, whether, under sect. 51 of the Act, the husband of the appellant is a competent witness.*

CASE stated by justices :—

1. The appellant was charged by summons, upon an information laid by the respondent, a superintendent of police of the county of Hants, for that she, then being duly licensed to sell by retail intoxicating liquors in her house and premises, known by the sign of the Montagu Arms, in the parish of Beaulieu, in the county of Hants, did, on the 24th Dec. 1883, in the said parish of Beaulieu and county of Hants, sell and expose for sale, by retail, intoxicating liquors at a certain other house in the occupation of Tom Biddlecomb, situate in Beaulieu-street, in the parish of Beaulieu aforesaid, where she was not authorised by her licence to sell the same, contrary to the statute 35 & 36 Vict. c. 94, s. 3.

2. Upon the hearing of the information it appeared that the appellant was a married woman, having married since the renewal of her licence for the Montagu Arms in 1883, and kept the Montagu Arms, Beaulieu, aforesaid, as the holder of a licence granted under 9 Geo. 4, c. 61, to sell excisable liquors by retail, to be drunk or consumed on the premises therein specified.

3. In support of the information, the respondent called as witnesses Tom Biddlecomb, the person at whose house the alleged unlawful sale took place, Edward Shergold, Harry Vine, and Walter Payne, all of whom, acting on the advice of the appellant's solicitor, objected to answer the question whether they were present at Biddlecomb's on the occasion in question, or the question as to what they did there, on the ground that the answer might incriminate them, but, notwithstanding their objections, were directed by us to answer such questions, and who, subject to the aforesaid objections, then proved that on the evening of the 24th Dec. a number of persons, including themselves and the husband of the appellant, were on the premises of one Tom Biddlecomb, where some bottles containing spirits were deposited by the appellant's husband in the room in which the same, or some of them, were subsequently raffled for. It was stated by Biddlecomb that his premises were not licensed for the sale of intoxicating liquors. The licence granted to the appellant was not called for or produced in evidence.

It was further proved by the same witnesses that, at the same time and place, some of the said bottles of spirits were put up to be raffled for by the persons present, whose names were then and there taken down. Each person, before being allowed to take part in a raffle, paid over a sum of money, the amount of which was determined by the value of the spirits put up for sale, and the number of the persons joining in the raffle. All money so paid was placed in a basin on the table.

5. The husband of the appellant was about to be called as a witness for the respondent, but it was objected that he was not a competent, or if competent, not a compellable witness, and the objection was allowed. Subsequently evidence of a statement made to an inspector of police by the husband of the appellant, in the presence of his wife, was tendered on the part of the respondent. The inspector stated as follows :

I am an inspector in the detective department of the police. On Wednesday, the 2nd Jan. instant, I was at Beaulieu to investigate the case in connection with the Montagu Arms raffling at Tom Biddlecomb's house, accompanied by Superintendent White. I went into a private room at the inn. Mrs. Seager, the defendant, and her husband, were in the room. I said to Mr. Seager, "I am a police officer; I have been sent down by the chief constable to investigate this case of raffling in connection with this public-house. If you have any statement to make, Mr. Seager, in this matter I will take it down, but before you commence I tell you that you are not the landlord, and don't hold the licence, therefore I should like Mrs. Seager to remain in the room while you make the statement."

Such evidence was objected to as inadmissible on the following grounds : 1. That whatever took place in connection with the alleged offence, it being in the presence of the husband, the wife was irresponsible as acting under duress. 2. That the statement by the appellant's husband was not a voluntary one. 3. What was said, either to or by the husband, could not, under the circumstances, be evidence against the wife. These objections were overruled, and the evidence was admitted, and was to the following further effect :

James Seager stated that he was the husband of the landlady. On Monday, the 24th Dec. 1883, he took spirits from the Montagu inn, at Beaulieu, to the house of Tom Biddlecomb; it was then raffled for; he was present during the raffle; the money was taken by a Mr. Goff. Mr. Goff was staying at the inn at the time as a friend. The money was put in a basin on the table; the money was afterwards brought to the inn, and put upon the table there (pointing to the table the witness was writing at when the statement was made). One or other of them, the landlady or Seager himself, took it from the table. During the time of the raffle he took some spirits up to Biddlecomb's house; he took it all.

Mr. Seager further stated, if anything took place he would stand by it, he was to blame and no one else; he did not want raffling in his house.

6. It was contended on behalf of the appellant : 1. That in consequence of the wrongful admission of evidence she was entitled to have the information dismissed. 2. That even on the evidence wrongfully admitted, there was nothing to bring the appellant within the section of the statute under which the information was laid, as any part she took in the transaction was entirely at the Montagu Arms, from which the liquor was sent, and where alone she received money; the sale, if any, by her being there, and there only. 3. That, excluding the evidence wrongfully admitted, there was no evidence at all against the appellant. 4. That if an unlawful sale did take place at all at Biddlecomb's, all such sale was by the husband of the appellant, not by her. 5. That anything the evidence disclosed against the appellant, she was not responsible for, as it was done by her husband, and under his control and duress.

7. It was contended, on behalf of the respondent, that the sale took place on the premises where the liquor was, in fact, disposed of, and where the appellant was not authorised by her licence to sell the same.

8. It was held by the justices that a transaction in the nature of a sale by the appellant had taken place, and that consumption of intoxicating liquors actually did take place, with the appellant's privity and consent and for her benefit, within the meaning of the 62nd section of the Licensing Act 1872. The appellant was therefore convicted of the offence charged, and fined 10*l.* and costs.

9. The questions for the opinion of the court.

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are: (1) Whether, in the circumstances proved at the hearing, there was any legally admissible evidence to show that the appellant had committed the offence charged; and (2) whether we rightly convicted her.

If this honourable court should be of opinion there was such evidence, and that we rightly convicted, then the conviction will stand; otherwise it will be quashed.

*Foots* for the appellant.—The justices referred to sect. 62 of the Act, and they thought that, under that section, it was not necessary to show that the liquor was sold with the privity of the appellant. [He was stopped.]

*Bullen* for the respondent.—There was here some evidence to support the conviction. The sale, such as it was, actually took place at Biddlecomb's, and by the husband acting for the wife. The justices actually find, as a fact, that a transaction in the nature of a sale did take place. This is in accordance with the very words of the 62nd section of the Act. The spirits were taken away from the Montagu Arms without being paid for, and taken to Biddlecomb's for the purpose of sale by the raffle, and it was there that the sale, or what was equivalent to a sale, took place. Mrs. Seager, the appellant, is the person who held the licence of the Montagu Arms, and therefore she is the person who is responsible in this case. There was ample evidence in the case to support the conviction. [COLERIDGE, C.J.—The husband, but not the appellant, was in the house when the drink was sold. He said that he, and he alone, was to blame in the matter.] My contention is that, even if the husband was the person acting in the matter, he was not the holder of the licence, but was acting for the benefit of the appellant. She was the real acting party in the matter. The justices held that what was done was done with the consent and privity of the appellant. By the 51st section of the Act both husband and wife were competent witnesses, and the fact of the appellant not giving any evidence on the matter, though entitled to do so, was some evidence that she was guilty of the offence.

*Foots* in reply.—Apart from the husband's evidence, there was no evidence to support the conviction. [STEPHEN, J.—The wife was either in court or might have been, and, as she was a competent witness, the fact that she did not appear and give evidence is strongly against her.] The money was taken by Seager or Biddlecomb; there was nothing she was called on to contradict. The case finds that, one or other of them, the landlady or Seager himself, took the money from the table. This is evidence to be acted on with great caution. [STEPHEN, J.—That was all for the magistrates to consider. COLERIDGE, C.J.—You ask us to infer, after all the facts, that all this was done without the knowledge and consent of the wife; the money was laid on her table and taken up by her or her husband.] As to the value of the statement made by the husband, it is worthless. [COLERIDGE, C.J.—I thought all along that there was hardly sufficient proof to convict the wife, but, when I find that she could have been called, and was not, that difficulty is removed.] The wife was acting under the coercion of her husband in what she did.

Lord COLERIDGE, C.J.—I confess that I think this is a clear case now, though I did not at first.

At first I was under the impression that the proof was defective, but Mr. Bullen has satisfied me that the evidence of the husband was not only stronger than it seemed, but it was given in the presence of the wife, and she did not attempt to contradict it, though she was entitled to do so, as by sect. 51 of the Act she was competent to give evidence in the matter. The evidence of the other witnesses did not contradict the husband's account of the transaction, and his evidence was to the effect that he took the liquor from this licensed house, the Montagu Arms, to the house of Biddlecomb, where a raffle was going on, and brought back the money and placed it on a table in the Montagu Arms, and that one or other of them, the appellant or himself, took it from the table. Now, the appellant could have been called as a witness to contradict this evidence and to show that the transaction took place without her knowledge, but she did not appear to give any such evidence; this shows, to my mind, that the case is extremely strong, that this sale did take place for the benefit and with the consent of the appellant, and I think that the case was proved against her. The offence with which the appellant is charged, it will be remembered, is that she sold intoxicating liquor at Biddlecomb's house, where she had no licence to sell the same, contrary to the provisions of the 3rd section of the Licensing Act 1872. I think, therefore, our judgment must be for the respondent.

STEPHEN, J.—I am of the same opinion. The husband, in the wife's presence, made a statement which would go far to show that the wife was cognisant of the transaction, but the wife, although a competent witness, is silent and says nothing at all. I think, therefore, that the appellant did sell the liquor at an unauthorised place, and that what took place was quite sufficient to satisfy the words of the 62nd section of the Act. This section provides that in proving the sale or consumption of intoxicating liquor for the purpose of any proceeding relative to any offence under this Act, it shall not be necessary to show that any money actually passed, or any intoxicating liquor was actually consumed, if the court hearing the case be satisfied that a transaction in the nature of a sale actually took place. With regard to the question of the admissibility of the husband's evidence, in a case like the present, where the wife is the licensed person, the 51st section of the Act says nothing, for it merely says, that in all summary proceedings under this Act the defendant and his wife shall be competent to give evidence; but there are no corresponding words, "the defendant and her husband." But then it is said that the wife, being presumed to be under the husband's pressure, would not be an admissible witness if he would not be. There is, no doubt, a rule relating to larceny, that the wife, in her husband's presence, is deemed to be acting under his coercion, but if that rule were inquired into, it would be found to have arisen as a compensation to women instead of the benefit of clergy which was denied to them. It is a melancholy rule, and one not to be extended or commended. In this case, however, the wife, being the defendant, was clearly admissible as a witness, and, as she did not give any evidence to rebut the charge, there is a moral certainty that she was not able to do so; and when a state of moral certainty is produced before a court, it is enough.

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I have no doubt that, in the present case, the woman knew all about it, and, as she could have explained the matter and did not do so, and did not even ask for an adjournment for the purpose of giving further evidence, I think there was evidence against the appellant, and that, therefore, our judgment must be for the respondent.

*Conviction affirmed; judgment for respondent.*

Solicitors for the respondent, *Stocken and Jupp*.  
Solicitors for the appellant, *Bell and Tayler*,  
Southampton.

Wednesday, April 2, 1884.

(Before Lord COLERIDGE, C.J. and CAVE, J.)

BEATY AND OTHERS (apps.) v. GLENISTER (resp.). (a)

*Public peace—Disturbance of—Salvation Army—Singing, shouting, and cornet playing in public streets—Hastings local Act (2 Will. 4, c. xci. s. 61).*

*By the 61st section of the Hastings local Act (2 Will. 4, c. xci.) it is provided that if any person shall make, excite, or join in any brawl, or otherwise disturb the public peace, every person so offending shall for every such offence forfeit and pay any sum not exceeding forty shillings.*

*A., B., and S., members of the Salvation Army, led a crowd by a circuitous route through certain of the streets of the town of H. to the meeting-house of the army, S. during the march blowing a cornet loudly and in a discordant manner, and A. and B. marching with him singing hymns, beating time, and shouting loudly "Alleluia" and other expressions. Several of the inhabitants of the streets through which they passed were disturbed by the loud and discordant noises, but there were not more than fifteen members of the Salvation Army present, much of the noise being caused by a mob of 400 or 500 persons following them, and hostile to their proceedings.*

*Informations having been preferred against A., B., and S. under the local Act for disturbing the public peace, it was found as a fact that A., B., and S. disturbed the public peace within the meaning of the statute, and they were convicted.*

*Held, on case stated, that there was no evidence of the offence charged upon which the defendants could be rightly convicted under the Act of disturbing the public peace, and that the conviction must be quashed.*

THIS was a case stated by justices of the borough of Hastings under 42 & 43 Vict. c. 49.

The material parts of the case were as follows:—

At a petty session, held at the town hall in the said borough on Thursday, the 13th Dec. 1883, two informations, preferred by the said William Glenister, superintendent of police, hereinafter called the respondent, against William Beaty and John Blandy, respectively hereinafter (with Frank Smith) called the appellants, under sect. 61 of 2 Will. 4, c. xci., charging that they, the said appellants, on the 2nd Dec. then instant, at the parishes of St. Mary in the Castle and the Holy Trinity in the said borough, and within the district of the Hastings urban sanitary authority, in certain public places there situate, called respectively Marine-parade, Castle-street, Devonshire-road, and Wellington-place, did disturb the public peace by singing and shouting, contrary to the said

statute, were heard and determined by us, the said parties respectively being then present; and upon such hearing we convicted each of the said appellants in the penalty of 1s. and costs.

At the same sessions an information, preferred by the respondent against Frank Smith, one of the above-named appellants, under the same section of the same Act of Parliament, charging that he, on the 2nd Dec. then instant, at the same places named in the other informations, did disturb the public peace by playing a cornet, contrary to the said statute, was heard and determined by us, the said parties respectively being then present, and upon such hearing we convicted the said Frank Smith in the penalty of 1s. and costs.

Upon the hearing of the said informations it was proved: (a) that on Sunday, the 2nd Dec. last, shortly before 11 a.m., the defendants, with a number of other people, had assembled on the beach, and that the appellant Beaty was preaching there, and that shortly afterwards all the appellants, who are members of the Salvation Army, headed the crowd into the street, and by a circuitous route led it through the several streets mentioned in the information to the meeting-house or "fort," as it is called, of the Salvation Army in St. Andrew's-square; (b) that during the march the defendant Smith, a major in the Salvation Army, blew a cornet loudly and in a discordant manner, Beaty and Blandy marching with him, giving out and singing Salvation Army hymns or songs, beating time and shouting loudly "Alleluia" and other expressions; (c) that a crowd, which continued to increase and ultimately amounted in number to 400 or 500, accompanied or followed the defendants, and that there was a great noise caused by the cornet, and also by shouting and singing through the several streets, which could be heard at a distance of 400 or 500 yards, of which noise complaint was made to a police officer on duty in one of the streets; (d) that a sergeant of police remonstrated with Smith, and told him to leave off playing the cornet, but that Smith turned the cornet towards him and continued to blow it; (e) that several of the inhabitants of the streets through which the crowd passed were disturbed by the loud and discordant noises.

The appellants proved that the actual members of the Salvation Army present did not exceed fourteen or fifteen in number, and that much of the noise which was made was caused by the mob which followed, and who were hostile to their proceedings.

It was contended by counsel for the appellants that there had not been any disturbance of the public peace by them or by those who acted with them, but that any noise or disturbance that occurred was occasioned by the persons in the crowd who were hostile to the appellants, and that the fact that such other persons committed unlawful acts could not constitute an offence by the appellants, who were only acting within their legal rights; that the statute 2 Will. 4, c. xci., under which the informations were laid, could not abrogate or annul the common law with reference to the offence with which the appellants were charged, and that the informations should therefore be dismissed.

We found as a fact that the appellants disturbed

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the public peace within the meaning of the statute under which they were charged.

The question of law for the opinion of the court is, whether there was any evidence of the offence charged having been committed by the appellants upon which we could convict them of disturbing the public peace under the aforesaid statute.

The local and personal Act (2 Will. 4, c. xci.) is entitled "An Act for paving, lighting, watching, cleansing, and improving the town and port of Hastings, in the county of Sussex, and for establishing and regulating markets therein, and supplying the inhabitants thereof with water, and for other purposes;" and the 61st section, after enumerating a great number of obstructions and nuisances in the streets, provides that

If any person shall make, excite, or join in any brawl, or otherwise disturb the public peace, or use any obscene, profane, or abusive language in any of the said streets or places, or commit any public nuisance or annoyance whatsoever within the said town and port; every person so offending shall for every such offence forfeit and pay any sum not exceeding forty shillings.

*Sutherland* for the appellants.—There was no evidence before the magistrates on which the appellants could rightly be convicted of this offence, and the convictions ought therefore to be quashed. The appellants were acting strictly within their legal rights in what they did. The mere making of a noise in a public place so as slightly to interfere with the comfort of the inhabitants is not a disturbance of the public peace within the legal meaning of that term.

*Prosser* for the respondents.

Lord COLERIDGE, C.J.—I am of opinion on the facts stated in this case that there was no evidence of any disturbance of the public peace having been committed by the appellants within the meaning of this Act, on which they could rightly be convicted of an offence against its provisions.

Cave, J. concurred.

Solicitor for the appellants, *Bennett*.

Solicitors for the respondents, *Meadows and Elliott*, Hastings.

Monday, May 26, 1884.

(Before STEPHEN and MATHEW, JJ.)

CUNDY (app.) v. LE COCQ (resp.). (a)

*Licensing Acts—Selling intoxicating liquor to a drunken person—Conviction for—Knowledge of condition of customer—No indications of insobriety—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 13.*

*Sect. 13 of the Licensing Act 1872 enacts that, "If any licensed person permits drunkenness, or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding, for the first offence, ten pounds, and not exceeding, for the second and any subsequent offence, twenty pounds."*

*Held, that this section contains an absolute prohibition against selling liquor to a drunken person, and is not confined to those cases where the publican or his servants knew, or had reasonable means of knowing, that the person served was drunk, the object of the Act being that, when licensed persons sell intoxicating liquor, they*

*should find out that the person to whom it is sold was not drunk.*

CASE stated under 20 & 21 Vict. c. 43.—

At the West Ham Police-court, on the 1st Feb. 1884, the appellant was charged by the respondent, under sect. 13 of the Licensing Act 1872, for that he, being the keeper of certain licensed premises, had, on the 14th Jan. 1884, sold intoxicating liquor to a drunken person.

It was proved that there had been a sale of intoxicating liquor, and that the person served was drunk, but it was also proved, in answering the complaint, that neither the appellant nor his servants had noticed that the person served was drunk, and that the drunken person, while in the licensed premises, had been quiet in his demeanour and had done nothing to indicate insobriety, the evidence showing that there was no apparent indication of intoxication.

Upon the evidence, it was contended for the appellant that there was nothing to show any knowledge or means of knowledge on the part of the appellant or his servants that the person served was drunk.

The magistrate convicted the appellant, holding that the offence was complete on proof that a sale had taken place and that the person served was drunk, and that it was unnecessary to determine whether the appellant or his servants knew, or had the means of knowing, that the person served was drunk, or could, with ordinary care, have detected the drunkenness.

The question for the opinion of the court was, whether the construction placed by the magistrate on the section was right, or whether in arriving at his decision it was necessary for him to consider whether or not the appellant or his servants knew or had the means of knowing, or whether they could with ordinary care have detected, that the person served was drunk.

Sect. 13 of the Licensing Act 1872 (35 & 36 Vict. c. 94) is as follows:

If any licensed person permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds.

*Besley* for the appellant.—Before the appellant can be convicted, it is necessary to show that he knew or had the means of knowing that the person served was drunk. There can be no conviction for a crime unless there be a "guilty mind." In *Somerset v. Hart* (53 L. J. 77, M. C.; 12 Q. B. Div. 360), where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person, employed on the premises, but there was no evidence to show any connivance or wilful blindness on the part of the licensed person, and it did not appear that the servant was in charge of the premises, it was held that the justices were right in refusing to convict the licensed person of suffering gaming on the premises; and, though in *Mullins v. Collins* (29 L. T. Rep. N. S. 838; L. Rep. 9 Q. B. 292; 43 L. J. 67, M. C.; 22 W. R. 297) a licensed person was held to have been properly convicted under sub-sect. 2 of sect. 16 of this Act, where his servant knowingly supplied liquor to a constable on duty, Archibald, J., in giving judgment in that case, said: "In construing this enactment adversely to

(a) Reported by HENRY LEECH, Esq., Barrister-at-Law.



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the appellant, we are not interfering with the maxim that, before a person can be criminally convicted, he must be shown to have a *mens rea*" (L. Rep. 9 Q. B. at p. 295):

*Reg. v. Prince*, 33 L. T. Rep. N. S. 700; L. Rep. 3 C. C. B. 154; 44 L. J. 123, M. C.; 24 W. R. 76; *Bearne v. Garton*, 2 E. & E. 66; 28 L. J. 216, M. C.

*R. S. Wright (Danckwerts with him)*.—All the sections of the Licensing Act 1872 which make knowledge essential to the commission of an offence expressly use that word; e.g., in several sections it is provided that if a licensed person "knowingly" does such a thing, then he shall be liable to conviction. Here the word "knowingly" is omitted, and, as these are sections dealing with offences against public order, the word cannot be imported into them where it is not used. The rule as to guilty knowledge is a presumption merely, and the question whether knowledge is or is not essential to the commission of an offence depends on the wording of the particular statute which may be applicable to it:

*Nichols v. Hall*, 28 L. T. Rep. N. S. 473; L. Rep. 8 C. P. 322; 42 L. J. 105, M. C.; 21 W. R. 579.

In *Reg. v. Bishop* (42 L. T. Rep. N. S. 240; 5 Q. B. Div. 259), where the defendant was convicted of receiving two or more lunatics into her house without a licence, and where the jury found that, though the persons so received were lunatics, the defendant honestly and on reasonable grounds believed that they were not lunatics, it was held that such belief was immaterial, and that the conviction was right:

*Reg. v. Woodrow*, 15 M. & W. 404; *Attorney-General v. Lockwood*, 9 M. & W. 378.

So knowledge on the part of the seller that an article is adulterated is not necessary to sustain a conviction under sect. 2 of the Adulteration Act 1872 (35 & 36 Vict. c. 74):

*Roberts v. Egerton*, 30 L. T. Rep. N. S. 633; L. Rep. 9 Q. B. 404; 43 L. J. 135, M. C.; 23 W. R. 797; *Fitzpatrick v. Kelly*, 28 L. T. Rep. N. S. 558; L. Rep. 8 Q. B. 337; 42 L. J. 132, M. C.; 21 W. R. 681.

So, to support a charge of assault on a constable in the execution of his duty, it is not necessary that the defendant should know that he was a constable then in the execution of his duty:

*Reg. v. Forbes*, 10 Cox C. C. 362.

In *Davis v. Harvey* (30 L. T. Rep. N. S. 629; L. Rep. 9 Q. B. 433) a person was convicted of an offence under sect. 77 of the Poor Law Amendment Act 1834, although he had not a guilty knowledge. Effect ought to be given to the distinction, drawn in various sections of the Act, between offences in which knowledge is expressly made an element and those in which it is not so made.

*Beesley* in reply.

STEPHEN, J.—I am of opinion that this conviction should be affirmed. The case turns upon the question whether the words of the 13th section, —the section under which the conviction took place—taken in connection with the general scheme of the Act, should be read as implying that a licensed person, before he can be convicted under that section of selling intoxicating liquors, must know, or have reasonable means of knowing, that the person served was drunk, or whether the section amounts to an absolute prohibition against selling intoxicating liquor to a drunken person,

even when the seller had no such knowledge. I am of opinion that the words of the statute amount to an absolute prohibition of the sale of intoxicating liquor to a drunken person, and that, if the person selling the liquor did not know, or had not the means of knowing, that the person served was drunk, this is no answer to the charge, but is merely a matter to be urged in mitigation of the penalties imposed by the section. I come to this conclusion, not only in consequence of the general object of the Act, which is an Act for the prevention of drunkenness, but also by a comparison of the sections dealing with "offences against public order." In some of these sections the word "knowingly" is introduced; for instance, by sect. 14, a penalty is imposed upon a licensed person who "knowingly" permits his premises to be the habitual resort of prostitutes, and by sect. 16 a penalty is imposed for "knowingly" harbouring a constable. Now, in those cases knowledge is necessary to constitute the offence. But in the section we are now dealing with, the word "knowingly" does not occur, and I believe the object of omitting the word was to throw on the publican the duty of finding out whether the person served was drunk or not, the consequence being that, if a customer is drunk, the publican or his servants must find out that he is drunk, or take the consequences of serving him. On the other side it has been urged that the maxim of the criminal law, that before a person can be convicted of a crime there must be a "guilty mind," applies to this case. This maxim came into use in early times, when the criminal law was in an undefined state, for the guidance of those who administered that law, and in those times the maxim may have been of general application. A "guilty mind" is a necessary element in some crimes, but those crimes have now been defined, and the maxim has been superseded in consequence of the greater precision in the definitions of crimes, and now, the question whether a "guilty mind" is necessary to constitute an offence turns upon the words of each particular statute. The case of *Reg. v. Prince (ubi sup.)* shows that a guilty knowledge is not always necessary to constitute an offence; and *Reg. v. Bishop (ubi sup.)* is to the same effect. The object of this part of the Act is to preclude all disputes as to whether the publican or his servants knew, or had reasonable means of knowing, that the person served was drunk at the time, the duty being thrown on the publican to find out that the person so served was not drunk. I think, therefore, that this conviction was right.

MATHEW, J.—I am of the same opinion. The language of this section is perfectly clear. This section would be altogether useless if Mr. Beasley's construction were to prevail. It can be no hardship on the publican to have to find out whether the customer is drunk or not. It seems to me that the word "knowingly" was purposely omitted here. I quite agree with my brother Stephen that this conviction should be affirmed.

*Judgment for respondent. Conviction affirmed.*

Solicitors for the appellant, *Peckham, Maitland, and Peckham*.

Solicitor for the respondent, *Solicitor to the Treasury*.

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THE UNITED LAND COMPANY v. THE TOTTENHAM LOCAL BOARD.

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Monday, May 26, 1884.

(Before HAWKINS and SMITH, JJ.)

THE UNITED LAND COMPANY v. THE TOTTENHAM LOCAL BOARD. (a)

*Local Authority—Highway—Expenses of diverting—Employment of solicitor by Local Board of Health—The Highway Act 1835 (5 & 6 Will. 4, c. 50), ss. 84, 85—The Public Health Act 1875 (38 & 39 Vict. c. 55), s. 144.*

By the 84th. section of the Highway Act 1835 (5 & 6 Will. 4, c. 50) it is provided that, if any party shall be desirous of stopping up, diverting, or turning any highway, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and, if such inhabitants shall agree to the proposal, the surveyor shall apply to two justices to view the same, and in such case the expenses attending such view, and the stopping up, diverting, or turning such highway, shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under the Act.

By the 144th section of the Public Health Act 1875 (38 & 39 Vict. c. 55), it is provided that every urban authority shall, within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, and shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which, by the Highway Act 1835, are vested in and given to the inhabitants in vestry assembled of any parish within their district, and that all ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint.

The U. Land Company, being desirous of diverting certain public footways on their estate in the parish of T., requested the T. Local Board of Health to assent to such diversion and to take the necessary steps to have the said footways legally closed. The T. Local Board assented, and instructed their solicitors to take the necessary steps, and, these having been duly taken, paid the bill of costs presented by them in respect thereof, and recovered the amount thereof summarily as "expenses" within the meaning of the 84th section of the Act of 1835.

Held, on case stated, that the words of the 144th section of the Public Health Act 1875 "may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint," did not empower the local board to employ a solicitor to do the ministerial acts in question, and that therefore the solicitor's charges were not "expenses" payable by the land company under the 84th section of the Highway Act 1835.

THIS was a case stated by justices of the peace for the county of Middlesex, under 20 & 21 Vict. c. 43, s. 3, for the purpose of obtaining the opinion of the court upon the questions of law arising thereon.

The case was, so far as material, as follows:—

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

At a court of summary jurisdiction sitting at the County Court at Edmonton, in the county of Middlesex, on the 2nd Aug. 1883, the appellants appeared before us to answer a complaint preferred by Edward Crowne, clerk to the respondents, that the respondents being the surveyor of the highways within their district, which comprises the parish of Tottenham, in the said county, and having on the 11th July 1883 duly required the appellants forthwith to pay to them as such surveyor the sum of 75l. 6s. 4d., being the expenses attending the view by two justices, stopping up, diverting, or turning a certain public highway or footway, situate in the said parish, in compliance with a written notice given by the appellants to the respondents as such surveyor as aforesaid, the appellants had neglected to make payment of the said sum, and the same was still due.

The following are the particulars of the said charges:

	£	s.	d.
Solicitor's charges.....	40	1	10
Paid for fixing notices.....	4	4	0
Printer's charges.....	0	17	6
Advertisements.....	9	2	8
Carpenter for boards.....	0	7	0
Magistrates' clerk's fees.....	5	2	10
Counsel's fees.....	4	11	6
Clerk of peace's fees.....	10	16	8
Costs of taxation.....	3	17	10

£79 1 10  
Taxed off ..... 3 15 6

£75 6 4

At the same time and place the appellants appeared before us to answer two further complaints also preferred by the said Edward Crowne, which last mentioned complaints were identical in terms with the one just set out, save that the sums alleged therein to be due from the appellants to the respondents were respectively 74l. 16s. 7d. and 74l. 6s., which said sums include payments to the like amounts in each case as those included in the previous mentioned sum of 75l. 6s. 4d.

The said three complaints were thereupon severally heard and determined by us, and the appellants have applied to us to state and sign a case in respect of our determination of each of the said complaints. The facts proved before us, the question of law raised by the parties, and the grounds of our adjudication thereon were the same upon each of the three complaints, and this case is by consent of the parties to be read and taken as though a separate case to the same effect had been stated and signed by us in respect of each of our said determinations.

The following facts were either proved before us or admitted by both parties:

The appellants are and have been since April 1881 the owners of an estate at Bruce Grove, Tottenham. The respondents are an urban authority under the Public Health Act 1875, and by virtue of sect. 144 of that Act execute the office of and are surveyor of highways within their district, which includes the parish of Tottenham.

In the month of Dec. 1881 the appellants, being desirous of diverting three public footways on their said estate within the said parish, requested the respondents to assent to such diversion, and to take the necessary steps to have the said footways legally closed. After some correspondence, and

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after formal applications had been made and plans deposited by the appellants, the respondents passed a resolution assenting to the diversion of the said three footways, and conveyed their determination in the following letter to the appellants, dated the 1st Feb. 1882, and signed by their clerk:

I beg to acknowledge the receipt of your letter of the 26th ult., inclosing three separate applications and plans for the turning, diverting, or stopping up three several footpaths or highways crossing the above estate, and in reply to inform you that the same were submitted to the board at their meeting yesterday, when the proposed diversions were assented to, and I was directed to apply to the justices to view the highways proposed to be diverted. The board gave their assent and the above direction on condition that the entire expense in connection with the several diversions shall be defrayed by the company.

To this letter the appellants' solicitor, on the 2nd Feb. 1882, replied as follows:

I am in receipt of your letter of the 1st inst., and in reply may say that my clients, the above company, will pay the expenses in connection with the several diversions of footpaths herein.

The clerk of the respondents (who is not a solicitor) thereupon instructed the solicitors who usually acted for the respondents to take the steps necessary and required by the Highways Act 1835 to be taken in such cases. Such instructions were given by the said clerk, who *bonâ fide* considered he had a general authority to instruct the said solicitors when legal assistance was required in conducting the business of the respondents, and the instructions so given were afterwards approved and adopted by the respondents, but there was no express resolution of the respondent board directing or empowering the said clerk of the respondents so to instruct the said solicitors with respect to the particular matters in question. There was at the time when the expenses herein-after mentioned were incurred a surveyor in the employment of the respondents appointed by them under the powers conferred on them by the Public Health Act 1875.

In the course of the year 1882 and the early part of 1883 the notices, advertisements, views, and certificates of justices and other proceedings prescribed by the 85th section of the Highway Act 1835 were given and had by the said solicitors in respect of each of the three footways. While these things were being done, the said solicitors were in constant communication with the appellants with respect thereto, in the course of which they suggested that the appellants had better prepare the plans themselves; but the appellants declined to do so.

On the 12th April 1883 the appellants received a letter from the said solicitors asking for payment of their charges, and were subsequently furnished with a copy of a bill of costs previously delivered to the respondents, amounting to 185*l.* 9*s.* 4*d.*

After some correspondence, the appellants' board resolved that they could not recognise the claim nor pay the amount until the account had been taxed by the proper authority.

The appellants' said bill (the fees of the clerk of the peace having been added thereto) was taxed by the clerk of the peace of the county of Middlesex, on the 26th June 1883. The appellants' solicitor attended the taxation, and contested the said bill item by item. The said clerk of the

peace allowed upon such taxation the sum of 224*l.* 8*s.* 10*d.*

On the 29th June 1883 the said solicitors of the respondents informed the appellants' solicitor of the result of the taxation, and of the amount allowed thereon. And on the 11th July they, on behalf of the respondents, demanded at the office of the appellants payment of the said sum, which appellants refused.

The respondents thereupon paid to the said solicitors the said sum of 224*l.* 8*s.* 10*d.* being the amount of the said bill of costs, and at the same time directed summary proceedings to be taken under sect. 101 of the Highway Act 1835 for the recovery thereof from the appellants. The complaints mentioned in the 1st and 2nd paragraphs hereof were accordingly preferred on behalf of the respondents by their clerk, and summonses issued thereon, the sums severally claimed being the apportioned amount of the costs alleged to have been incurred in respect of each of the said three footways.

It was contended before us by the appellants that the respondents were not entitled to employ a solicitor for the purpose of performing the duties cast upon them as the surveyor of highways by the 85th section of the Highway Act 1835; that the said duties were for the most part, if not wholly, ministerial, and ought to have been performed by the respondents' surveyor; that in particular the charges made on the solicitors' scale for corresponding with the respondents' clerk, attending and instructing printers for advertisements and notices, and attending the view by the justices, were not authorised by the statute, and were therefore not "expenses" within the meaning of the 84th section, or recoverable summarily under that and the 101st section. We, however, were of opinion, and find as a fact, that the employment of the solicitors by the respondents was reasonable and proper, and that the costs of such employment were "expenses" properly incurred for the purpose of the view and the stopping up, diverting, or turning of the highways.

It was further contended by the appellants that the said costs were not recoverable as "expenses" by the respondents, inasmuch as there was no evidence that the said solicitors had been employed by the respondents to do the work charged for. We, however, are of opinion, and find as a fact, that the said Messrs. Heath, Parker, and Brett were employed by the authority of the respondents to do the work charged for.

The appellants further contended that many of the items in the bill of costs were excessive and unreasonable, and in particular that, though the diversion of the three footpaths was practically a single operation, much of the work done in connection therewith, such, for instance, as attendance on the printer and at the view, was charged for three times over, and that they were not excluded from objecting to such charges before us by the taxation of the bill and their attendance thereat. We, however, ruled that the taxation was conclusive evidence of the reasonableness of the charges.

The appellants further contended that there was no evidence of a demand of the specific sums payment whereof was stated in the several complaints to have been required. We, however, were of opinion that, having regard to the facts stated

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in the 12th paragraph hereof, no further demand was necessary.

We accordingly convicted the appellants of the three offences complained of, and by three separate convictions adjudged that for their said offences they should forfeit and pay the three sums sought to be recovered as stated in the 1st and 2nd paragraphs hereof.

The question for the opinion of the court is whether, having regard to the above mentioned contentions of the appellants, the said convictions were right.

*Asquith* for the appellants.—The question to be determined is whether a surveyor of highways is, whenever anyone desires to close a highway, entitled to delegate the duties imposed upon him by the 84th and 85th sections of the Highway Act 1835 (5 & 6 Will. 4, c. 50) to a solicitor, and recover the costs of so doing on the usual scale charged by solicitors, from the person desirous of closing the highway. The contention of the appellants is that he is not entitled to do so, but that the Act throws these duties upon him personally and that he is bound to discharge them without charge. In this case the duties of surveyor of highways have, by the 144th section of the Public Health Act 1875, devolved upon the respondents as urban sanitary authority of the district. [SMITH, J.—Does not the 84th section say that the expenses are to be paid to the surveyor by the party desirous of stopping up the highway?] It says: “the expenses aforesaid,” meaning the expenses attending the view. [SMITH, J.—The words are, “the expenses attending such view, and the stopping up, diverting, or turning such highway.” Are not these expenses attending the stopping up of this highway?] There is a distinction between the purely ministerial acts, which the surveyor was intended to perform, and the actual out-of-pocket expenses for conveying the justices to the view, and for printing. These charges are chiefly for performing the purely ministerial duties of fixing the notices, &c., and they come within the meaning of the last paragraph of the 144th section of the Public Health Act 1875, which says that “all ministerial Acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint.” [SMITH, J.—Do not the solicitors in this case come within the words “such other person as they may appoint?”] No; the meaning is that, if the board has no regular surveyor, they may appoint someone *pro tempore*. In any case these words do not authorise the board to employ an expensive person such as a solicitor to perform these simple duties. The word “must be taken to mean “such other person of a like character.” The 189th section of the Act of 1875 provides what officers an urban sanitary authority may appoint, and makes no mention of the appointment of a solicitor. The Legislature cannot have intended that, in a case where there was no opposition, the surveyor of highways should be able to make the expense of stopping up a highway 75l. [SMITH, J.—Have not the justices found as a fact that the expenses were necessary?] But they are not such as the section says the party stopping up the highway is to pay. [SMITH, J.—Who is to pay the expenses actually incurred at the quarter sessions? The surveyor

cannot be expected to be acquainted with the law of quarter sessions, and counsel must appear.] It is for the party closing the highway to support his application at quarter sessions or not as he chooses. The taxation has no bearing on this point. It is merely *prima facie* evidence that, assuming the solicitors were rightly employed by the respondents, the charges made are reasonable.

*Turner* for the respondents.—It is impossible for a surveyor of highways, who has no legal knowledge, to carry through without legal advice the intricate business of closing a highway, in which the omission of a single technical requirement may easily invalidate the whole proceedings. [HAWKINS, J.—But overseers of the poor and churchwardens frequently have most intricate duties to perform. Why should not a surveyor of highways?] The matter being purely legal, the employment of a solicitor was reasonable, and was clearly justified under the general words of the section “such other person as they may appoint.” [HAWKINS, J.—The sections state very exactly what has to be done. What does the surveyor of the board do for his salary, if not such duties as these? If you have at their request done certain things which they might properly have done at their own expense, but which do not come within the expenses payable by them under the section, you may have an action in respect thereof, but this can give you no right to a penal order under the 101st section.] The costs have been duly taxed, the appellants being represented at the taxation, and the justices have found that the employment of a solicitor was necessary and reasonable, and, this being so, the expenses were expenses attending the stopping up of a highway within the meaning of the 84th section, and the convictions ought to stand.

HAWKINS, J.—I think that this appeal ought to be allowed. The order appealed from is an order for the payment of several sums of money alleged to be expenses incurred under the 84th and 85th sections of the Highway Act 1835 (5 & 6 Will. 4, c. 50), which deal with the stopping-up, diverting, and turning of highways. The 84th section provides that, when the inhabitants in vestry assembled shall deem it expedient that any highway should be stopped up, diverted, or turned, either entirely or preserving a bridleway or footway along the whole or any part or parts thereof, the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view the same, and shall authorise him to pay all the expenses attending such view, and the stopping up, diverting, or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this Act; and then it goes on to say that, “if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid for the purposes aforesaid; and in such case the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any for-

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feiture is recoverable under this Act," the effect of the section being that, if the matter originates with the vestry, a certain process is to be gone through, while if a private person is desirous of taking advantage of the section he brings it before the vestry, and, if they assent to it, the same process is gone through, the only difference being that the surveyor is to pay the expenses out of the money received by him for the purposes of the Act; while, in the case of a private individual, the "expenses aforesaid" are to be paid to the surveyor by the party or be recoverable in the manner prescribed by the 101st section of the Act for cases of penalty or forfeiture. Then the 85th section provides that, when it shall appear upon such view of such two justices of the peace made at the request of the said surveyor as aforesaid that any public highway may be diverted and turned so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand, or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form or to the effect of schedule (No. 19) to the Act annexed, in legible characters, at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up, and also to insert the same notice in a newspaper, and a number of other steps are to be taken before the highway is effectually diverted. Now, in the present case, there is no doubt that the appellants made application to the respondents, who, as the local board of health for Tottenham, are substituted by the 144th section of the Public Health Act 1875 for the old surveyor of highways and for the inhabitants in vestry assembled, and that the respondents assented to their proposal that the public ways in question should be diverted, and gave their assent thereto on condition that all the expenses incurred should be defrayed by the appellants. Then, after they had assented, proceedings appear to have been taken to carry out what was proposed, and to have been successful; and it is on these proceedings that the question we have to decide arises. The local board of health, having been requested by the appellants to take the necessary steps, instructed their solicitors to take them, and, having taken them, they presented a bill of costs in respect of taking them; and the question we have to decide really is whether this bill of costs comes within the meaning of the words, "the expenses attending such view, and the stopping up, diverting, or turning such highway," in the 84th section of the Act. I am of opinion that these solicitors' charges are not within the meaning of this section. I think that the expenses spoken of in the 84th section, and made recoverable by it under the 101st section, were intended by the Legislature to be the expenses of attending the justices on the view, and the expenses of the plan, and other similar expenses; and I do not think that it was the meaning of the Legislature that solicitors should be instructed to carry out the various steps prescribed by the sections dealing with the subject. I say nothing as to the point whether the present appellants would be liable in an action on contract; it may be that

they would, and it may be that they would not, but I simply say that in my opinion these expenses are not such expenses as would rightly come under the 84th section of the Act. Then it is said that the Public Health Act 1875, which transfers the duties of the surveyors of highways to the urban authorities, alters the case. The 144th section of that Act provides that every urban authority shall, within their district, exclusively of any other person, execute the office and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, and that all ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to "such other person as they may appoint." I think that the words "such other person as they may appoint" mean such other person of the same character as the surveyor of the authority, or of the same character as the other officials they are empowered by the Act to appoint. These are by the 189th section a medical officer of health, surveyor, inspector of nuisances, clerk, and treasurer, and also such assistants, collectors, and other officers and servants as may be necessary and proper for the efficient execution of the Act. I do not think that there is any ground here for the employment of an independent firm of solicitors, and certainly I am of opinion that, looking back again to the 84th section, these are not expenses within the meaning of that section. I think, therefore, while purposely abstaining from commenting on the items of these bills of costs before me, that these expenses are not such as were contemplated by the Legislature in enacting the sections under our consideration, and that therefore our judgment must be for the appellants.

SMITH, J.—The question left to us here by the justices is whether they were right in convicting the appellants, the United Land Company, and adjudging them to pay the three sums of 75*l.* 6*s.* 4*d.*, 74*l.* 16*s.* 7*d.*, and 74*l.* 6*s.*, claimed by the Tottenham Local Board under the circumstances set out in the case, the point really being whether these sums are expenses within the meaning of the 84th section of the Highway Act 1835, because, if they are not so, it is quite clear that the 101st section of the Act, which provides for the summary recovery of such expenses, cannot be brought into operation. In the first place I wish to say that I do not decide whether the Tottenham Local Board has got an action against the land company, because it does seem to me possible that an action might lie for money paid at the request of the land company—at any rate, that is a question which might reasonably be argued—but what I do say is, that these expenses are not expenses within the meaning of the 84th section of the Highway Act 1835. I agree with what Mr. Turner says, that where a man desires to stop a highway it would be very unwise for him to rely on the surveyor of taxes, or the sanitary authority, because I think it is very possible that there might be some flaw in the proceedings which would be fatal to him when the matter came before the court of quarter sessions; but that does not settle this case. It is perhaps necessary under such circumstances to employ a solicitor to see that the neces-

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nary formalities are complied with, but that is not the point here, the question simply being whether such expenses are within the 84th section of the Act or not. Now the surveyors of highways constituted under the Highway Act 1835 are under the earlier sections (sects. 6-8) of the Act, under which they are appointed, obliged to take up the office on compulsion of a fine of 20*l.*, although, it is true, there are certain instances in which parishes may employ a paid surveyor. Then if a vestry want to stop up a highway, they are by the 84th section of the Act to direct the surveyor to apply to two justices to view the same, and shall authorise him to pay all the expenses attending such view, and the stopping up, diverting, or turning such highway. These are the expenses which a surveyor would have to incur when he stopped up a highway. Then, if a private person wishes to stop up a highway, there is only one additional formality which he has to go through, and that is to require the surveyor to give notice to the churchwardens to assemble the vestry and to submit thereto the wish of such person, and then if the vestry agree to the proposal, the proceedings are exactly the same, except that "in such case the expenses aforesaid shall be paid to the surveyor by the said party." What are the expenses aforesaid? They are exactly the same expenses which a surveyor would have to incur when stopping up a road at the instance of the vestry, and I do not see that it is anywhere contemplated in this section that a surveyor should go and take the advice of an independent solicitor. Then we come to the Public Health Act 1875, by the last words of the 144th section of which Mr. Turner says the authority were entitled to employ an independent solicitor. The words he relies upon are to the effect that "all ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint." I read these words in conjunction with the 189th section, which gives the urban authority power to appoint fit and proper persons to be medical officer of health, surveyor, inspector of nuisances, clerk, and treasurer, and such assistants, collectors, and other officers and servants as may be necessary and proper for the efficient execution of the Act. As to the point raised with respect to the taxation, I agree entirely with Mr. Asquith's argument thereupon, that it only applies to cases in which the local authority are making the application. I think therefore that these expenses are clearly not within the 84th section, and, that being so, that this appeal must be allowed with costs.

Solicitor for the appellants, *H. Smith*.

Solicitors for the respondents, *Heath, Parker, and Brett*.

Tuesday, June 10, 1884.

\*(Before FIELD, MANISTY, and LOPES, JJ.)

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*Municipal election—Election of town councillors—Four candidates elected—Three only petitioned against—Mayor's allowance of objections appealed against—Practice—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), ss. 87, 88, 93—Sched. 3, part 2, rr. 3, 10, 14.*

*At a municipal election to fill four vacancies in the office of town councillor, A., B., and C. (the respondents), and D. were elected, and a petition was subsequently presented against the election of A., B., and C. on the ground of the alleged improper allowance by the mayor of objections to the nomination papers of certain other candidates, who were thereby prevented from going to the poll.*

*An application by the respondents for an order to strike the petition off the file, on the ground that D., to whose election the same objection equally applied, was not made a respondent to the petition, and that no relief could therefore be granted under it, as it did not pray that the election, as a whole, should be set aside, having been refused by Mathew, J. at chambers, the respondents appealed therefrom to this court, when it was*

*Held (Lopes, J. dissentiente), by Field and Manisty, JJ. (dismissing the application), that, under the Municipal Corporations Act 1882, a petition might be presented against the election of any one or more of the individuals elected, and that it was not necessary to petition against all of them, or to seek to avoid the election as a whole; and, therefore, to take the petition off the file would contravene the theory and spirit of the Act, which pointed directly to proceedings by petition against the election of any individual elected.*

*Sed aliter, per Lopes, J.: The petition should have included all the four elected candidates, as the election must stand or fall as a whole, and the election of three of the elected only cannot be set aside under this petition. But for the mayor's decision the result of the election might have been very different, and, as no relief can be granted under the petition, it should be struck off the file.*

*Per totam Curiam: Where it is clearly shown on the face of an election petition that no relief can be granted under it, the court has power under the Act of 1882 to take it off the file.*

APPEAL from an order of Mathew, J. at chambers, refusing to make an order to strike a petition, by certain burgesses of the municipal borough of Daventry, against the election of the three respondents to the office of councillors for the borough, off the file, on the ground that it had not been presented in the prescribed manner, and did not pray that the election should be declared void, but only that it might be declared that the respondents were not duly elected, and that their election and return were null and void.

The facts of the case, and the grounds on which the election and return of the respondents were sought to be set aside, are fully set forth in the following petition of the six burgesses of the borough who subscribed the same:

The petition of William Line, William Henry Henoe,

(a) Reported by HENRY LAUREN, Esq., Barrister-at-Law.

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William Webb the elder, Samuel George Leigh, William Dickens the elder, and John Gardner, whose names are subscribed:

1. Your petitioners are persons all of whom voted, and had a right to vote, at the above election.

2. And your petitioners state that the said election was holden on the 24th day of October and the 1st day of November, A.D. 1883, when the respondents and Edward Brooks, William White, Thomas Harris, John Merrifield, Charles Rodhouse, and William Edward Rodhouse, were candidates; and the respondents and the said Thomas Harris were declared to be duly elected.

3. The said borough of Daventry is not divided into wards.

4. On the 16th of October 1883 the town clerk of the said borough duly signed and published a notice of an election for four councillors, to fill four vacancies in the council thereof. By the said notice it was also announced that the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more; and notice was also thereby given of the time before which nomination papers were to be delivered.

5. Pursuant to the said notice, and relying thereon, nomination papers, properly subscribed by a sufficient number of burgesses, were duly delivered to the town clerk in proper time on behalf of each of the persons mentioned in paragraph 2 hereof; and none of such burgesses subscribed more nomination papers than there were vacancies to be filled up; nor did any one of them subscribe more nomination papers than one of any candidate.

6. The mayor attended at the proper time and place, pursuant to the said notice, for the purpose of hearing objections to the said nomination papers. An objection was raised by the said Edward Brooks on behalf of himself and the said respondents to the nomination paper delivered on behalf of the said Thomas Harris, on the ground that the persons subscribing his nomination paper had also subscribed other nomination papers of candidates at the said election.

7. The like objection was taken by and on behalf of the same persons to the nomination papers of each of them the said John Merrifield, Charles Rodhouse, and John Edward Rodhouse.

8. The mayor, after hearing evidence, declared himself unable to decide which of the said nomination papers had been first delivered, and gave no decision on that question; but the said Edward Brooks offering to withdraw the objection to the nomination paper of the said Thomas Harris, the mayor gave no decision upon the objection to the nomination paper of the said Thomas Harris, but permitted the objection to be withdrawn, and wrongfully allowed the objection raised to the nomination papers of the said John Merrifield, Charles Rodhouse, and John Edward Rodhouse, and refused to allow them to become candidates, or to publish their names as candidates at the said election. The names of the other persons mentioned in paragraph 2 hereof were published as candidates by the town clerk, and the said Thomas Harris and the said respondents were, after a poll, declared duly elected.

9. By reason of the matters aforesaid the said John Merrifield, Charles Rodhouse, and John Edward Rodhouse were prevented from being candidates at the said election.

10. Your petitioners allege and contend that the said election was conducted irregularly, and not in accordance with the principles laid down by the Municipal Corporations Act 1882; and that the mayor ought not to have allowed the objections, and that the same were bad in law; and that the evidence in fact showed that one of the nomination papers to which the objection was allowed was in fact the first delivered; that the mayor refused to give any decision on that question; that the said John Merrifield, Charles Rodhouse, and John Edward Rodhouse were duly nominated, and that they, or some or one of them, ought to have been permitted to be candidates at the said election; or, if they were not so duly nominated, that they and the burgesses purporting to nominate them, and the burgesses generally, were misled by the said notice so published by the town clerk as aforesaid, and that the said election and return of the said respondents was and is wholly null and void. Wherefore your petitioners pray, &c.,

That it may be declared that the said respondents were

not duly elected, and that their said election and return was and is wholly null and void.

(Here follow the signatures of the six petitioners above named.)

The following sections of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) and the rules laid down in the third schedule to the Act with respect to the nomination in elections of councillors, were cited and referred to in argument, and are material:

Sect. 87.—*Power to question municipal election by petition.*—(1.) A municipal election may be questioned by an election petition on the ground . . . . . (c.) That the person whose election is questioned was at the time of his election disqualified; i.e., (d.) That he was not duly elected by a majority of lawful voters. (2.) A municipal election shall not be questioned on any of those grounds except by an election petition.

Sect. 88, sub-sect. 2.—Any person whose election is questioned by the petition . . . . . may be made a respondent to the petition.

Sect. 93, sub-sect. 4.—At the conclusion of the trial, the election court shall determine whether the person whose election is complained of, or any and what other person, was duly elected, or whether the election was void, and shall forthwith certify in writing the determination to the High Court, and the determination so certified shall be final to all intents as to the matters at issue on the petition.

*Third Schedule, Part II.—Rules as to nomination in elections of councillors.*—8. Each candidate must be nominated by a separate nomination paper; but the same burgesses or any of them may subscribe as many nomination papers as there are vacancies to be filled, but no more . . . . . 10. Where a person subscribes more nomination papers than one, his subscription shall be inoperative in all but the one which is first delivered.

14. The decision of the mayor shall be given in writing, and shall, if disallowing an objection, be final; but if allowing an objection shall be subject to reversal on questioning the election or return.

*Objection* for the respondents, the applicants, contended that three-fourths only of a municipal election could not be declared void on a ground which equally affected also the fourth candidate, and that such fourth candidate, viz., Thomas Harris, should have been joined as a respondent with the other three, because the election must stand good or be declared void, if at all, as a whole. The petition was bad on the face of it, and could not be amended. This objection goes to the root of the whole matter, and, if the mayor's decision was wrong, this court cannot split up the election and declare the election void as to three only of the four persons elected. By voiding the election of the three, the election of the fourth must necessarily also be avoided; yet that cannot be done, as that fourth man is not a party to the proceedings, and there is no power to unseat a person whose election is not petitioned against. Were the mayor's decision to be upset on this petition, the whole election would be null and void of necessity, inasmuch as, had the rejected candidates been allowed to stand the poll, *non constat* that Harris would have been elected. That alone has been held, under the Municipal Corporations Act of 1872 (35 & 36 Vict. c. 94)—the words of sect. 12 in which are identically the same as in the present Act—to be a sufficient ground for declaring an election to be void:

*Budge v. Andrews and others*, 39 L. T. Rep. N. S. 166; 47 L. J. 586, C. P.; 3 C. R. Div. 510;

*Hovess and another v. Turner and another*, 35 L. T. Rep. N. S. 58; 1 C. P. Div. 670; 45 L. J. 550, C. P.

This is a preliminary objection going to the root of the petition, and the object of it is to save the



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expense of proceeding with the special case; for, assuming the petition not to be struck off the file and the petitioners to succeed at the trial, the court would not be able to give the only relief which it was competent to them to give, namely, to declare the whole election to be void.

*Yarborough Anderson and Montague Shearman*, for the petitioners, *contra*, argued that, unless the petition were shown to be an abuse of the process of the court, it could not be struck off the file. The court should dismiss the respondents' application as being concluded by the consent order made by Field J. for a special case. The respondents might have petitioned against Harris's election had they chosen to do so; but the petitioners are not compelled by any statute to object to or question the election of a person with whose election they are satisfied. It had been said that the rejected candidates were disqualified by rule 10 of schedule 3 of the Act of 1882, which says that where a burgess subscribes more than one nomination paper, all the papers shall be inoperative except the one first delivered. But that is contradicted by rule 3, which permits a burgess to subscribe as many nomination papers as there are vacancies, but no more. The town clerk's notice followed that rule. This dilemma may be put: if the notice be good, the mayor's decision was wrong, or the petitioners are entitled to upset it on the ground of being misled, which is one ground of the petition. Another ground was that the persons petitioned against were not elected by a lawful majority. The petitioners have complied with all the statutory requirements, and the relief prayed for can be given on the petition. Sect. 87, sub-sects. (c.) and (d.) and sect. 88, sub-sect. 2, are very important and clearly show that a petition against individuals whose election or return is complained of is well warranted. [FIELD, J. referred to and read rule 14 in schedule 3, part 2.] The case of *Hovess v. Turner* (*ubi sup.*), cited for the respondents, does not support the proposition for which it was cited, for there all the elected persons were respondents, and so the court had power to declare the whole election void. The petition should not be removed from the file unless no relief can be given under it; but it is clear from sect. 87 that relief can be obtained, whilst sect. 93, sub-sect. 4, shows plainly the intention of Parliament to enable the court to declare on petition the election of individuals to be void, thus giving, necessarily, the right to petition against some only of the elected candidates.

*Coward* in reply.—The court has no jurisdiction to entertain the point. No doubt, one or more persons might be picked out and petitioned against for bribery, but here the objection goes to the root of the whole election, and all the candidates were equally disqualified. A case in 2 O'Malley & Hardcastle's Rep. 77—178, and the *Tipperary case* (3 Ib. 81), cited in Leigh and Anderson's Election Law Guide, 3rd edit., show authority enough for taking the petition off the file.

LOPES, J.—I regret to say that in this case I cannot agree with my learned brothers in the decision at which they have arrived with regard to it. An application to take this petition off the file was made at chambers before my brother Mathew, and he has made no order, and thereupon it comes before us on appeal from the learned

judge. Now it appears that on the 24th Oct. and the 1st Nov. last year there was an election at Daventry for the office of councillor for that borough, and it appears that there were four vacancies and nine candidates. A poll was taken. The three respondents, Samuel Warren, George Checkley, and James Bromwich were elected, and also a man named Harris, who is not a respondent, and who has not been petitioned against. It appears that at this election objections were taken to three out of the nine candidates, and that these objections were allowed by the mayor. Consequently, as it appears to me, the electors had no opportunity of voting for those three candidates, and it may be that if those candidates had gone to the poll they might have been elected, and that some of the respondents might not have been elected; and it is even possible that Harris himself might not have been elected. The mayor having allowed the objections it was open to any of the electors to petition against the election. I use that word advisedly—to petition against the election. The petitioners, however, have not petitioned against the election; or, in other words, they have not petitioned against the four candidates who were elected, but have only petitioned against three of them, omitting Mr. Harris altogether. Harris, it appears, happened to entertain the same views as the petitioners, and I presume that is the reason that he has not been petitioned against. Now the question which arises is this: Can a portion of the elected body be petitioned against, or must the petition be against the whole of them? In my opinion you must petition against the whole number of the elected body, and the petition must seek to set aside the whole election, and it cannot seek to set aside a part of it only. If you could petition against certain individuals and not against all those elected, this might happen: Harris might in this case stand elected when it may be he never would have been elected if the mayor had not erroneously allowed the objections taken to the other three candidates; or, in other words, Harris might stand elected without the names of the three other candidates against whom the mayor allowed the objections having been submitted to the constituency at all. It appears to me that this was not the intention of the Act, and I think that it cannot be done. In my opinion the petitioners are bound to seek to set aside the whole election, and cannot seek to set aside the election of certain individuals only. Then the question is, if I am right in that, whether or not this petition ought to be struck off the file. I think it should be for this reason. It appears to me that, if this petition is permitted to proceed, the court who heard it would have no jurisdiction to grant the prayer of it, and could not grant any relief under it. I think, therefore, that it would be a great waste of time, a great waste of trouble, and a great waste of expense, to permit the matter to proceed further, and therefore I think that the application made at chambers was improperly disallowed, and that this petition ought to be struck off the file.

MANISTY, J.—I am always sorry when there is a difference of opinion on the bench; but I confess that, in this case, I cannot agree with my brother Lopes in the view which he has taken. In the first place, I entertain no doubt that the court has jurisdiction to take a petition off the file if a proper cause is made out; that is to say, if on the

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face of it the court has no jurisdiction, or (which is to my mind the same thing) if on the face of it the court can grant no relief it would be an idle waste of time and money to go on with a petition which can have no result. It is enough to say that there are cases in which the court would take the petition off the file; but I am not satisfied that this is a case in which relief may not be granted. It would be quite enough if I stopped here. It would be quite enough to say that this is too doubtful a case in which to interfere. But I do not stop there, because, as at present advised, I think relief can be granted. It would, in my judgment, be a very serious and strange consequence if, in the case of a number of candidates who had been nominated, and where the whole body of electors are perfectly satisfied with nine-tenths of them, the election, without any application to set it aside *in toto*, could nevertheless be set aside, and no relief could be granted. It is said that, if anyone objects to the election of any one of those who have been returned, the whole election is void. It seems to me that the whole spirit of the Act is founded upon this, that the court gives relief to the extent to which parties object to the election. If in this case no one had objected it could not be contended for a moment that all the four candidates who were returned were not duly returned. It is not as if it were illegal. That would be a totally different thing. If it were illegal then it would be all by law void, and every act done would be void. But that is not so. The Act of Parliament has provided relief in case of objection, and the objection here is against three. Mr. Harris, the fourth candidate elected, is not before the court. The court, therefore, could not deal with him. But it is said you must have all the elected candidates before the court, and that an election cannot be declared void without making all respondents; so that all of them must be made respondents though the whole constituency is perfectly satisfied with say nine-tenths, because in their absence you cannot declare the election void. It would take a great deal to convince me that that is the law; and when I look to the terms (I do not propose to go through them) in which all the subsections of sect. 87 are couched, and the rules which have been framed in pursuance of the authority of that Act, they all, in my opinion, point to objections to certain individuals. You may object to all, but it seems to me that, subject to objection, the court cannot inquire into the right of those who are absent. I think there is a great deal in the argument that it was never intended, by changing the form of proceeding, to take away a right which existed previously, namely, the right under *quo warranto*. We must look to the whole scope of the Act of Parliament, and the spirit in which it is framed, with a view and for the purpose of questioning elections. It is said that a municipal election may be questioned by election petition; but that clearly does not mean that you must of necessity object to everyone and to the whole election. A single individual may be the subject of an objection to a municipal election. Therefore, looking at the whole of the provisions, and to the most serious consequences which would follow if the contention of the applicant in the present case is correct, I think it is not by any means a case in which we cannot give relief. There is another point which has

been adverted to, namely, the effect of that order by consent as to the special case. I think there is something in that. I cannot decide that this is by no means such a case as ought to induce the court to interfere and stay proceedings by taking the petition off the file.

FIELD, J.—I am of opinion that my brother Mathew's order was perfectly well founded and ought to be affirmed. I do not altogether share the regret which my brethren express that there should be a difference of opinion on the bench. I think it is a most valuable quality in our administration of justice, because it shows that each judge exercises his own individual independent view, and gives his judgment according to what he thinks to be right, and every view is thus considered and disposed of. Although, of course, the difference of opinion of my brother Lopes tends to make me doubt the correctness of my own opinion, it does not do so to the extent of making me think I ought not to give the judgment I am about to give. I think my brother Mathew's order was right on the ground that Mr. Coward has no *locus standi* here by reason of his having consented that this should be turned into a special case. I think he has deprived himself by that consent of any other mode of questioning this election than such as he will be entitled to raise under the special case. If he is well warranted in his facts, and if he is well warranted in his law, he will raise all that by special case, and this court, when it hears that case, will decide every point which has been raised before us to-day. But we are asked to prevent that decision taking place and to take this petition off the file, and not to permit any argument before the court which shall be competent to decide it. I very much hesitate to do that in all cases. I require to be very well and clearly satisfied that a subject who comes to this court by way of petition can have no relief that he has prayed for, and, unless I am so satisfied, I, for one, will never take his petition off the file. Now, what are the material facts here? Municipal election, and objection taken to certain nomination papers on the ground that they have been subscribed by more than one person. Now by law the mayor is made the judge of all these objections. He must be treated as an official. It is not a question of other than a judicial decision which the Legislature vests in him for purposes very desirable, in order that there may be as little expense and trouble as possible. The Act of Parliament distinctly says that the mayor shall attend and shall decide the validity of every objection made in writing to a nomination paper. He is therefore a judge, and his decision is one which is to be taken to be sound. But there is a right of appeal given in a certain alternative, and that right of appeal is this: he shall give his decision in writing, and, if he disallows an objection, it shall be final. But, if he allows the objection, then his decision shall be subject to reversal. When? On petition. Questioning what? The election or return. It points, therefore, to two distinct and different things—the election or the return. In the present case the mayor did allow the objection. It is said by the petitioners that he was wrong in doing that. Whether right or wrong will be the question, of course, which will have to be decided upon the petition. But then it is said that upon this petition the petitioners are entitled to no re-

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lief, for the reason that there was another man, Harris, to whom the same objection would apply. We do not know whether it would or not. But assume that it would. It is said that, inasmuch as the petitioners have not made Harris a respondent, they cannot have, in any view of the case, the relief which they claim here. Well, I first of all shall ask, is there any law which says that? Mr. Coward says "No." He cannot put his hand on any section which says that, but he asks us to infer that that is the state of the law from the language of the Act, and from certain decisions which he has cited. Now he says (and says very properly) that, if this objection is not good (and this is the point upon which my brother Lopes seems to feel a difficulty, or rather founds his opinion upon), then the election ought to be declared void, and that it cannot be declared void because Harris is not a party respondent to the petition. But then I think we must all recollect that, in this country, we are very much in the habit of not correcting public evils by public people. Public evils are corrected by individual prosecutors, both in regard to crime and in election matters, and the Legislature has thought it right to trust to individuals to enforce the provisions of this Act. Her Majesty's Attorney-General cannot come here and make any complaint. It is left to the good feeling or bad feeling (very often the latter) of individuals whether they will put the law in force, just in the same way as it is left in the hands of a prosecutor whether a criminal should be punished or not. That is what we do. I do not say it is wrong, but that is what we do and what has been done here, and what has always been done in election matters. Now let us see what is the remedy, because an individual is put forward as the prosecutor to correct, it may be, a general evil, or it may be a local evil. What are his rights and powers? That is the only question we have to decide, and, if the statute does not provide for this case at all, I decline to take this petition off the file until I see a proper case made out. What powers has the statute given to individuals to prosecute for wrong proceedings? It has provided two distinct lines of conduct. Anybody may complain who is an elector. What may he complain of? Two distinct things. He may complain that the election is altogether void, or he may complain that certain persons have been improperly returned, and that distinction is taken in the very first words of the 87th section of the Act, which says: "A municipal election may be questioned by an election petition on the ground (a) that the election was, as to the borough or ward, wholly avoided by general bribery, treating, undue influence, or personation; or, (b) that the election was avoided by corrupt practices or offences against this part committed at the election." Those are the grounds upon which the election as a whole may be declared void, and this petition, as Mr. Coward properly remarked, does not come within either of those two grounds. I quite agree that it does not. It does not seek to avoid the election. He could not do it on any such grounds as he has alleged here, because he can only void it on the grounds of general corruption influencing the whole election. But now come the cases in which, under the same section (87), returns are complained of.

What are they? (c) "That the person whose election is complained of" (therefore he is the only person, the only defendant, if I may use that word) "was at the time of the election disqualified; or (d) that he was not duly elected by a majority of lawful votes." It therefore seems to me that the statute expressly gives to individuals the power to go against everybody, or to go against those individuals whose return they choose to question. It is said that Mr. Harris is a partisan of Mr. Anderson's clients. Very likely he is. But that is the whole basis of our system of representation and elections. From the House of Commons downwards it is the same thing. We elect those who are members of our party; we vote for members of our party, and that is considered the wholesome mode by which we arrive at the general opinion of the country, either at parliamentary or municipal elections, viz., by selecting those whom we think (if we exercise our franchise honestly) to be the best men to manage affairs either in Parliament or elsewhere. It is admitted that, if the facts on the petition are proved, and if the law contended for is correct, the petitioners are entitled to the relief they claim, subject only to this—that Harris has not been made a respondent. Then where is the law which says that they were bound to make Harris a respondent? Suppose Harris were your father, the best friend you had in the world, a man in whom you had the greatest possible confidence. Are you to be told, "No, although there are parties returned who in your judgment are scoundrels, yet you must not question their return unless you question Harris's return also." Is that so? Let us see what comes next. "A municipal election shall not be questioned on any of these grounds except by way of election petition." Then Mr. Anderson says, I do question it on those grounds. This is the only mode in which it can be done—by election petition, for *quo warranto* is gone. Therefore it seems to me clear that the Legislature intended to comprise in those four paragraphs all the relief which they intended to give. There is nothing in the subsequent clauses or sections that at all alters that, and I am unable to follow the authorities which have been quoted for it. In my judgment there is no ground whatever for saying, as far as I can judge at present, that this petition must fail. If I am wrong in that, it is a matter which will be settled when the petition comes on for argument. Till then, of course, I reserve my opinion upon it. I am so well satisfied with that view, or at all events I see such great difficulty in saying that it is wrong, that I cannot myself be a party to taking this petition off the file.

*Judgment for the petitioners, confirming the order of Mathew, J., and dismissing the respondents' application with costs.*

Solicitors for the petitioners, Caister and Shearman.

Solicitors for the respondents, Kingsford, Dorman, and Co., agents for Burton and Willoughby, Daventry.

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REG. v. FLETCHER AND OTHERS.

[Q.B. Div.]

Thursday, June 12, 1884.

(Before MATHEW and DAY, JJ.)

REG. v. FLETCHER AND OTHERS. (a)

*Bastardy—Issue of summons—"Such justice of the peace shall thereupon issue his summons"—The Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65), s. 3.*

*By the 3rd section of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) any single woman who may be with child, or who may be delivered of a bastard child, may, within the time therein specified, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, "and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty sessions to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts."*

*On the 15th Jan. 1884 a single woman made application under the said section to a justice of the peace, who thereupon issued a summons to the putative father to appear on the 1st Feb. On the 1st Feb. the putative father, by his solicitor, objected to the said summons on the ground that it was not duly served, and thereupon another justice issued a fresh summons returnable on the 15th Feb. On that date the case was heard on its merits, no objection being taken to the summons, and an order was made on the putative father for the payment of 5s. per week.*

*Held, on rule for certiorari, that the issuing of the summons by a justice of the peace other than the justice to whom the application was made was an irregularity waived by the appearance of the putative father and his failing to take the objection at petty sessions, and not an illegality nullifying the order, and that the order was therefore good.*

THIS was a rule nisi for a writ of certiorari to be directed to justices of Worcestershire commanding them to bring up a bastardy order made by them to be quashed on the ground that they had no jurisdiction to make the said order.

The circumstances under which the order was made were as follows:—

On the 15th Jan. 1884 the mother of a bastard child made an application under the 3rd section of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) to a justice of the peace for the county of Worcester, acting for the petty sessional division in which she resided, for a summons to be served on the man alleged by her to be the father of her child, and the said justice thereupon issued his summons to the man so alleged to be the father to appear at a petty session to be holden for that petty sessional division of the county on the 1st Feb. On that day a solicitor appeared at the said petty session on behalf of the putative father, and took the objection that the summons had not been duly served. This objection was allowed by the justices, and thereupon a justice for the said county, who was there sitting at the said petty sessions, other than the justice to whom the mother had originally made

application and who had issued the original summons, without any fresh application by the mother, issued a second summons returnable on the 15th Feb. On that day the case was heard upon its merits, and, no objection being taken to the summons by the solicitor who appeared for the putative father, an order was drawn up against the putative father for the payment of 5s. a week as from the 1st Feb. Objection being taken to this order on the ground that the magistrates had no jurisdiction to order the payment to be made from the 1st Feb., a second order was drawn up in accordance with the facts ordering the payment to be made from the date of the order, and on the face of this order it appeared that the application of the mother had been heard by one justice, and the summons on which the putative father had appeared and the order had been made had been issued by another. The putative father thereupon obtained a rule nisi calling upon the justices who had made the order to show cause why a writ of certiorari should not be directed to them commanding them to bring up the order so made to be quashed on the ground that they had no jurisdiction to make it under the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65), ss. 3 and 4.

The 3rd and 4th sections of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) are, so far as material, as follows:

3. Any single woman who may be with child, or who may be delivered of a bastard child after the passing of this Act may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts.

4. After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child, and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child, or to any person who may be appointed to have the custody of such child, under the provisions of 7 & 8 Vict. c. 101, of a sum of money weekly not exceeding five shillings a week for the maintenance and education of the child, and of the expenses incidental to the birth of such child, and of the funeral expenses of the child, provided it has died before the making of such order, and of such costs as may have been incurred in the obtaining of such order, &c.

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

*Paterson*, for the justices, showed cause against the rule.—The objection that the application of the mother was made to one justice, and the summons on which the order was made was issued by another, has no force to invalidate the order. It might have been a good objection, if taken at petty sessions to invalidate the summons; but the objection not being taken then is of no force now, but was waived by the appearance of the putative father. This case is concluded by *Reg. v. Hughes* (40 L. T. Rep. N. S. 685; 4 Q. B. Div. 614), which was decided in 1879 by nine judges against one, Kelly, C.B. dissenting. There a police constable procured a warrant to be illegally issued without a written information on oath for the arrest of T. upon a charge of assaulting and obstructing him in the discharge of his duty. Upon such warrant T. was arrested and brought before justices, and was without objection tried by them and convicted. The police constable was afterwards indicted for perjury committed on the said trial and convicted, and it was held that he was rightly convicted notwithstanding that there was neither written information nor oath to justify the issue of the warrant, and that the justices had jurisdiction to hear the charge though the warrant on which the accused was brought before them was illegal. So here the justices had jurisdiction to hear this case, the irregularity being of much less importance. The fact that that was a case of assault makes no difference. The case of *Reg. v. Fletcher* (24 L. T. Rep. N. S. 742; L. Rep. 1 C. C. R. 320), however, in 1871, is a bastardy case. It was under 7 & 8 Vict. c. 101, s. 2, which provided that where application for a bastardy summons is made before the birth of the child, the woman shall make a deposition upon oath, and there the prisoner was convicted of perjury alleged to have been committed on the hearing of a bastardy summons which had been issued before the birth of the child, upon the application for which no written deposition was made, but only a verbal statement upon oath by the woman. The prisoner appeared to the summons and made no objection to its validity or to the jurisdiction of the court, and it was held that the court had jurisdiction to hear the summons, and that the conviction for perjury was right. The justices therefore were justified in making the order, and the order is good. He also cited

*Ex parte Johnson*, 8 L. T. Rep. N. S. 275; 3 B. & S. 947.

A. T. Lawrence for the applicant.

H. Dickens for the putative father.—The order is bad, and cannot be said to have been waived by the putative father, since he never knew, and had no opportunity of knowing, of the illegality of the summons until the first order had been objected to, and the second drawn up. In the case of *Reg. v. Fletcher* (*ubi sup.*) the finding of the court was not that the justices had jurisdiction in spite of the statute having been disobeyed, but that the statute had not been disobeyed. Bovill, C.J. says: "I think at any rate an oral statement, taken down in writing in the usual way in which depositions are taken, must be sufficient;" in fact, that the woman did make a deposition upon oath. The other case cited (*Reg. v. Hughes*, 40 L. T. Rep. N. S. 685; 4 Q. B. Div. 614) was a case of assault, and is not an authority on this point,

because it was not a case in which the jurisdiction of the justices was founded on statute. In this case the statute had clearly not been complied with, and therefore the justices never had any jurisdiction. [MATHEW, J.—Did you not waive the non-compliance.] The summons contains no statement as to before what justice the application was made, and the putative father did not, and could not, know of the defect, and therefore cannot be said to have waived it. But it was not an irregularity which could be waived, but an illegality which could not in any way be waived, the condition precedent necessary to give the justices jurisdiction being absent. The case of *Reg. v. Pickford* (4 L. T. Rep. N. S. 210; 1 B. & S. 77; 30 L. J. 133, M. C.) is parallel to the present. There a single woman, having been delivered of a bastard child, within twelve months obtained a summons upon the putative father, but he having absconded it was not served. More than twelve months after the birth the justice who issued the summons died; and, the putative father having returned, she applied to another justice, and a summons was issued and served, and the justices made an order of maintenance, and it was there held that the second justice had no power under 7 & 8 Vict. c. 101, s. 2, to issue a summons, and therefore the order was bad. Here the second justice had no power to issue a summons under the Act of 1872, no application having been made to him by the mother, and therefore the order is bad. [MATHEW, J.—You were entitled to take the point before the justices, and demand strict proof that the summons was issued by the justice who heard the application, but you omitted to do so.] This is an illegality which cannot be waived by such an omission. Further, the mistake made by the justices in their first order was a mistake in point of substance, and could not be amended:

*Reg. v. Tomlinson*, 27 L. T. Rep. N. S. 544; L. Rep. 8 Q. B. 12.

[MATHEW, J.—I think not; it did not agree with the actual facts, and was therefore rightly amended; but is the hearing of the application and the issuing of the summons by the same justice essential to give the justices jurisdiction?] It is; the whole of the 4th section is based on the 3rd. [MATHEW, J.—Is it not rather based on the appearance of the person summoned?] No; the words are, "so summoned," i.e., in accordance with the 3rd section. [MATHEW, J.—It does not seem from the report that the putative father appeared in *Reg. v. Pickford*.] The court cannot go outside the order, which is bad on the face of it.

MATHEW, J.—I am of opinion that this rule must be discharged. The learned counsel who appears in support of it has failed to satisfy me that there is any such irregularity in the order he seeks to bring up as to entitle him to have it quashed. The circumstances of the case are very simple. In the first instance a summons was issued by a justice upon the application of a single woman, who had been delivered of a bastard child, directed to the man whom she alleged to be the father of the child, calling upon him to appear at a petty session to be holden on the 1st Feb. In the service of this summons there was some irregularity, and it became necessary to issue a second summons. A second summons was there-

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fore issued by another magistrate for the 15th Feb., and properly served, and to this summons the defendant appeared, and, the case being investigated upon the merits, the magistrates found that the man so summoned was the father of the child, and an order was drawn up ordering him to pay 5s. a week for its maintenance from the 1st Feb. Objection was taken to this order, on the ground that the payment ought not to have been ordered to commence from the 1st Feb., and another order was then drawn up in accordance with the proceedings that had actually taken place. From this second order it appeared that an irregularity had taken place in the issue of the summons, inasmuch as it had been issued by one justice, another having heard the application. On these facts the learned counsel for the defendant has argued that the order of the justices is a nullity, and that they had no jurisdiction to make it, since, in order to give them jurisdiction, it is necessary that the summons should be issued by the same justice who hears the application. But the learned counsel has not convinced me that the arguments which influenced the court in the case of *Reg. v. Hughes* (*ubi sup.*) do not apply here. There a police constable procured a warrant to be illegally issued, without a written information or oath, and it was held that a person arrested upon it and brought before justices and without objection tried by them and convicted was rightfully convicted, notwithstanding that there was neither written information nor oath to justify the issue of the warrant, and that the justices had jurisdiction to hear the charge, though the warrant upon which the accused was brought before them was illegal. In that case therefore the appearance of the defendant was held to be a waiver of an irregularity of the grossest kind, the man being arrested on an illegal warrant under circumstances entitling him to maintain an action for false imprisonment, and yet being held to be rightly convicted. In this particular case the justices had jurisdiction under the 4th section of the Act of 1872 on the appearance of the person so summoned. Up to that time the disobedience complained of to the letter of the 3rd section of the Act was a matter of substance, and if the defendant had chosen to take his stand and insist upon that objection, the magistrates would probably have felt themselves bound to entertain it and give weight to it, but the moment he appeared and proceeded to discuss the matter on its merits with his opponent, without taking the objection which was open to him, he waived that objection, and it ceased to be material. For these reasons, I think that the order of the magistrates was right, and that this rule must be discharged with costs.

DAY, J.—I concur.

Solicitors for the justices, *Gregory, Rowcliffes, and Co.*, for *W. H. King*, Stourbridge.

Solicitors for the applicant, *Hunt and Son*, for *Miller Corbet*, Kidderminster.

Solicitors for the putative father, *Kingsford, Dorman, and Co.*

Tuesday, June 17, 1884.

(Before MATHEW and DAY, JJ.)

SUMMERS AND OTHERS v. MOORHOUSE AND OTHERS. (a)

*Evidence — Ambiguity — Municipal election — Voting paper — Admissibility of parol evidence to explain manifest ambiguity in—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 60.*

*Sub-sect. 4 of sect. 60 of the Municipal Corporations Act 1882 enacts that, "Every person entitled to vote may vote for any number of persons not exceeding the number of vacancies, by signing and personally delivering at the meeting to the chairman a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes."*

*At an election of aldermen under sect. 60 of the Municipal Corporations Act 1882, a voting paper began in the name of one voter, in the following terms: "I, the undersigned, A. B., being, &c., do hereby vote for the following persons, &c." This voting paper was properly dated, but was signed, not by A. B., but by another voter, C. D. There were other voting papers to the same effect and in similar terms.*

*On the hearing of a petition under the same statute against the return of the respondents, on the ground that such voting papers ought to have been rejected, the commissioner admitted parol evidence to explain the mistake in the voting papers, when it appeared that the said voting papers were filled in at the top by the town clerk with the names of voters by whom they were intended to be used, but by mistake they were given to the wrong persons, each of whom, without discovering the error, signed his name at the foot of the voting paper, intending thereby to make it his voting paper, and after signing his name personally delivered it, as such voting paper, to the chairman at the meeting.*

*Held, that such evidence was properly admitted to explain the manifest ambiguity in the voting papers, and that, as each voter had signed his voting paper, and personally delivered it at the meeting to the chairman, the requirements of the statute had been fulfilled, and that the votes were rightly counted.*

SPECIAL CASE.

1. This was a petition under the Municipal Corporation Act 1882 against the return of the respondents as aldermen for the borough of Wakefield, which came on for trial before me at the said borough on the 12th, 13th, and 14th March 1884.

2. The petition prayed that it might be determined that the respondents were not duly elected, and that John Connor and Thomas Howden (two of the candidates at the said election) were duly elected, and ought to have been returned.

3. On the trial the following facts were admitted, or proved, and I reserved the question hereinafter mentioned for the opinion of the High Court of Justice.

4. At the election of aldermen for the borough of Wakefield, held on the 9th Nov. 1883, pursuant to the Municipal Corporation Act 1882 (45 & 46 Vict. c. 50), s. 60, the four respondents were the Liberal candidates, and John Connor and Thomas Howden were the Conservative candidates. The



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number of vacancies to be filled up was four. The mayor acted as chairman at the election.

5. The number of votes recorded for the respective candidates was as follows: George Moorhouse, 16; George Mander, 16; Benjamin Peacock, 16; Reuben Reynolds, 16; John Connor, 12; Thomas Howden, 12; making a majority of four for each of the respondents, who were declared by the chairman to be duly elected.

6. Eight of the voting papers, which were counted in the majority for the respondents, and which were partly printed and partly written, when delivered to the chairman, contained the names of two persons entitled to vote, one of which was inserted in writing at the top of such paper after the printed words, "I, the undersigned," and the other was written at the foot of such paper.

The following is an identical copy of one of those papers:

#### ELECTION OF ALDERMEN.

##### VOTING PAPER.

*Borough of Wakefield, in the West Riding of the County of York.*

I, the undersigned, Francis Milthorp, being one of the members of the council of the said borough, entitled to vote in the election of aldermen for the same borough, do hereby vote for the following persons to be aldermen of the said borough accordingly:

Christian Name and Surname of the Persons for whom I vote.	Their respective Places of Abode.	Their respective Descriptions.
George Moorhouse ...	Northgate ...	Grocer.
George Mander ...	Margaret-street ...	Solicitor.
Benjamin Peacock ...	Westgate ...	Grocer.
Reuben Reynolds ...	Sandal Magna ...	Corn Miller.

Dated this 9th day of November 1883.

WILLIAM LEE SELLERS.

The other seven papers were to the same effect.

7. It was contended, on behalf of the petitioners, that the above-mentioned eight papers were void and invalid as voting papers, as being uncertain and ambiguous, and that no evidence was admissible to explain this ambiguity, or to show by what voters they were used, and I was of opinion and found that without such explanatory evidence such papers were void and invalid for the above reasons.

8. The respondents thereupon tendered evidence to show the circumstances under which the voting papers were filled up, and the persons by whom they were signed and used, and contended that such evidence was admissible.

9. I admitted the said evidence (subject to all just exceptions), which was to the following effect: That all the said eight papers were filled in at the top by the town clerk with the names of the respective voters by whom they were intended to be used. In this condition they were then handed by him to one Mr. Horner, who acted on behalf of the Liberal voters.

10. That the said Mr. Horner thereupon inserted in each of the said papers the names, places of abode, and descriptions of each of the respondents as candidates, and having done this proceeded to distribute them among the respective voters by whom they were intended to be used, and in so doing he inadvertently handed each of the said eight papers to a person other than the one whose name appeared at the top of such paper, and to whom he intended to deliver it.

11. Each of the persons who so received a paper thereupon, without discovering the error, signed his name at the foot of it, intending by so doing to make it his voting paper, and to vote for the persons named thereon, and after so signing his name, personally delivered it as such voting paper to the chairman, who then read out the names appearing at the foot of each paper as the names of the persons voting respectively for the candidates named therein.

12. If the above evidence was admissible, I found as a fact that it was true, and consequently held that the above-mentioned eight papers were valid voting papers, and that the respondents were duly elected.

13. The question for the opinion of the court is, whether the above evidence was admissible to explain the said eight voting papers, or whether the voting papers were so ambiguous and contradictory as to render parol evidence to explain them inadmissible.

14. The parties have agreed to my stating this case as a way of reserving the question for the opinion of the High Court of Justice.

15. I have reserved my determination, whether the respondents were duly elected or not, and whether the said John Connor and Thomas Howden were duly elected, and ought to have been returned, until the court has determined the above question, and I shall certify according to the decision of the court thereupon, and order that the costs to be paid by the parties respectively shall follow such decision.

16. If the court should decide that the said evidence was admissible, I shall certify that the respondents were duly elected. If the court should be of the contrary opinion, I shall certify that the respondents were not duly elected, and that John Connor and Thomas Howden were duly elected, and ought to have been returned.

CHARLES MARSHALL GRIFFITH, Commissioner.

*Mattinson* for the petitioners.—These voting papers are clearly void and invalid, as being uncertain and ambiguous, and no parol evidence is admissible for the purpose of explaining the ambiguity. They begin by stating the name of one voter, and are signed at the end, not by the same voter, but by a different voter. In *Rowley v. The Queen* (14 L. J. 62, Q. B.), where an election was held to fill three ordinary vacancies and one extraordinary vacancy, and the voting papers contained the names of four candidates, but did not specify the person intended to fill the latter vacancy, such voting papers were held to be void. He also cited

*In the Goods of Hunt*, 33 L. T. Rep. N. S. 321; L. Rep. 3 F. & D. 250.

Cyril Dodd, for the respondents, was not called on.

MATHEW, J.—I am of opinion that our judgment in this case must be for the respondents. There is a voting paper beginning with the words, "I, the undersigned, Francis Milthorp, being one of the members of the council of the said borough entitled to vote in the election of aldermen for the same borough, do hereby vote for the following persons to be aldermen of the said borough accordingly;" then follow the names of the candidates and the date, but at the end, instead of being signed by Francis Milthorp, it is signed by another voter, William Lee Sellers, so that there



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is here an ambiguity arising from there being two names in one voting paper. To understand how to deal with this ambiguity, we must look at sect. 60 of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), which regulates the time and mode of the election of aldermen. By subsect. 4 of sect. 60 it is enacted that, "Every person entitled to vote may vote for any number of persons not exceeding the number of vacancies, by signing and personally delivering at the meeting to the chairman a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes." From this section we see that it is the duty of the chairman to ascertain that the person entitled to vote does vote by signing and personally delivering at the meeting to the chairman a voting paper containing the names, places of abode, and descriptions of the persons for whom he votes. The voter must sign his voting paper, and must personally deliver it at the meeting to the chairman. All this has been done in the present case. But an objection was taken before the commissioner that the voting papers were void and invalid, and that evidence was not admissible to explain the mistake or ambiguity in them, or to show by what voters they were used. I am of opinion that the commissioner was right in receiving evidence to explain such a manifest ambiguity, and such evidence was correctly and properly received; and consequently that the eight votes in question were properly admitted and counted.

DAY, J. concurred.

*Judgment for the respondents, with costs.*

Solicitors for the petitioners, *H. B. Clarke and Son*, for *Harrison and Beaumont*, Wakefield.

Solicitors for the respondents, *Van Sandau and Co.*

Saturday, Oct. 25, 1884.

(Before GROVE and SMITH, JJ.)

REG. v. BIRON AND OTHERS. (a)

*Practice—Rule under Jervis's Act—Rule for mandamus—Concurrent remedies—Applicant in person—11 & 12 Vict. c. 44, s. 5.*

*A rule under sect. 5 of Jervis's Act, and a rule for a mandamus, calling upon justices to show cause why they should not proceed to hear and determine the matter of an application for a summons are concurrent remedies.*

*A rule under the 5th section of Jervis's Act is not confined to cases where the justices need protection in doing any act relating to their duties.*

*A rule under this section may be moved for by an applicant in person.*

*Reg. v. Phillimore (51 L. T. Rep. N. S. 205) followed.*

*Reg. v. Percy (L. Rep. 9 Q. B. 64) not followed.*

Is this case a rule had been obtained under 11 & 12 Vict. c. 44, s. 5, by one Walter Hasker, in person, calling upon R. J. Biron, Esq., Q.C., one of the metropolitan magistrates, and G. F. Goldsborough and William Morrish, to show cause why the said magistrate should not proceed to hear and determine the matter of an application for summonses against the said Goldsborough and Morrish for libel.

Hasker appeared to support the rule in person.

(c) Reported by W. P. EVERSLY, Esq., Barrister-at-Law.

By 11 & 12 Vict. c. 44, s. 5, it is enacted:

And whereas it would conduce to the advancement of justice, and render more effective and certain the performance of the duties of justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him; be it therefore enacted, that in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and if after due service of such rule good cause shall not be shown against it, the said court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet, and the said justice or justices, upon being served with such rule absolute, shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule and done such act so thereby required as aforesaid.

G. L. Denman for the magistrate showed cause.—This is a rule which has been obtained under 11 & 12 Vict. c. 44, s. 5. The proper course, where it is sought to compel a magistrate to do such an act as is here required, would have been by way of *mandamus*, and not by rule under Jervis's Act, which only applies where the magistrate needs protection in the performance of his duties:

*Reg. v. Percy*, L. Rep. 9 Q. B. 64.

No doubt this court could exercise its discretion and grant a rule for a *mandamus*, if it seemed just. But if so, it is not the practice of this court to allow an application for a *mandamus* to be made in person:

*Ex parte Wason*, 10 B. & S. 580.

GROVE, J.—The master has drawn our attention to the note of a case, *Reg. v. Phillimore*, decided on the 2nd April of this year by the Lord Chief Justice, Watkin Williams and Cave, JJ., (a) in which *Reg. v. Percy* was not followed. The master's note of that case is as follows: "*Reg. v. Phillimore and others*, Justices, &c. Absolute under Jervis's Act with costs against Pilling. The court, on consideration of *Reg. v. Percy*, now hold that the construction placed on 11 & 12 Vict. c. 44, s. 5, is too narrow, and that the order under that section and *mandamus* are concurrent remedies, and may be granted either one or the other at the discretion of the court." We think, having regard to the fact that *Reg. v. Percy* was considered in that case by a court of three judges, that we are bound by the more recent recent decision, and the applicant should be heard in person in support of his rule. Applicant in person heard. (b)

Solicitors for the magistrate, *Hicklin and Washington*.

(a) This court was so constituted, it was stated, for the purpose of reconsidering the decision in *Reg. v. Percy*.

(b) The rule was subsequently discharged on the merits with costs against the applicants.

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BRIERLEY HILL LOCAL BOARD v. PEARSALL.

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## HOUSE OF LORDS.

March 14 and 17, 1884.

(Before the LORD CHANCELLOR (Selborne), Lords WATSON and FITZGERALD.)

BRIERLEY HILL LOCAL BOARD v. PEARSALL. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Public Health Act 1875* (38 & 39 Vict. c. 55) sect. 308—*Compensation for damage—Procedure—Arbitration—Dispute as to liability.**The arbitration clauses of the Public Health Act should receive the same interpretation as those of the Lands Clauses Act.**By sect. 308 of the Public Health Act 1875, where any person sustains any damage by reason of the exercise of any of the powers of the Act, the local authority shall make compensation, "and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration."**Held (affirming the judgment of the court below), that, although the local authority bonâ fide dispute their liability, the arbitrator has, nevertheless, jurisdiction under the section to make his award as to the fact of damage and the amount of compensation.**The question of liability should be raised in an action on the award.*

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Lindley and Fry, L.JJ.), reported in 11 Q. B. Div. 735, and 49 L. T. Rep. N. S. 486, reversing a judgment of Bowen, L.J. in an action tried before him without a jury at the Gloucester Summer Assizes 1882.

The action was brought against the appellants, as the urban sanitary authority of Brierley Hill, under the Public Health Act 1875, to recover an amount awarded by an arbitrator under sect. 308 of the Act as compensation to the respondent for damages for interference with the access to his house in consequence of alterations made in the level of a street under the powers of the Act.

The local board disputed their liability, and attended the reference under protest, contending that the question of liability must be decided before the compensation could be assessed.

Bowen, L.J. decided in their favour, but his decision was reversed as above mentioned.

*Jelf, Q.C. and Kettle* appeared for the appellants, and contended that wherever the liability to make compensation is *bonâ fide* disputed, and the amount is not ascertained, the arbitration clauses of the Public Health Act do not apply, and there is no jurisdiction in the arbitrator; secondly, where the liability is *bonâ fide* disputed, and the arbitrator cannot fix the amount of compensation without deciding the question of liability, the clauses do not apply; thirdly, the award is bad on the face of it if the arbitrator has taken upon him to decide the question of liability. Either of these propositions is sufficient to support the case of the appellants, for there is no question that there was a *bonâ fide* dispute here as to the liability of the local board. To extend the principle of the Lands Clauses Act to the Public Health Act would cause much difficulty and inconvenience.

The following cases were cited in the course of the argument:

*Reg. v Metropolitan Commissioners of Sewers*, 1 E. & B. 694;

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

*Bradby v. Southampton Local Board*, 4 E. & B. 1014; *Reg. v. Burslem Local Board*, 1 E. & E. 1077; *Burgess v. Northwich Local Board*, 37 L. T. Rep. N. S. 355; 44 L. T. Rep. N. S. 154; 6 Q. B. Div. 264; *Bradford Local Board v. Hopwood*, 6 W. R. 818; *London and North-Western Railway Company v. Smith*, 1 Mac. & G. 216.*Bosanquet, Q.C. and A. T. Lawrence*, who appeared for the respondent, were not called upon to address the House.

At the conclusion of the arguments for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: In this case there really appears to me to be nothing in favour of the claim made by the appellants except for some observations which were made in two of the authorities to which we have been referred, namely, in the case of *Reg. v. Metropolitan Commissioners of Sewers* (1 E. & B. 694) and in the case of *Reg. v. Burslem Local Board* (1 E. & E. 1077). But for those observations I should think that it was impossible to distinguish the clause in the Public Health Act from the clause in the Lands Clauses Consolidation Act, upon which, as has been very fairly and properly admitted, there has been a series of decisions which have practically put an end to every question of this kind. The Lands Clauses Consolidation Act, in sect 68, begins with the words, "If any party shall be entitled to any compensation" under the Act, either for lands taken or for lands injuriously affected, and provides that in that case a certain course shall be followed. That course, shortly stated, is this: If either party wishes to have the amount of compensation determined by arbitration he may have it so done, in precisely the same way as under the Public Health Act; that is to say, if the parties cannot agree upon the nomination of one or more arbitrators there may be two arbitrators, one to be nominated by each party; but if the person claiming compensation nominates an arbitrator and the other party fails to nominate one on his side, then the single arbitrator nominated by the party making the claim is to be in the same position as if both parties had agreed to a sole arbitrator. That is exactly the mode of arbitration provided by the Public Health Act. So far there is no difference whatever between the two Acts; and if the differences which there are in the phraseology are to be regarded as of any importance, I confess it seems to me that the argument in favour of the view presented by the appellants here would be stronger upon the phraseology of the Lands Clauses Act than it is upon the phraseology of the Public Health Act of 1875; because sect. 68 of the Lands Clauses Consolidation Act begins with the words, "If any party shall be entitled to any compensation," and it might be plausibly said that the proof of the title to compensation is a condition precedent to all the things which are to be done in order to ascertain the compensation to which the party is entitled; whereas here the Legislature has said, "where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage or amount of compensation shall be

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settled by arbitration." Well, here at all events the right to compensation is introduced by reference not to a matter of law, the title to compensation, but to a matter of fact, the sustaining of damage, which matter of fact is most distinctly put within the power of the arbitrators as well as the question of amount. Therefore it strikes me that this clause is worded in a manner more unfavourable to the argument of the appellants than the Lands Clauses Act. No doubt there is this difference, pointed out on behalf of the appellants by their able counsel, that the Lands Clauses Act does not say that full compensation shall be made, and then go on to determine the way in which it is to be ascertained, but it treats the way in which it is to be ascertained as the mode of making compensation where the title to it does exist. Well, I agree that it is so; and if here any other mode of ascertaining the compensation had been provided except that which is found in the immediate context of the same clause, or if no mode at all had been provided, the observation would have had some force; but a mode is provided, which is by arbitration; and the arbitration is to be upon "any dispute as to the fact of damage or amount of compensation." Now, on ordinary principles of construction, laying aside entirely the prior authorities, I should have thought that it was plain there, that two things were meant at all events to be the subject of inquiry by the arbitrators: the first, "the fact of damage;" the second, the "amount of compensation" when damage there was. What is meant by "damage?" On common principles of construction it surely must mean that damage described in the words which immediately precede, and in respect of which alone compensation is to be made. "Damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default." Those words are introduced as the foundation of the inquiry into the fact of damage, the fact of such damage as gives a right to compensation. That matter of fact no doubt cannot be ascertained without dealing with the actual state of facts, whatever it may be found to be; and that actual state of facts may possibly raise questions of law as to what is or what is not done properly "in the exercise of any of the powers of the Act," and also as to what is and what is not a default on the part of the claimant. But the inquiry does not cease to be an inquiry into the facts though the facts may raise questions of law. If the arbitrator goes into the inquiry, as he ought, as a question of fact, and if he deals with the facts as he finds them, but deals with them in a wrong view of those facts according to law, then no doubt his award will not be final. If an action is brought upon it and it appears that he has been mistaken in the view of the law which has governed his view of the facts, there will be a verdict for the defendants upon the award; but if he has not miscarried, the award certainly cannot be worse for his stating upon the face of it that he finds that state of facts into which by the express terms of the law he is bound to inquire, and which alone could give any right to compensation. If, therefore, the case were entirely free from all authority, I should say that, under the terms of this clause in this Act, it was plain that, without paralysing altogether the whole provisions of the Legislature for the com-

pensation of a person who had suffered damage, the course of proceeding must be by arbitration, and then by bringing an action upon the award. That is the proper course; and what the learned judge has found (and as far as I can understand he had reasonable ground for finding it) is, that as a matter of fact, and as a matter of law also, the damage was sustained "by reason of the exercise of the powers of the Act." Well, I really do not know that under those circumstances your Lordships need go at much length into the examination of the authorities, some of which may probably have been determined at a time when the general law under the Lands Clauses Act was not so well settled as it is now. If we look at the series of cases beginning with the *East and West India Dock Company v. Gatliffe* (3 Mac. & G. 155) before Lord Truro, which practically, though not in so many words, overruled the case of *London and North-Western Railway Company v. Smith* (1 Mac. & G. 216) before Lord Cottenham; if we begin with that case, and follow the subsequent series of authorities, we find it perfectly settled that, when an arbitration is insisted upon under the Lands Clauses Act, the company has no right to say that the arbitrator cannot go into the questions of which he is the proper judge because the company, plausibly or not, denies the right; and, on the other hand, that the company will not be prejudiced, if it has good legal ground for denying all liability, because the award will not be conclusive—an action may be brought upon it, and if it turns out that the law is in favour of the company, the company will have the benefit of it. That is perfectly settled under the Lands Clauses Act, and no question of this kind can be raised about it. The cases which have been mentioned, *Reg. v. Metropolitan Commissioners of Sewers* (*ubi sup.*) and *Reg. v. Burslem Local Board* (*ubi sup.*), were not upon an Act containing this clause, or showing so unequivocally as this does that something more than the mere question of the amount of compensation is to be determined. I rather prefer not expressing any opinion which I may have formed upon those cases. There is a good deal of difficulty, but I do not want unnecessarily to enter into a criticism of judgments upon a different Act of Parliament. They are undoubtedly decisions of judges of very high authority; but I am bound to say as much as this, that, as I read those judgments, and what passed in the case of *Bradby v. Southampton Local Board* (4 E. & B. 1014), they seem to say that the mere denial of liability by the company is enough to suspend the right to proceed by way of arbitration. That (unless it turns upon differences in the particular terms of the different statutes) is inconsistent with what has since been determined in the case of *Burgess v. Northwich Local Board* (37 L. T. Rep. N. S. 355; 44 L. T. Rep. N. S. 154; 6 Q. B. Div. 264), the whole proceeding in that case showing that, even where there was matter to be inquired into (as in that case there was), matter of law affecting the right and the liability, the court made that inquiry in an action brought upon the award, and did not find the award bad merely because that inquiry was one which it was necessary and proper to make. In that case it is perfectly clear that the award would have been sustained if the state of facts had been found to be such as *Bowen, L.J.* found them to be in the present case. Now, that

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really is all which I feel it necessary to say. The conclusion to which I come is, that the Court of Appeal has been entirely right, and that the appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON.—My Lords: I am entirely of the same opinion. Comparing the 308th section of the Public Health Act 1875 with the 68th section of the Lands Clauses Act 1845 I see no reason whatever for coming to the conclusion that a claimant under the one clause can be entitled to a remedy which is denied to a claimant under the other. The practice under the Act of 1845 has been authoritatively settled. I do not think that the same thing can be said of the practice following upon the Act of 1875. There are some decisions as to the procedure under the clauses of its predecessor, the Public Health Act of 1848; but even there there is no conclusive series of authorities. I find that in 1880, in the case referred to by the Lord Chancellor, of *Burgess v. The Northwich Local Board* (*ubi sup.*), and previously in 1874, in the case of *Uiley v. The Todmorden Local Board* (31 L. T. Rep. N. S. 445), the procedure taken by the plaintiff was precisely that adopted by the respondent in the present case, and the court maintained the right of the plaintiff to recover in an action brought upon an award, although the decisions to which they came in the two cases were different; in the one case they sustained and in the other they set aside the award, but they said that in their opinion such a course of proceeding was perfectly right. Then I quite agree with the finding of Bowen, L.J. that the acts of the local board in this case were acts in exercise of their statutory powers under the Act of 1875. That finding has not been seriously impeached. All due weight was given to it, apparently without objection, by the Court of Appeal, and I think that it must have a similar effect upon your Lordships. I therefore agree with the Lord Chancellor that the judgment under appeal ought to be affirmed with costs.

LORD FITZGERALD.—My Lords: The only difficulty which I have felt is in differing from the considered judgment of Bowen, L.J. I am, however, of opinion that the decision of the Court of Appeal was correct on the interpretation of the statute, and that even if the argument *ab inconvenienti* is applicable the balance of convenience preponderates in favour of that decision. It would certainly not be desirable or for the public interests that the received interpretation of the 68th section of the Lands Clauses Act and the long-settled practice thereunder, should be departed from in the construction of the 308th section of the Public Health Act 1875. The two statutes are general enactments, each affecting the whole kingdom, and ought as to their arbitration clauses to receive the same interpretation unless the differing language of the enactments forbids it. In my opinion there is no such difference of language or of subject as requires a different interpretation to be put on sect. 308 of the Public Health Act from that which has been established as the meaning of sect. 68 of the Lands Clauses Act. Looking at the case as wholly governed by sect. 308 of the Public Health Act, it seems to me to be clear that it was open to the respondent (the plaintiff) to pursue the course of having the fact of damage and the amount of compensation

settled in the first instance by arbitration. In establishing his case under that section the plaintiff had to sustain four propositions, viz., first, that he had sustained damage; secondly, that such damage had been occasioned by reason of the exercise by the local authority of the powers of the Act; thirdly, that such damage arose in relation to some matter as to which he was not himself in default; and, fourthly, the amount of compensation to which he was properly entitled. Any dispute as to propositions one and four is to be settled by arbitration. The fact of damage comes first in the section and is the foundation of all the rest. In the execution of his duties it is difficult to see how the arbitrator can avoid inquiring whether the acts complained of were matters done in the exercise of the powers of the Act, and as to which the claimant was not himself in default, so as to limit the scope of his assessment of compensation; but his decision, if any, as to the liability of the defendants in point of law would not be binding and would be inoperative. If the damage complained of has been occasioned apparently by reason of the exercise of the powers of the Act, the arbitrator proceeds to assess the amount of compensation limited to such damage, and leaving it open to the defendants, if they think fit, to contest their liability to the amount awarded on any grounds that may be open to them. The course pursued here seems to me to be a convenient one; the statute does not forbid it, nor is there anything to be found in its language which indicates that it should not be open to the party who alleges that he is injured to elect to have the compensation which he claims assessed in the first instance in the manner prescribed by the statute.

*Order appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Byrns and Lucas*, for *Homfray and Holberton*, Brierley Hill.

Solicitors for the respondent, *Mackeson, Taylor, and Arnould*, for *Joseph Higgs*, Brierley Hill.

April 1, 3, and 4, 1884.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN, WATSON, and FITZGERALD.)

THE JUSTICES OF MIDDLESEX v. THE QUEEN. (a)  
ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND

*Prisons Act 1877* (40 & 41 Vict. c. 21)—*Superannuation — Compensation — Apportionment — Superannuation Act 1859* (22 Vict. c. 26)—*Special minute.*

*At the time of the coming into operation of the Prisons Act 1877 (40 & 41 Vict. c. 21) C. was the governor of a prison which had been under the control of the justices of M. as the local authority, but by the Act it was transferred to the Secretary of State for the Home Department. Shortly afterwards C., who was not incapacitated in any way, resigned his appointment in order to facilitate some improvements in the organisation of the prison, and the Commissioners of the Treasury granted him an annuity pursuant to sect. 36 of the Act, and apportioned it, in accordance with paragraph 4 of that section, between the county rates of M. and moneys to be provided by Parlia-*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

ment. No special minute within the meaning of sect. 7 of the Superannuation Act 1859 (22 Vict. c. 26) was made or laid before Parliament with reference to C. or his office.

*Held (affirming the judgment of the court below), that, upon the true construction of the Act, the commissioners had power to apportion the annuity as they had done, and that the provisions of the Act of 1859 as to a special minute were directory only, and not a condition precedent to the granting of an annuity such as that in question.*

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Lindley and Bowen L.JJ.), reported in 11 Q. B. Div. 656 and 49 L. T. Rep. N. S. 614, affirming a judgment of the Divisional Court (Field and Stephen, JJ.), reported in 48 L. T. Rep. N. S. 480, upon a special case.

The special case is set out in the reports in the court below.

The question arose upon a rule calling upon the justices of Middlesex to show cause why a writ of *mandamus* should not issue commanding them to pay to Col. Colvill the proportion of the pension awarded to him as the late governor of the Coldbath Fields Prison, which had been charged upon the county rates under sect. 36 of the Prisons Act 1877 (40 & 41 Vict. c. 21).

A special case was afterwards stated for the opinion of the court, who held that the justices were liable, and their decision was affirmed as above mentioned.

This appeal was then brought by the justices.

*B. S. Wright and Hannen* appeared for the appellants.

The *Attorney-General* (Sir H. James, Q.C.), the *Solicitor-General* (Sir F. Herschell, Q.C.), and *Danckwerts*, for the Crown.

The argument turned entirely upon the wording of the sections of the Act, and appears sufficiently from the judgment of their Lordships.

At the conclusion of the arguments, their Lordships gave judgment as follows:—

THE LORD CHANCELLOR (Selborne).—My Lords: Perhaps it may be convenient that your Lordships' attention should first be directed to the last point which has been raised under sect. 7 of the Act of 1859, because, if that point were tenable, it would be entirely fatal both to the grant of this pension to the officer now immediately concerned, and, so far as I can judge, to all the grants which have been made to any officers of the same class—a most serious consequence. If your Lordships were obliged to arrive at that result nobody can tell how far-reaching it might be in its operation and effect as to other cases also; and it would be certainly most unwillingly that your Lordships would adopt that view, not only bearing in mind those consequences, but also bearing this in mind, that though the point does not seem to have been lost sight of either when the special case was settled, or when the argument took place before the Court of Appeal, yet it was one which the justices are obviously, and for reasons creditable to themselves, most unwilling to press, which they rather endeavoured to use as putting a kind of compulsion upon the court to yield to their views upon a totally different point, and therefore it was rather a subsidiary portion of their argument than the main fundamental ground of it, and yet it is evident that if the objection is tenable it is

a fundamental objection. Now, after consideration, and hearing what has been said on both sides, your Lordships I think are agreed that you may safely hold what is said here about the necessity of a special minute to be directory, and not in the nature of a condition precedent on which the validity of the grant must essentially depend, and I may add I think directory for reasons which do not apply to anything which has been actually granted in the present case, or in any case exactly like it, but would apply to any excess beyond that which in the present case has been granted. I cannot but refer upon this subject to what appears in the documents which are part of the special case as to the practice of the Treasury. This particular grant was announced not alone, but with other grants under the Prison Act of 1877, by a Treasury letter addressed to the Secretary of State on 2nd Aug. 1878, in which the Under-Secretary, or the proper officer of the Treasury, writes: "I am directed by the Lords Commissioners of Her Majesty's Treasury to acquaint you, for the information of the Secretary of State, that my Lords have been pleased to award to the prison officers mentioned over leaf, the pensions set against their respective names, apportioned between the rates out of which their salaries were payable immediately before the 1st April 1878, and moneys voted by Parliament, and I am to state that my Lords have directed the Paymaster-General to pay the portions of the pensions payable out of voted moneys from the dates specified in each case." And, some correspondence having followed with the county officers, there is a subsequent letter on the 9th Jan. 1879, from the Treasury to the Secretary of State, in which this is said: "The letter announcing the pension is the only evidence of the action of the board in granting it which has ever been given, or, as my Lords believe, has ever been asked for since pensions began to be granted. The Comptroller and Auditor-General, an authority not open to the charge of being too easily satisfied, accepts these Treasury letters as sufficient vouchers for all pensions payable out of public moneys. It is not immaterial to notice that when pensions of a special character are to be granted, the Legislature has provided that copies of the minutes granting such pensions shall be laid before Parliament. Such an express provision, coupled with uniform practice from the time of this statute (22 Vict. c. 26), not to mention the earlier statute of 1834 which it partly embodies, sufficiently proves that the intention of the Legislature was to leave the Treasury to settle the routine of procedure in other cases. The Prison Act of 1877 contains no directions to the Treasury as to the process of awarding pensions, beyond such as may be gathered from the word 'award' in sect. 36 read in connection with the Superannuation Act of 1859, to which my Lords are referred for certain purposes in that same section. My Lords consider that it would be a very serious thing for a public department to depart from its procedure in the transaction of its business after so long a sanction by usage, nor can they consent to do so. In addressing their awards to the Home Office and not to the late prison authorities, my Lords have believed themselves to be complying with the view of the Secretary of State;" and so on. That I think seems to show that the

view upon which the Treasury have acted, and all officers have acted, upon which pensions have actually been paid and the payment passed through the Audit Office, has been this, that except when an exceptional reason has required information to be given to Parliament, the ordinary procedure should be followed in all respects, and that this ordinary procedure amounts to a grant and an award of a pension, and I cannot but think that, when we bear that in mind, as we properly may in connection with the language of the clause, we can see our way to distinguish between that which operates as a grant to the pensioner and that which ought to be done by the granting authority for the purpose of giving information to Parliament in certain cases. The clause begins with the words, "It shall be lawful for the Commissioners of the Treasury to grant to any person retiring or removed from the public service in consequence of the abolition of his office," and so forth, "such special annual allowance by way of compensation" as they consider proper. I need not follow the terms of the clause at this moment. Now we must consider the question as between the Treasury and the grantee. It would be a most serious thing if he should suffer for any neglect of those things which are to be done in any particular case by the Commissioners of the Treasury, of which he has no knowledge, for which he has no responsibility, and over which he can have no control. The correspondence which I have read shows distinctly that as a general rule the uniform practice of all the Government Departments is to consider the grants or the awards of pensions as made in the manner in which they have been made in this particular case, and I cannot but ask the question in those cases in which the Treasury ought to make a special minute for the purpose of being laid before Parliament, assuming, as I suppose we must assume, that the words "special minute" have some technical meaning, and that such letters as those which I have read do not come within it—I would ask, I say, the question, how is it possible that the title of an officer to his pension can be held to depend upon a thing resting with the Commissioners of the Treasury alone, upon minutes to be made by them in their own proper minute-books in their own department, to which the Acts of Parliament do not give the pensioner, as far as I can see, any right of access, and which they do not even require to be communicated to the pensioner, because they only require that they shall be laid before Parliament? With those preliminary considerations we have to approach the words which relate to this special minute: "If the compensation shall exceed" a certain sum, I need not enter into the details, "such allowance shall be granted by special minute stating the special grounds for granting such allowance, which minute shall be laid before Parliament." It seems to me that the object of that is to account for the excess, and to account for it by reasons to be communicated to Parliament, and that in the nature of the case it is not intended to affect the validity of the grant, at all events as far as relates to that which is not in excess, and which, if granted alone, would not require any special minute at all. But I do not shrink from going further than that, nor from saying that if that which is granted might properly be granted, and if the grant or the award is made, as far as

the officer is concerned, in the usual manner, and communicated to him in the usual manner, I do not think that the neglect of the Treasury, or of their proper officer, to record in their proper books a special minute, or their neglect to lay that special minute before Parliament, need be construed as nullifying what otherwise would be a valid grant and award of a pension made and announced to the pensioner in a form which is sufficient in all other cases. Therefore I think that your Lordships, without doing any real violence either to the spirit or to the language of the Act of Parliament, may dispose of that argument in a manner which certainly would avoid consequences in the last degree inconvenient, and I may add unjust, which otherwise might possibly result. That argument being out of the way, it appears to me that the rest of the case may be disposed of without much difficulty. I will first refer to the arguments raised upon the clauses of the Act of 1877. Clause 36 of that Act in its first paragraph speaks of a case of superannuation after a certain length of service, or after a certain age has been attained, but it also applies that very term "superannuation allowance" to other cases which do not come within the natural and proper idea of the mere word "superannuation," namely, cases of incapacity from "sickness, age, or infirmity, or injury received in the actual execution of duty," all of which are contingencies independent of mere age, independent of mere length of service, and therefore to which the term "superannuation allowance" can only be applied in a secondary and not strictly etymological sense. That of itself seems to me to go a considerable way towards destroying the foundation of the main argument advanced at your Lordships' bar, which was this, that the term "superannuation" or "superannuation allowance" is used throughout this and other Acts in a technical sense inapplicable to the case in which an officer is retired and put upon a pension for the reason that his office is abolished, or that his retirement will facilitate improvements in the organisation of the department. I confess I can see no reason in the nature of things, or in the original meaning of the term, why what is granted upon compulsory retirement, or upon a retirement with the consent of the officer because it is desirable to abolish his office or to reorganise his department, should not be called a superannuation allowance, as much as in a case in which he retires not because he has attained a certain age or has served for a certain number of years, but because he has suffered accidental injury in the service, or has fallen into sickness or other infirmity. Then the next section of clause 36 is this, and this is the section which I think is applicable to the present case: "If any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison who by reason of such abolition, retirement, or removal is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act 1859, with respect to a person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs." That in effect means that such a case as that with which we are now dealing should be dealt with under sect. 7 of the Super-



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annuation Act 1859. Paragraph 3 of clause 36 in the Act of 1877 deals with "prison service," which is there defined, and we then come to the particular words upon which so much argument was offered to your Lordships: "Any annuity by way of superannuation allowance or gratuity granted under this section shall be apportioned between the period of service before the commencement of this Act and the period of service after the commencement of this Act, and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid, but without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department, shall be paid by the prison authority of the prison in which the officer to whom such annuity or allowance is granted was serving at the date of the commencement of this Act, out of rates which at or immediately before the commencement of this Act were applicable to the payment of the salary of such officer, and the residue shall be paid out of moneys provided by Parliament." Now it was insisted, as I understood the argument, that because that portion of the clause begins with the words "any annuity by way of superannuation allowance or gratuity granted under this section," the apportionment provided for would only be applicable to a case in which the retirement is after a certain length of service or a certain age, or from incapacity by reason of sickness, age, infirmity, or injury received in the execution of the office, as to which it is indeed true that in the first paragraph of the section there are the words "an annuity by way of superannuation allowance, or a gratuity," the same words which we have in this fourth paragraph. The argument was, that those words occurring in both those places mean the same thing in both, and therefore that they mean in the second place neither more nor less than they mean in the first, and are inapplicable to any of the cases mentioned in the second paragraph of the section, and therefore to the case now before your Lordships' House. Now I cannot but think that that argument sticks to the letter and loses sight entirely of the spirit and substance of the clause. I am not sure whether I should have been able to say so if there had been nothing in the context of the paragraph itself to make the matter clear, because then undoubtedly there would have been force in the observation that the words "any annuity by way of superannuation allowance or gratuity" are the very same words which occur in the first paragraph of the section, and do not occur in the section elsewhere. I confess that that is the only argument which would have had much weight with me, even if the context had not made, as it does to my mind make, the matter perfectly clear, because, although it may be very true that on account of the natural and original meaning of the word "superannuation" there may be particular clauses in some of the Acts upon this subject which give a more limited meaning to that word than others, on the other hand there are some clauses which appear to me to justify, and even to require, a larger meaning, and I cannot but say that the mere fact that the Act of Parliament which is expressly here referred to as the Act by which the grant of a pension in such a case as

that now before your Lordships is to be regulated is called "The Superannuation Act of 1859," and is referred to here by title, goes a very long way to repel the narrow and technical interpretation which the argument of the appellants seems to put upon that word "superannuation." The Legislature thought that all the cases of pensions provided for by the Act came within the sense of the word "superannuation," as conveniently and popularly used, sufficiently to make that short title a good general description of all that was done by the Act. But I need not dwell upon that point, because it seems to me that upon the very face of this clause the Legislature has manifested in the most unequivocal manner possible an intention to include in these words "any annuity by way of superannuation allowance or gratuity" the particular case provided for by the second paragraph with which your Lordships have now to deal. The words "without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department," are applicable to that case, and inapplicable to any other, and the fact that that is not to be taken into account shows plainly that but for that exclusion it might have been taken into account in the view of the Legislature, and therefore those are cases within the purview and intent of this particular paragraph. That argument of the appellants therefore appears to me entirely to fail. I now come to the remaining arguments. The argument upon sect. 53 was this: that this particular officer would not have been entitled to such an allowance as that which has been awarded him under the Prison Act 1865. The section is: "Nothing in this Act contained shall entitle any existing officer of a prison to any superannuation or other allowance, the conditions of whose office would not have entitled him to superannuation or other allowance under the Prison Act 1865." But the conditions of such an office as this would have entitled this officer to a superannuation or other allowance under the Prison Act 1865; that is to say, would have entitled him in the only sense in which anybody could have been entitled; it would have been in the power of the proper authorities to give it to him. And the section does not say that he shall not be entitled to any other or greater superannuation allowance than he could have obtained under the Prison Act 1865, but that unless he is an officer holding such an office as would have brought him within the superannuation provisions of the Act of 1865, he shall not be brought within those provisions of the Act. But Col. Colvill was an officer who would have been within those provisions, and being such an officer he gets the full benefit of the provisions of this Act. That argument, therefore, entirely fails. Then we come to the argument upon the Act of 1859. Now I do not think it advisable without necessity to enter into a question upon which possibly some of your Lordships may not take the same view as I do. I have certainly formed a pretty clear and decided opinion as to what is the meaning of the hypothesis in sect. 7 of the Act of 1859 upon which the necessity for a special warrant depends, and I certainly do think that contemplates this case, that there is an amount ascertained which it is proposed to award by way of compensation to the officer under that section, which would



exceed the amount to which he would be entitled calculated upon the principles of sect. 2 with ten years added to his actual period of service, and it does not appear to me I confess, at present, though I do not think it at all necessary for your Lordships to decide the question, that that can be expanded into anything more than ten years by anything which is done, or by any right or title derived by the officer under sect. 4. But that point your Lordships, in my opinion, need not determine, because it is admitted here as a matter of fact that nothing has been apportioned against the justices of the annuity granted to Col. Colvill excepting the amount to which he would be entitled in respect of length of service computed upon the principles of sect. 2 of the Act of 1859, and the additions made, if properly made, under sect. 4 of the same Act; and the question is whether those are matters which, according to the true interpretation of the Act of 1877, can properly be chargeable upon the county by way of apportionment. No question arises as to the amount computed upon the actual length of service under sect. 2; it is admitted, upon the assumption of there being a valid grant of pension at all, that it was apportionable as it has been apportioned against the county. But the question arises under sect. 4. Now sect. 4 of the Act of 1859 provided this, that by a general order or warrant the Treasury might direct that when any person now holding an office coming within any of certain classes should retire from the public service, a number of years not exceeding twenty, to be specified in the order or warrant, should, in computing the amount of superannuation, be added to the number of years during which he might actually have served. It is manifest that, in the cases to which that provision applies, the additional number of years is not added in respect of abolition of office, or to aid in the reorganisation of the department, but it is added in respect of a totally different class of considerations, namely, the character of the office and the requirement of peculiar qualifications in the person holding that office. Well, that being so, the next question is whether Col. Colvill's comes within that provision at all or not. In the year 1860, the year which immediately followed the passing of that Act, a general order or warrant was duly made by the Commissioners of the Treasury specifying certain classes of officers who were to have the benefit of this 4th section to the extent there mentioned. The governors of prisons are put, in, as I understand, so as to entitle them on retirement to have five years added to their period of service on account of special qualifications within the meaning of that 4th section being required of them. It is said, and truly said, that in 1860 Col. Colvill was not a governor of any public prison, and was not a public servant or a public civil servant in the sense of these Acts or of that order. But when in 1877 he was brought within that category, and when under the Act of 1877 the Superannuation Act of 1859 was made applicable to the case of pensions on the retirement of such an officer, I apprehend that the Act of 1859 was made applicable in all its provisions, and, as he had then become and was a public servant in the civil service of the Crown within one of those categories which had been mentioned in the order or warrant of 1860, it appears to me

quite impossible to say that sect. 2 of the Act of 1859 is to be applied to this case, and not sect. 4. That being so, the addition of five years is properly made to his actual period of service, and that is in respect of the peculiar character of his office and the qualifications required for it. That being so, when we come back to sect. 36 of the Act of 1877 it seems quite impossible to treat those five years as to be excluded under the words "without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department," because those five years were not added to the officer's service on account of abolition of office, or for facilitating the organisation of the department, but were added for a totally different purpose, and nothing has been added which can come within that category. Nothing has been apportioned against the county except that portion of this gentleman's pension which represents his actual period of service and that additional portion which represents the allowance of so many years, in addition to the years of actual service, not added on account of the abolition of his office or for facilitating the organisation of the department, but because he was the governor of a prison in a particular category. I really cannot agree with the argument that there is the smallest difficulty in apportioning over the number of years' service the total amount of compensation, though five years are added to the actual service. It is as easy to apportion a hypothetical addition of five years as it is to apportion the actual period of service. The thing to be apportioned is "any annuity by way of superannuation allowance or gratuity granted under this section." The annuity granted under this section, excluding that which it is proper to exclude, is the annuity which represents the actual period of service and the five years added. The manner of apportionment is far from difficult, because it is to be between the period of service before the commencement of this Act, an ascertained period, and the period of service after the commencement of this Act, an ascertained period. The numerical ratio is ascertained by a comparison of the two periods. The thing to be apportioned is the annuity actually granted by way of superannuation allowance, excluding, as in this case has been excluded, any number of years added for abolition of office or for facilitating the organisation of the department. Therefore, the principal argument failing, namely, that there has been no valid grant of an allowance, the result is that the order appealed from is right and ought to be affirmed, and I move your Lordships accordingly.

**LORD BLACKBURN.**—My Lords: I am of the same opinion. I think it is most convenient to begin by referring to the Superannuation Act of 1859, and considering the question as if the justices of Middlesex had nothing to do with this case, as if it was Col. Colvill who was setting up a claim which had somehow come before us to have a pension calculated upon the number of years that have been allowed to him, and that he was seeking that pension under the Superannuation Act of 1859, I will consider that first. Now, supposing that to be so, sect. 7 is the one under which he would claim: "It shall be lawful for the Commissioners of the Treasury to grant

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to any person retiring or removed from the public service," upon grounds which apply to Col. Colvill's case, "such special annual allowance by way of compensation as on a full consideration of the circumstances of the case may seem to the said commissioners to be a reasonable and just compensation for the loss of office." Now, stopping there, it is plain enough that the Lords of the Treasury are to be the sole judges, or the persons who are to judge what they think a reasonable and just compensation for the loss of office, and that they are to grant that by way of an annual allowance. But what follows immediately afterwards gives an indication of how the Legislature supposed they would consider it. "If the compensation shall exceed the amount to which such person would have been entitled under the scale of superannuation provided by this Act," is the idea which then comes in. From that it is plain enough that the Legislature thought that the annuity which would be granted would be considered thus: if instead of the man being turned out of his office he had retired as being superannuated, he would have had an annuity in such and such a proportion to his salary. In Col. Colvill's case it would have been an annuity proportioned to twenty-three years of service, he having come within the class which is mentioned in sect. 4 as being a peculiar class to be dealt with in a peculiar manner. On that ground Col. Colvill would have been entitled to that unless what follows is made a condition precedent to the granting by the commissioners of the retiring allowance to him. It says that if it exceeds what it would be if ten years were added to the number of years he had actually served, "such allowance shall be granted by special minute, stating the special grounds for granting such allowance, which minute shall be laid before Parliament." I do not inquire into the question whether or no the particular case is brought within that class for which a special minute is required, whether ten years being added under this section, and five years being added under sect. 4, brings it within the term requiring a special minute. I do not inquire into that. I will assume for the purposes of the argument that it does require a special minute, though I am not prepared exactly to express an opinion either one way or the other upon the question, and that the Lords of the Treasury neglected their duty in not making a special minute stating the special grounds, and laying that minute before Parliament. I think that is not intended to be a condition precedent to the grant in favour of the officer of his retiring allowance, but as what is commonly called directory only. It is an enactment put in, if I may use plain English about it, in case there should be "jobs;" the Lords of the Treasury, when they do this unusual thing, shall state in a minute their special reasons for it, and shall lay that minute before Parliament, and have them criticised. There are many cases (I was not aware that this point was to be raised, and I have not looked into them, and I cannot refer to them), but there is a numerous class of cases in which it has been held that certain provisions in Acts of Parliament are directory, in the sense that they were not meant to be a condition precedent to a grant, or whatever it may be, but a condition subsequent, a condition as to which the responsible persons may be blameable and punishable if they

do not act upon it, but their not acting upon it shall not invalidate what they have done, third persons having nothing to do with that. Therefore if this case had arisen under the Superannuation Act of 1859, and that Act alone, I think that Col. Colvill would have been entitled to a superannuation allowance which he has received, calculated upon a number of years including both the years of his service and also the ten years which have been added on account of the abolition of his office. Now let us see what the Legislature said in another Act of Parliament. Inasmuch as this was a prison office which had been transferred to the Government, and Col. Colvill retired from it after he had become a civil servant of the Government under the Prisons Act, we are referred to sect. 36 of the Act 40 & 41 Vict. c. 21. That section provides, first, that if any officer retires on account of ill-health, or for various other reasons which do not apply to the present case, a superannuation allowance shall be granted. Then, secondly, it says that "If any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison who by reason of such abolition, retirement, or removal, is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act 1859 with respect to a person retiring or removed from the public service in consequence of the abolition of his office," and so on. That brings us to this, that Col. Colvill having now retired, his case is to be dealt with according to the Act of 1859, sect. 7, to which I have already alluded, and that says he is to have such annual allowance as the Lords of the Treasury, considering all the circumstances, think it just to appoint to him. Then comes the provision on which the present question arises: "Any annuity by way of superannuation allowance or gratuity granted under this section" (that is sect. 36), which includes, I should have thought if there had been nothing else to the contrary, not only a superannuation allowance properly so called, but an allowance granted under the clause which has preceded it beginning with the words, "If any office in any prison is abolished." I should have thought that it would have come under that if it had stood alone, but that would have been a matter of some doubt and difficulty. It "shall be apportioned between the period of service before the commencement of this Act and the period of service after the commencement of this Act, and so much of such annuity and allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid." In the present case the amount of salary was not altered, but owing to Col. Colvill having become a civil servant the amount of his superannuation allowance on which he would retire was altered, but that, I think, does not affect the present case. "But without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department, shall be paid by the prison authority." That is really where the question comes in. It was argued that in the previous Acts (and owing to the very clumsy mode in which the Act is drawn referring to a whole number of previous Acts, I suppose we ought to look at them all) "superannuation allowance" has acquired a technical meaning, or

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rather it was not said it had acquired a technical meaning, but that it had often been used in one sense, whereas "allowance by compensation" had been used in another, and therefore we ought to construe the earlier part of the section as confined to those which were strictly superannuation allowances. That argument would hardly, I think, have prevailed with me (although I see Lindley, L.J., if I understand him rightly, says in his judgment that it would have prevailed with him) if this subsequent part of the section had not come in, but when I find these words added, "But without taking into account any number of years added to the officer's service on account of abolition of office," it becomes quite clear to my mind that the Legislature meant to include in it not only the superannuation allowance which was mentioned in the first part of the paragraph, but also the allowance which by the wording of the second paragraph in sect. 36 is ordered to be given, dealing with him in the same way as he would have been dealt with under the Act of 1859 if he had been a civil servant under the Act of 1859, and in that case he is to have such annual allowance as the Lords of the Treasury have thought to be reasonable and just compensation, but if such annual allowance exceeds the amount which he would have been entitled to as superannuation, then, says the Act, that portion of the amount which is measured by the additional years granted on account of abolition of office shall be struck off, and the justices—or the people who pay the rates—shall not be called upon to pay that, but it shall be paid out of moneys voted by Parliament. Why should not that be just and proper? I cannot see. It seems to me very reasonable and proper. If once you say the retirement is to be compensation for having served for a time under the ratepayers, and then after a time having served under the Crown and now being turned out, it seems to me most reasonable that the amount of compensation which is given should, as far as regards the service before, fall upon the ratepayers, and that the amount as far as regards the service since should fall upon the Crown who have enjoyed it since; and so far as regards that portion which is added in consequence of the abolition of the office subsequently to his becoming a servant of the Crown, that should fall on the Crown. That seems to me perfectly reasonable and just, and that is, I think, what the Legislature has said. There is one other point that was made. It was said that under sect. 4 of the Superannuation Act the amount which he was to have when he was retiring under superannuation was to depend on the number of years service, and if he was in a particular class within which the governors of prisons (the office which Col. Colvill held) were brought, he was not only to have that amount of superannuation which was allowed him for the years of service, but also five years more just as if he had served five years more. Such is the enactment there. That is an addition to his superannuation allowance, if it had come to be a superannuation allowance by adding years, but it is not an addition by adding years owing to the abolition of the office. It is the amount of the superannuation which he would have been entitled to upon his past service, he being in a particular class in which in that particular way the amount of superannuation has been increased,

and therefore it seems to me to be clear enough, looking at it quite independently of the other question, that the five years added under sect. 4 is just like the twenty-three years actually served, not an addition on account of the abolition of the office, but an addition on account of qualification, and consequently it is not taken out of the 36th section, and it is not prevented from being part of what would fall on the justices or ratepayers of Middlesex. There were one or two smaller points about the nature of the appointments of Col. Colvill, some at earlier times, and some later, but I do not think they were much pressed, and certainly they seem to me to have been completely disposed of; therefore I will not waste time by going into them. I therefore quite agree that the decision below is correct, and that it should be affirmed.

LORD WATSON.—My Lords: I am of the same opinion in this case with that which has been already expressed by my noble and learned friends. I cannot say that the 36th section of the Prisons Act of 1877 appears to my mind to be of so extremely doubtful interpretation as it was regarded by the learned judges of the Court of Appeal. No doubt, if you look at the provisions of that Act, and also the provisions of the various Superannuation Acts that have been passed from time to time, there is a great deal of looseness in the way in which the terms "superannuation allowance" and "annuity by way of superannuation allowance" have been used. The expression, it may be said, as used has not in all cases been very accurate or very appropriate, but I do not think there can be any reasonable doubt as to what its signification is in the 4th paragraph of the 36th section of the Act of 1877. Turning to the provisions of the Superannuation Act of 1859, I think Mr. Wright's criticisms upon that term were so far justified. I think the term "superannuation allowance" is used to denote an allowance made in respect of service and calculated according to the period of service upon a higher and lower scale according as the case dealt with by the Commissioners of the Treasury is or is not within sect. 4 as well as within sect. 2 of the Act. On the other hand, where an office has been abolished, or an officer entitled to superannuation allowance has been retired in order to make way for the reorganisation of the public department to which he belongs, the consideration given to him in respect of his removal or retirement is termed in the statute an "allowance," and in other parts of it is dealt with as compensation. But whatever may be the meaning of the words as used in the Act of 1859, we are not, in this question between the Treasury and the justices, dealing with the provisions of that statute at all; we are under the 36th section of the Prisons Act. Now at the outset of that the words "an annuity by way of superannuation allowance" are undoubtedly applied to the ordinary case of the retirement of an officer, but including retirement not necessarily from age, but possibly from injuries received in the actual execution of his duty, or from sickness and so on. Then follows the provision in the 2nd paragraph of that section with regard to the case of retirement or removal such as is dealt with by the 7th section of the Act of 1859, and the provision made in the statute of 1877 is that cases of prison officers coming within that shall be dealt with in

manner provided by the Superannuation Act of 1859; and if the enactment had ended there, there would have been some room for applying the argument which was addressed to us on behalf of the appellants, but when you come to the 4th section, which is really the material part of the clause in the present case, it is perfectly clear that the Legislature by the words "annuity by way of superannuation allowance or gratuity" intended to include not only allowances made in respect of service, and calculated by duration of service, but also allowances made in respect of abolition of office, and enforced retirement in order to make way for improvements in the organisation of officer's department, because it provides that such annuity when apportioned shall not be apportioned as a whole, but that, in separating the amounts that are to be severally borne by the Treasury on the one hand and the old prison authority on the other, you are to lay out of the account altogether that part of the allowance which has been added by reason of the abolition of office, or the compulsory retirement of the officer. Now that section not only points to the very wide meaning which the Legislature obviously intended to give to the words "annuity by way of compensation allowance," but to my mind it goes a step further. It indicates that it is to be the duty of the Treasury, in giving an allowance to one who has been an officer of the old prison authority, to give him the total sum upon different considerations; to give him first an allowance in respect of the term of service, if any, to which he is entitled, and then to add to it a special allowance under sect. 7, irrespective of service, and on account solely of abolition of office, or compulsory retirement. If that were not given effect to by the Treasury it would be impossible, so far as I can see, to arrive at the just sum which is to be apportioned as between the Treasury and the justices. Now the provision of that 4th clause is, that the justices are to bear their due proportion according to the term of years for which he has served under them of so much of the annuity or allowance as is payable in respect of service before the commencement of this Act. That clearly refers to the allowance to which the officer might be entitled under sect. 2 of the Superannuation Act, because that in terms of sect. 2 is an allowance granted to a person who has served in an established capacity in the permanent civil service of the State. But what is added to that under sect. 4 of the Act of 1859 is quite as much an allowance in respect of service as the allowance given him under sect. 2. As I read it sect. 4 is not a separate and independent enactment giving a distinct allowance for distinct considerations, but an enactment intimately connected with sect. 2, giving an allowance upon an increased scale to officers in whose cases for the due performance of the duties of their office higher qualifications are required than in ordinary circumstances. The provision of sect. 4 is not that an addition shall be made, or a separate allowance given, but that, in computing the amount of superannuation allowance which may be granted to him under the foregoing section of the Act, there shall be added a certain number of years. The provision is made not for the purpose of giving a separate allowance, but for the purpose of giving an additional item leading to an increased total sum in computing

the provision under sect. 2 of the statute. Well, that being so, I think it perfectly clear upon these considerations that sect. 36 of the Act makes it incumbent on the justices to bear that proportion of the retiring allowance of Col. Colvill which the judgment of the Court of Appeal lays upon them. But then a very ingenious argument was raised, and more firmly insisted upon at your Lordships' bar than it seems to have been before the Court of Appeal, to this effect, that under sect. 7 it is incumbent on the Treasury, when they give an allowance to an officer who has been removed or compulsorily retired for the purposes in that section stated, to proceed by means of a special minute, and that special minute must be laid before Parliament. I do not think it necessary for the purposes of this case to state what my own views are of the just construction of that section. That is a question which it does not appear to me that the justices, the appellants, are entitled or have any right to raise in the present case. The enactments with regard to a special minute appear to me to be plainly directory. I do not think it was intended that it should be a condition precedent of an arrangement made by the Treasury with respect to a retirement of a prison officer or any other civil servant whose case falls within the 7th section of the statute, that he should have the implied assent of Parliament from the presentation of such a minute, and, I suppose, its lying unchallenged on the table of either House of Parliament for a certain period. That was not the intention of the provision. It was not intended to take away from the Commissioners of the Treasury the power of making these arrangements. The provision is, that for the information of Parliament a minute containing the special reasons for granting a large allowance to a civil servant in such circumstances shall be laid upon the table, it being of course within the power of one of the Houses of Parliament to deal as they choose in committee of supply with the allowances that are made by the Treasury. Therefore, my Lords, it appears to me that we must here assume, and I do assume, that everything was rightly done, and certainly that it is not within the competency of the appellants to challenge what was done by the Treasury in making an addition, as I think the Act of 1877 directs them to do, to the salary of Col. Colvill in respect of his having been removed in order to provide for the better organisation of the department over which he so long presided. I therefore agree with your Lordships that the judgment under appeal ought to be affirmed.

LORD FITZGERALD.—My Lords: There was a real and substantial question in the case very much discussed in the court below, and at your Lordships' bar. That was whether the justices were liable to any portion whatsoever of this grant of an annuity to Col. Colvill under the terms of sect. 36 upon the true construction of them. But the argument of Mr. Wright, I think, was met very firmly in the Queen's Bench Division by Stephen, J., and also in the Court of Appeal, with some little shade of hesitation, by Lindley, L.J. Your Lordships have adopted the views of both the Divisional Court and the Court of Appeal, and in your Lordships' views I entirely concur. Now it is very agreeable, in also

adopting your Lordships' solution of the various difficulties that the ingenuity of Mr. Wright has raised in his argument here, to be able to come to the conclusion that, assuming the construction of sect. 36 as adopted by your Lordships to be the true one, the justices are only called upon to pay exactly what they ought to pay, and not one farthing more. It is true that Col. Colvill did go through a short service after the Prison Act had come into operation, but no allowance whatever was made in respect of that. I think it was four months. They took the twenty-three years of actual service before the Act, and superadding the five years under sect. 4, that made the twenty-eight sixtieths which they allowed him for the service before the Act, and nothing more, and in the allocation of the entire annuity that is exactly what the justices are required to pay. Then the remaining portion as to which it is said the special minute required by sect. 7 ought to have been granted, the ten-sixtieths, does not fall upon the justices, they are not injured by it. They are not affected by that ten-sixtieths, and in my opinion they have no right whatever to inquire whether that ten-sixtieths was or was not justified by a special minute under sect. 7. On these grounds I entirely agree with your Lordships that the appeal should be dismissed.

*Order affirmed, and appeal dismissed. (a)*

Solicitors: for the appellants, *B. Nicholson*; for the respondent, *The Solicitor to the Treasury*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Wednesday, Nov. 19, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

REG. on the prosecution of *HOOLEY v. THE LICENSING JUSTICES OF PIREHILL NORTH, STAFFORDSHIRE. (b)*

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice—Mandamus—Return of unconditional compliance—Plea to—Rules of Supreme Court 1883, Order LIII., r. 9; Order LXVIII., r. 1; Order LXXII., r. 2.*

*Where a return is made to a writ of mandamus of unconditional compliance therewith, the prosecutor can still plead to the return, notwithstanding the provisions of Order LIII., r. 9, as the former practice is kept alive by Order LXVIII., r. 1, and Order LXXII., r. 2.*

*Judgment of Mathew and Day, JJ. affirmed.*

THIS was an appeal by the defendants from the judgment of Mathew and Day, JJ., dismissing a motion to strike out or set aside a plea to a return to a writ of *mandamus*.

The judgment appealed from is reported *ante*, p. 392, where the facts are fully stated.

The appeal was argued by *Bosanquet*, Q.C. (*H. D. Greene* with him) for the appellants, and

by *Jelf*, Q.C. (*John Rose* with him) for the respondent.

The following statutes, rules, and authorities were referred to:

- 9 Anne, c. 20 (25 in Revised Statutes), s. 2, 1 Chitty's Statutes, 4th edit. 1248;
- 1 Will. c. 21, 4 Chitty's Statutes, 4th edit. 348;
- 6 & 7 Vict. c. 67, 4 Chitty's Statutes, 4th edit. 350;
- The Common Law Procedure Act 1854 (17 & 18 Vict. c. 125), s. 77, 3 Chitty's Statutes, 4th edit. 951;
- The Statute Law Revision and Civil Procedure Act 1883 (46 & 47 Vict. c. 49), Annual Continuation of Chitty's Statutes, vol. 1, part 3, page 454, commencing on 24th Oct. 1883, and repealing all the above-mentioned enactments;
- The Supreme Court of Judicature Act 1875 (38 & 39 Vict. c. 79), s. 21, 3 Chitty's Statutes, 4th edit. 759;
- Rules of the Supreme Court 1883, Order LIII., r. 9, Order LXVIII., r. 1, Order LXXII., r. 2;
- Tapping on Mandamus, 406;
- Reg. v. Mainwaring*, 27 L. J. 378, M. C.;
- Reg. v. Bingham*, 4 Q. B. 877;
- Reg. v. The Earl of Dartmouth*, 5 Q. B. 878.

BRETT, M.R.—The dispute which gives rise to the present appeal is this. A writ of *mandamus* was issued to the magistrates, and it was alleged that they had failed to hear and determine an application for the renewal of a licence. The magistrates make a return to the writ, and the person who claims the *mandamus* disputes the accuracy of that return. The magistrates say that they have obeyed the writ, but the prosecutor wishes to bring forward facts to show that they are wrong in saying so. It is said on behalf of the magistrates, that the prosecutor cannot do this, but that he must bring an action for a false return. The falsehood complained of in such an action would be that the magistrates did not, in fact, hear and determine the application. The same facts that are stated in the plea now before us would be brought forward, and the opinion of the court as to those facts would be taken. The point to be decided comes to this: Are the parties entitled to raise the question at this stage, or must these proceedings now be stopped, and other proceedings begun? This is what we are called upon to determine, and unless we are obliged to decide otherwise, I think we ought to prefer the more simple form of proceeding, which is, to raise the question now, to the other form of proceeding which has been suggested, which is not so simple, namely, to bring an action for a false return. The writ here is not a peremptory writ of *mandamus*, so we need not now determine as to the course of procedure in the case of a peremptory writ. The magistrates must know that the parties wish the dispute as to whether the application has been heard and determined to be decided. The usual way of determining such a question (as to which there are very few cases in the books) appears to have been for the magistrates to state what they have done, so as to raise the question before the court. I should suppose that this had been the almost invariable course. It is not denied that the facts which the magistrates thus alleged could be traversed, or that there could have been a demurrer. Here, however, the magistrates take upon themselves to decide as to whether they have obeyed the writ or not. If the appellants' contention is to prevail the magistrates would always have it in their power, by adopting this course, to force on the prose-

(a) The attention of the House was called to the fact that in cases of this nature the Crown neither pays nor asks for costs.

(b) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

[CT. OF APP.] REG. v. THE LICENSING JUSTICES OF PIREHILL NORTH, STAFFORDSHIRE. [CT. OF APP.]

entire necessity of bringing an action for a false return. Now, how were the proceedings regulated by the statute of Anne? Could the return be questioned by a traverse under that statute? It seems to me that the words of the statute of Anne are large enough to bear the construction that the return could be so questioned. The fact that the magistrates have obeyed the writ is a material fact, and therefore an allegation that they had done so could be traversed. That was the course of procedure where it was necessary, but the practice which was ordinarily followed never made it necessary. We must now see how the Judicature Acts and Rules have dealt with the practice. By Order LIII., r. 9: "Where any return is made to a writ of *mandamus* other than an unconditional compliance therewith, the applicant may plead to the return," &c. It is clear to my mind that the person who drew that rule, and the judges who passed it, thought there could be no plea to a return of unconditional compliance. However, the rule has not in terms dealt with that case, but has excepted it; and, as it is a matter coming under the head of proceedings on the Crown side of the Queen's Bench Division, which is not expressly provided for by the rules, it comes within the provisions of Order LXVIII., r. 1, and is not affected, while, by Order LXXII., r. 2, the old procedure is continued. Then it comes to this, that under the statute of Anne a return such as this might be pleaded to, and the rules made under the Judicature Acts preserve that right. But it is said that the statute of Anne is repealed, and this is true, but it was not repealed until the exact time when the rules came into force, and therefore the procedure under it was, up to that date, then existing procedure. If the rules say that the procedure is to be applied to future proceedings the statutes which created that procedure are no use, and therefore they are repealed, because they have become an incumbrance on the Statute-book. For these reasons I am of opinion that the better course in this case is to adhere to the view adopted in the judgment of the Divisional Court, although I do not say that good reasons could not be given either way. I think the judgment ought to be affirmed, principally on the ground which I first mentioned, that it is our duty, where possible, to advance and simplify the remedy.

COTTON, L.J.—I also think this appeal must fail. The question is one of procedure, and we have to decide whether the dispute can be tried in this way, or whether there must be an action for a false return. I think it should be tried by a traverse. The question is whether what was done here was a hearing and determining of the application for the renewal of a licence as alleged in the return made by the magistrates to the writ of *mandamus*. Order LIII., r. 9 deals with returns to writs of *mandamus*, but it excludes this case by the words "other than an unconditional compliance therewith," and therefore it does not apply. Then it is said that the practice of pleading to writs of *mandamus* existed only under the statutes of Anne and William IV. which have been referred to, and that these Acts have been repealed by the Statute Law Revision and Civil Procedure Act 1883 (46 & 47 Vict. c. 49.) I think it would be a wrong construction of that Act to hold that the repeal prevented the

practice under the repealed Acts from being "present procedure and practice" within the meaning of Order LXXII., r. 2, which came into operation at the same time as the repealing Act. I cannot see that any return is excepted from the words of 9 Anne, c. 20, s. 2, "As often as . . . any writ of *mandamus* shall issue . . . and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of *mandamus* to plead to or traverse all or any the material facts contained within the said return." I cannot see what there is to restrict the generality of the word "return" in that Act. That this is a return is shown by the words of Order LIII., r. 9, which expressly except a return of unconditional compliance. I therefore see no reason to restrict the meaning of the word, and I think that the former procedure remains in force, because by Order LXXII., r. 2, "where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." There is properly speaking no practice, because there are no cases to be found, but the statute of Anne regulated procedure, and this therefore was the procedure existing when the rules came into force. But it is said that Order LXVIII., r. 1, prevents Order LXXII., r. 2, from applying to a prerogative *mandamus*, because by the former rule "nothing in these rules save as expressly provided shall affect the procedure or practice in . . . proceedings on the Crown side of the Queen's Bench Division," and because there is not an express reference to prerogative *mandamus* in Order LXXII., r. 2, therefore that rule does not preserve the previously existing practice in the case of prerogative *mandamus*. I am of opinion that this is an unsound construction, and that it is wrong not to construe the rules as made with knowledge of the repeal (when the rules came into force) of the statute of Anne, which clearly applied to prerogative *mandamus*.

LINDLEY, L.J.—I am of the same opinion. The difficulty in this case arises from the wording of Order LIII., r. 9. It is obvious that the framers of that rule thought that returns such as this could not be traversed. That in practice they have not generally been traversed is beyond question, but it does not by any means follow that they are not traversable. Mr. Bosanquet says that the meaning of the word "return" in the statute of Anne is narrower than in Order LIII., r. 9, and does not include a certificate of compliance. I cannot find from the wording of that Act that this is so. I think the present case comes within the rule preserving the existing practice (Order LXXII., r. 2). The argument as to the repeal of the Acts of Anne and William IV. is too refined to be sound. Its effect is to invite us to defeat the object of the Legislature, and to work the repealing Act of 1883 and the rules of the same year so as to destroy each other.

#### Appeal dismissed.

Solicitors for the prosecutor, Robinson, Preston, and Stow, for Hollinshead and Moody, Tunstall.

Solicitors for the defendants, Thomas White and Sons, for Hand, Blackiston, and Everett, Stafford.



CT. OF APP.] REG. v. EDWARDS (Justice) AND EASTERN AND MIDLAND RAILWAY CO. [CT. OF APP.]

Friday, June 20, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

REG. v. EDWARDS (Justice) AND EASTERN AND MIDLAND RAILWAY COMPANY. (a)

*Lands Clauses Act 1845—Railways Clauses Act 1845—Jervis's Act—Compensation—Settlement by two justices of the amount—Time—8 & 9 Vict. c. 18 ss. 22 and 24—8 & 9 Vict. c. 20, s. 140—11 & 12 Vict. c. 43, s. 11.*

*The determination by justices under sect. 24 of the Lands Clauses Act 1845 of the amount of compensation to be paid by a railway company to a landowner whose lands have been injuriously affected by the construction of the railway is not an order for the payment of money within 11 & 12 Vict. c. 43, s. 1, and therefore sect. 11 of that Act does not apply, and the justices have jurisdiction although the complaint be not made within six months after the land has been so injuriously affected.*

*Re Edmundson (17 Q. B. 67) overruled.*

THIS was an appeal by George Henry Morse from an order of Lord Coleridge, C.J. and Cave, J., making absolute a rule for a *certiorari* to quash the adjudication of certain justices for the county of Norfolk, by which adjudication the appellant was awarded a sum of 50*l.* as compensation for the injuriously affecting of his lands by the Eastern and Midland Railway Company. The adjudication by the justices was made on the 15th Jan. 1884, upon a claim for 50*l.* made on the 1st Jan. of the same year, and at that time the line of railway had then been finished more than two years. On the hearing of the case before the justices the objection was taken that the application was too late, and the case of *Re Edmundson* (17 Q. B. 67) was cited as an authority.

The justices, however, heard the case, and awarded 50*l.* to the appellant as compensation.

The railway company applied to the Queen's Bench Division for a writ of *certiorari* to bring up and quash the adjudication, and that court, holding itself bound by the case of *Re Edmundson* (*ubi sup.*), made the rule absolute, on the ground that six months had elapsed from the injurious affecting, and that therefore, according to the authority of *Re Edmundson*, the justices had no jurisdiction.

Mr. Morse appealed.

Sects. 22 and 24 of the Lands Clauses Consolidation Act 1845 (8 Vict. c. 18) are as follows:

22. If no agreement be come to between the promoters of the undertaking and the owners of or parties by this Act enabled to sell and convey or release any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed fifty pounds, the same shall be settled by two justices.

24. It shall be lawful for any justice, upon the application of either party with respect to any question of disputed compensation by this or the special Act, or any Act incorporated therewith authorised to be settled by two justices, to summon the other party to appear before two justices, at a time and place to be named in the summons, and upon the appearance of such parties, or in the absence of any of them upon proof of due service of the summons, it shall be lawful for such justices to hear and determine such question, and for that purpose to examine such parties or any of them, and their witnesses, upon oath, and the costs of every such inquiry shall be

in the discretion of such justices, and they shall settle the amount thereof.

By 8 & 9 Vict. c. 18, s. 140, it is provided that:

In all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices; . . . &c.

By sect. 1 of Jervis's Act (11 & 12 Vict. c. 43), it is provided that:

In all cases where a complaint shall be made to any such justice or justices upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise, then . . . it shall be lawful for such justice . . . to issue his summons . . . &c.

By sect. 11 of the same Act it is provided:

That in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.

*French and Synnott* for the appellant.—Jervis's Act does not apply. The "settlement by two justices" under sect. 22 of the Lands Clauses Consolidation Act is not a "conviction or order" within Jervis's Act, neither is it an "order for the payment of money" within that Act. It is a mere assessment of damages, and the practice has always been to enforce this assessment by bringing an action upon it. It cannot be enforced in any other way, and any question of title can only be decided in the action upon the award. The justices therefore "order" nothing, they merely "estimate." *Re Edmundson* (17 Q. B. 67) was wrongly decided. That case was distinguished in *Reg. v. Hannay* (31 L. T. Rep. N. S. 702). They also cited

*Reg. v. Coombe*, 33 L. J. 67, M. C.

*R. S. Wright* for the respondent.—The justices are to "hear and determine," they call witnesses, and those witnesses are sworn, and the determination of the justices is a judicial act. If it is a judicial act it follows that it is an "order" within Jervis's Act, for that Act is exhaustive. It was passed after the Lands and Railways Clauses Acts, and was intended to include them. *Re Edmundson* (*ubi sup.*) was rightly decided. He also cited

*Morant v. Taylor*, 34 L. T. Rep. N. S. 139; 1 Ex. Div. 198;

*Sweetman v. Guest*, 18 L. T. Rep. N. S. 52; L. Rep. 3 Q. B. 262.

BRETT, M.R.—I remain of the opinion at which I arrived after reading the cases to which we have been referred, of *Re Edmundson* (*ubi sup.*) and *Reg. v. Hannay* (*ubi sup.*). I could have supposed the decision of either of those cases to be right, but I cannot see how both of them can be right. Moreover, I think it is plain that the learned judges who took part in the decision of *Reg. v. Hannay* did not really intend to support by their judgment the earlier case of *Re Edmundson*. The case of *Re Edmundson* was one of those cases which, having been decided by a court of concurrent jurisdiction, must not, according to the comity of our practice, be overruled by the learned judges who decided *Reg. v. Hannay*, and if the latter case had been subject to appeal I

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.



have no doubt they would have decided it in accordance with *Re Edmundson*, and left it to the Court of Appeal to overrule that authority. But there being no appeal, and not agreeing with the authority of *Re Edmundson*, the learned judges distinguished that case from the one they were considering in *Reg. v. Hannay*, and the distinction is certainly a very fine one. We therefore are now left in this position, that we have the case of *Re Edmundson* decided in one way many years ago, and the case of *Reg. v. Hannay*, which I think is really not distinguishable from the earlier case, decided in the opposite way also some years ago, and we are now left to choose between them. Now we always hesitate very much in the Court of Appeal about overruling a case which has been supposed to be good law for a number of years, especially when parties may constantly have altered their position upon the assumption that the law thus laid down was good; but this decision which we are now considering is only a decision as to the particular jurisdiction of a court, and I see no reason in this case to say that the case must stand as it is after this lapse of time, if in fact we do not agree with it. The question therefore is, do we agree with *Re Edmundson*, for there can be no doubt that it directly governs the present case? This is a claim made by a landowner against a railway company in respect of his land being injuriously affected by the company's works, and it is a claim made under sect. 6 of the Railways Clauses Consolidation Act 1845. I will not say whether or not this claim might be made under sect. 16 of that Act, it is enough that for the purpose in hand, namely, the obtaining of compensation, the claim comes under sect. 6 of that Act. Now sect. 6 of that Act refers us to the Lands Clauses Consolidation Act 1845, and turning to sects. 22 and 24 of that Act we have to inquire how such a claim when made is to be determined. I think it is plain that it is to be determined by two different tribunals. Two questions may arise upon such a claim: first, the title of the person who makes it to maintain it in respect of the lands; and secondly, the amount of compensation to be paid to such person, if the claim is maintainable by him. Now it cannot be said that any authority is given to the magistrates by the statute to determine the first of these questions, namely, that of title. Are we to imply any such authority? It is contrary to every idea of English law in dealing with magistrates, and yet here we are virtually asked to imply that such an authority is given by an Act of Parliament which does not in fact say anything about it. I can see no reason for any such implication. Therefore, the whole question involved in the dispute must be tried by two tribunals, and the only part of it with which the magistrates have to deal is the amount of compensation payable, if anything be payable at all. Sect. 24 of the Lands Clauses Consolidation Act 1845 is as follows: "It shall be lawful for any justice, upon the application of either party with respect to any question of disputed compensation . . . to summon, &c. . . and it shall be lawful for such justices to hear and determine such question." What question? The amount of the disputed compensation and that alone. That is a part only of the dispute between the parties, and not the whole question. Then is such a determination of the

justices, of the amount to be paid, an order within sect. 140 of the Railways Clauses Consolidation Act 1845? That section is dealing with cases where costs, damages, or expenses have been directed to be paid, and it gives justices, by whom the same have been ordered to be paid, power to issue their warrant to enforce payment. Can it be said that such a determination as we have been considering is an order to pay? Obviously not, because the question of title still remains open, and while that is so the whole question is not determined, and the company cannot be ordered to pay. Therefore, I come to this conclusion, that if you say what is done under sect. 24 of the Lands Clauses Consolidation Act is an order, it is still not within sect. 140 of the Railways Clauses Consolidation Act unless it be an order to pay. It is clearly not an order to pay, and I do not think it is an order at all; it is a mere assessment—a mere ascertainment of the amount of compensation to be paid, if any at all be due. I think such a determination of magistrates as is made under sect. 24 is not an order at all, it is not within sect. 140 of the Railways Clauses Act, and is not within Jervis's Act. Therefore, I think that the case of *Re Edmundson*, which was decided as Bowen, L.J. suggested during argument, in the early years of these Acts, and before the courts knew as much of the working of them as we know now, was wrongly decided, and the case of *Reg. v. Hannay*, which I think cannot be distinguished, was rightly decided, and therefore I think the judgment of the court below, who considered themselves bound against their own opinion by the earlier case, must be reversed, and the case of *Re Edmundson* must be overruled.

BOWEN, L.J.—I am of the same opinion. The first matter that is clear is that the case of *Re Edmundson* is exactly in point, and that there is no distinction between that case and the present. The question which arises is whether a decision of justices made under the Lands Clauses Consolidation Act sect. 24 is an order within Jervis's Act. The case of *Re Edmundson* decided that it was. I agree that we ought to hesitate before we overrule a decision of such long standing. It is true, as the Master of the Rolls has said, that the point decided in that case is not a point on which parties have altered their position upon the assumption that that case was good law, but still it has stood for some years. In that case, however, there was no appeal, and the decision has been doubted every time that it has come before the courts. The judges who decided *Reg. v. Hannay* differed from it, and Mellor, J. differed from it in the case of *Reg. v. Coombe*. And now we are asked as a Court of Appeal to overrule it. The basis of the reasoning on which it was supported, was that the court thought that a proceeding for compensation under sects. 22 and 24 of the Lands Clauses Act 1845 was a proceeding for redress, and that the award was in the nature of relief given, and was an award of damages within sect. 140 of the Railways Clauses Act 1845. Now is that view tenable? All the justices are to do when reference is made to them under these sections of the Lands Clauses Act 1845, is to settle the amount, and to hear and determine the disputed question of the amount of compensation. Behind that inquiry any question of title still remains

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undecided and open. Can it then be said that this assessment of the amount of a hypothetical compensation, which may or may not be payable according to the decision of ulterior questions, is an order for damages within sect. 140 of the Railway Clauses Act 1845? I think not. It seems to me that the decision of the justices is not an order at all. How can that be an order which neither expressly nor impliedly orders anything to be done, and imposes on penalty for disobedience? I think that the case *Re Edmundson* cannot be supported, and must be overruled, and that this appeal must be allowed.

Fry, L.J.—I am of the same opinion. I concur entirely in the reluctance which has been expressed to overrule a case decided so long ago, and, if that case had been regularly followed, my hesitation would have been increased, but looking at the circumstances, which have been fully dealt with by the Master of the Rolls, I think we are bound to consider whether *Re Edmundson* is right or wrong. In my opinion it is plainly wrong. All the learned judges in that case seem to have come to the conclusion that the determination and the ascertainment of the quantum of compensation was an order, and was treated as such by sect. 140 of the Railways Clauses Act. But that section deals with "damages directed to be paid." It seems to me to be plain that by the mere assessment of the quantum nothing is "directed to be paid." This is the limit of the magistrates' power. In point of form there is no order to pay, and surely there is none in substance; for a further question, namely, that of title, may arise, and until that is decided the amount ascertained is not payable, and perhaps may never become payable. I think that *Re Edmundson* was wrongly decided, and that this appeal must be allowed.

*Appeal allowed.*

Solicitor for appellant, A. R. Oldham.

Solicitors for respondent, Mathews and Browne.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Aug. 1 and 2, 1884.

(Before NORTH, J.)

THE MAYOR, &C., OF NEW WINDSOR v. STOVELL. (a)

*Local Board of Health—Ultra vires—Public Health Act 1848, s. 48—Premises beyond limit of district—Agreement for connecting sewer—Drainage of houses hereafter to be erected.*

*The defendants were the owners of the Clewer estate of 142 acres, of which sixteen were within and the remainder without the limits of the borough of New Windsor, for which the plaintiffs were the local board of health. By an indenture dated the 3rd Aug. 1857 the local board of health of that date had granted to the predecessor in title of the defendants, his heirs and assigns, in consideration of his having constructed a certain sewer, and of a payment of 10l. a year, "leave and licence to drain, carry off, and permit to flow off into and through a certain drain within the limits of the said district all the drainage and sewage from*

*the property and houses then belonging to him at Clewer, and any houses thereafter to be erected on the said property." There was at the date of the indenture only one street of houses on the said property outside the limits of the district; many others had since been built. This was an action to set aside this deed as ultra vires so far as it related to houses not erected at this date.*

*Held, that sect. 48 of the Public Health Act 1848, under which the board acted in executing the deed, only gave them the power of making the terms and conditions upon which a sewer might be connected with their system, and so long as the sewer remained the same no complaint could be made of the amount of sewage sent down it; therefore the agreement was not ultra vires.*

The plaintiffs in this action were the urban sanitary authority for the borough of New Windsor. The defendants were the persons entitled under the will of one Arthur Vansittart to an estate called the Clewer estate in the neighbourhood of New Windsor, whereof eighteen acres were within and three hundred and sixteen acres or thereabouts without the boundaries of the borough. Of the part without the boundaries one hundred and twenty-four acres or thereabouts were suitable for building purposes.

By an indenture dated the 3rd Aug. 1857, made between Arthur Vansittart, the predecessor in title of the defendants, of the one part, and the Windsor Local Board of Health, the then sanitary authority for the borough of New Windsor, of the other part, after reciting that the local board had constructed and laid down a system of drains and sewers for the purpose of draining the district of Windsor, in the county of Berks, and that the said A. Vansittart was the owner of large property and numerous houses forming a street called Bexley-street, at Clewer, in the said county, which were adjoining or near to, but beyond the limits of, the said district, and had applied to the said local board for permission to carry the drainage and sewage of the said property and houses along the line of a drain therein mentioned, so as to communicate with and run into the said district system of drains and sewers, and that the local board, in pursuance of the Local Public Health Act 1848, had agreed to grant him such permission upon the terms and conditions that he should construct and execute the works, and pay the yearly sum, and observe and perform the other acts thereafter mentioned; the said A. Vansittart agreed to construct certain brick barrel drains, and do certain other works for the benefit of the local board, and to pay 10l. a year to the local board, their successors and assigns, so long as they should drain and carry off, or permit to flow off, the drainage and sewage of the said property or houses belonging to him the said A. Vansittart as aforesaid, or any part thereof, through the said barrel drains, and the said local board covenanted in the following words:

The said local board do give and grant unto the said Arthur Vansittart, his heirs and assigns, full and free leave, licence, and permission for him and them to drain and carry off, and permit to flow off into and through the said barrel drain, so to be constructed between the points therein specified, within the limits of the said district, all the drainage and sewage from the said property and houses now belonging to him, the said Arthur Vansittart, at Clewer aforesaid, and any houses hereafter to be erected on the said property; and will

(a) Reported by J. B. BRADDER, Esq., Barrister-at-Law.

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afford free passage to all the drainage and sewage from the said barrel drain into their main sewer.

At the date of the said indenture there were upon the Clewer estate only about fifty houses, but the laying out of the whole for building was in contemplation. Before the date of the commencement of the action many more houses had been erected, and the whole of the estate was being laid out for building, and intended to be rapidly built over. At the date of the indenture the main sewer of the board of health drained into a brook communicating with the Thames. Subsequently the plaintiffs were compelled by proceedings under the Thames Navigation Act 1886, and the Rivers Pollution Prevention Act 1876, to construct works for the interruption of their sewage, to convey it some distance from the borough, and there deodorise and deal with it in a way involving considerable expense in pumping and otherwise.

The plaintiffs brought this action in September 1877, asking that the indenture of the 3rd Aug. 1857 might be declared *ultra vires* and void, and for an injunction restraining the defendants from sending any sewage into the plaintiffs' system of sewers.

Sect. 48 of the Public Health Act 1848, under which the Board of Health purported to act in executing the indenture in question, provides:

That any owner or occupier of premises adjoining or near to, but beyond the limits of any district, may cause any sewer or drain of or from such premises, to communicate with any sewer of the local board of health, upon such terms and conditions as shall be agreed upon between such owner or occupier, and such local board, or in case of dispute as shall be settled by arbitration, in the manner provided by this Act.

By the interpretation clause it was provided that the word premises shall include messuages, buildings, lands, and hereditaments of any tenure.

The plaintiffs also claimed to have the deed rectified on the ground that it was only intended by the parties to apply to the sewage from existing houses, but the Court held that there was no evidence of any ground for such rectification.

*Davey, Q.C., Everitt, Q.C., and Chadwick Healy* for the plaintiffs.—The local board had no power to make a contract except with respect to existing buildings. The right given by the Act is for the owner or occupier of premises to connect a sewer or drain, that is, for the owner or occupier of existing premises, and the board's right to make terms must be correlative to the right to connect. The local board were trustees to make the best terms they could for the ratepayers, and had no more right to contract for the future than a trustee for sale has to give an option to purchase at a future time:

*Clay v. Rufford*, 5 De G. & S. 768;

*Oceanic Steam Navigation Company v. Sutherland*, 43 L. T. Rep. N. S. 743; 16 Ch. Div. 236.

Even if this deed had been the grant of an ordinary easement the grantee could not materially increase the burden, but would be restricted to a reasonable use for the purpose of the land in the condition it was when the grant was made:

*Wood v. Saunders*, 32 L. T. Rep. N. S. 363; L. Rep. 10 Ch. 582.

Here the local board contracted to grant an

easement, and it must be construed in the same way. At least we are entitled to an injunction as to future houses:

*Attorney-General v. Acton Local Board*, 47 L. T. Rep. N. S. 510; 22 Ch. Div. 221.

The effect of the agreement as it stands is to compel the ratepayers of New Windsor to incur a constantly increasing expense in disposing of the sewage of the Clewer estate, while its inhabitants bear no share of the increased expense, and pay only the original sum of 10*l.* a year, however much the cost of dealing with their sewage may increase. The agreement was entered into upon the understanding that the local board would be allowed to go on turning the sewage into the Thames. It cannot be maintained now that circumstances have altered.

The *Solicitor-General, Barber, Q.C.*, and *De Castro* for the defendants, the trustees of the will of Arthur Vansittart.—It is not correct to say that the Act of 1848 vests in the local board a trust, or a power in the nature of a trust, to make these arrangements. The section gives the adjoining owner a right to connect his sewer. The terms are to be agreed with the board, and no doubt it is their duty to see that the terms are fair, but they cannot refuse to allow the connection. If the parties cannot agree the terms are to be settled by arbitration under the Act of 1848, and by the court under the Act of 1875, which is now substituted for that Act; an agreement settled by the court could hardly be *ultra vires*. The Act gives the board no power to regulate the amount of sewage to be sent down the sewer, but only to give leave to connect it. When it is connected the board must deal with all the sewage which can be properly sent down it:

*Newington Local Board v. Cottingham Local Board*, 40 L. T. Rep. N. S. 58; 12 Ch. Div. 725.

It is not true there is no limit, the limit is the capacity of the sewer connected, it cannot be enlarged without fresh terms. On the construction contended for by the other side it would be impossible to construct a sewer till all the houses were built, or a fresh agreement must be made on the erection of every new house. We only ask for the grammatical construction of the Act. There is no ground for reading into it the words "in its present state."

*B. B. Rogers and Druce* for different parties beneficially interested under the will.

*Davey, Q.C.* in reply.—The board must have some definite basis upon which to decide what terms to exact, and the only basis is the state of the property at the time. It is impossible to know what would be a fair compensation for permission to send down the sewage of a wholly indefinite number of houses. [*NORTH, J.* referred to *Newcomen v. Coulson*, 36 L. T. Rep. N. S. 385; 5 Ch. Div. 142.] There the court came to the conclusion, on the construction of the deed, that there was a grant of a general right of way for all purposes, and the case of *United Land Company v. Great Eastern Railway Company* (L. Rep. 17 Eq., 158) was decided on the same grounds. In *Newington Local Board v. Cottingham Local Board* (*ubi sup.*) the contract was between two local boards, and the only point decided was that it must be read subject to the Act. The Newington Board agreed to take all sewage properly coming down the sewers of the Cottingham

Board, and it was held they must take the sewage from persons outside the district which the Cottingham Board were under a statutory obligation to take. Mr. Vansittart is under no statutory obligation to connect the drains of new houses with his sewer. Every time he does so he indirectly connects them with the board's sewer, and that needs a fresh agreement.

NORTH, J.—There are three questions raised in this case. The first I will deal with is the question whether the deed as it stands now is correct or not, or whether the intention of the parties really was something different, and the deed must be put into a right shape so as to represent what was their intention. [His Lordship then, after stating the facts as above, went through the evidence as to the negotiations between the parties, and stated his conclusion that no rectification could be directed on that ground.] Then it is said—and this is the second point—that the deed itself was *ultra vires*, because the board were in effect entering into a bargain which amounted to a settlement of the price to be paid for every future communication made with the sewer of the board, and that this was outside their powers. That would not enable me to say the deed was void. As regards the surface drainage, and as regards the existing houses, it is clear beyond all question that it was most certainly and entirely within their powers. The only question therefore is whether it can be said that they were doing what was beyond their powers as regarded houses that were not in existence at that time, but should be erected afterwards. The words of the section are: [His Lordship read the section set out above.] Now it is said that that conferred a discretionary power upon the board as trustees, or *quasi* trustees, and that they would not exercise that with respect to the sale of property or agreeing for communications to be made, or anything of that sort, except with respect to what was actually being done at the time, and it is said, in effect, that that arrangement was a bargain made with respect to every connection made after its date, of a drain from a house not then existing to the board's sewer either mediately or immediately. It does not seem right to say that under that section the board are acting as trustees in the sense in which it was put. No doubt it is left to them to settle the terms and conditions on which this is to be done, and inasmuch as those terms and conditions were not affecting them individually or personally, but affecting the rate-payers, they were acting on behalf of all persons as to that, but the power to make an arrangement given is to make an arrangement as to the terms and conditions upon which the thing is to be done. There is nothing whatever which enables them to say it shall not be done at all. Under this Act, in case the terms should not be agreed upon, they might be settled by arbitration. Under the Public Health Act, passed in the year 1866, for the first time an additional power was given of having disputes settled by two justices, and that clause in effect is added to the Public Health Act of 1875; but instead of two justices a court of summary jurisdiction is put in, which means the same thing. That being so, it is a case in which, in my opinion, the owner of the adjoining property has a right to have this communication made, and that was decided by Malins, V.C. in the case I have referred to of *The Newington Local Board*

v. *The Cottingham Local Board* (*ubi sup.*). He says (12 Ch. Div. p. 733): "I have paid great attention to the case, which has been ably argued, and I feel bound to come to the conclusion that it is the right of every owner without the district to consider what will be most convenient to him. It cannot I think be better illustrated than by the case of the Botanic Garden, which lies immediately contiguous, so that nothing could be more advantageous to them, nothing more obvious to them, when building upon their ground, than to do that which it would be their duty to do, and drain into the nearest sewer; and that sewer is the sewer of the Cottingham district." I should say that as regards the Botanic Gardens they were the proprietors of I think fifty-five acres of land, which they were proceeding to lay out for building ground with villa residences, so that there was a building estate of a considerable size. Then he proceeds: "That is the right which they have proceeded to exercise, and that is the right which according to my view is clearly conferred upon them by sect. 22 of the Act of 1875, or by the Act of 1866, to which I have just referred, or in the present case by the Public Health Act of 1848, sect. 48 of which I have just read. If that is so there is a right on the part of Mr. Vansittart here to have this sewer made to communicate with the land. The terms no doubt are to be settled and fixed upon by the parties, and, if they cannot agree, the terms are to be settled by arbitration, and when settled by arbitration, notwithstanding any opposition on the part of the board, would be binding, and upon those terms being complied with the right to connect the sewer is to take place. As soon as that is done everything contemplated by the section has been done. The terms and conditions have been agreed upon by the parties, or have been settled for them by a power which has the right to settle them, the connection has taken place, and I do not see how after that anything further remains to be done. It is said the board would be in a difficulty in seeing what terms to settle on, because they could not know what would be done with the land, how many houses might be built on it, or what burthen might be cast on them. That is one of the difficulties they have to deal with, and they must deal with it by taking care that the terms which are provided limit the number of houses, or require a payment in respect of them which will be a fair remuneration for what is done. As Malins, V.C. pointed out in the same case, that is the position of the board. He says: "It appears to me that when the Newington Board entered into this arrangement with the Cottingham Board, they were bound to consider what under the existing law was the chance of the drainage being increased by persons other than those who had a strict right to drain into the Cottingham sewer. They were bound to enter into a calculation how far the sewage would be increased, and to make their sewer of the size which was calculated not only to dispose of the actual sewage, but of that sewage which would be added to it in the exercise of the powers which appear then to have existed, and which undoubtedly exist under the subsequent Act of Parliament. Therefore it is an inconvenience which, as it appears to me, they are bound to suffer, and the right is perfectly clear." Therefore Mr. Vansittart having a right to have this connection made immediately, and all the

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terms of the section carried out immediately, the board must do the best they can for the purpose of fixing the terms, and they must fix them fairly and reasonably, and those terms must be complied with, or else the connection cannot be made, and, as soon as these terms and conditions have been complied with the connection is to be made, and as it seems to me, there is an end of the matter. Under those circumstances the section is equivalent, in my opinion, to the conferring of a right upon the owner of the adjoining land to have this communication made, and for that purpose to use the communication when made for the purpose for which the sewer is made. There are no express words directing it, but I consider that the direction that the communication may be made carries with it the right to do what was the only purpose in contemplation when the arrangement to make the communication is made. Then it is said that this must be limited in some way to the property, in the state in which it actually existed at the time, and that the occupier of premises here, that is to say, the occupier of lands, buildings, or hereditaments who has put the section into play must have this right conferred on him simply with respect to the land as it stood at the time, and so as not to be capable of any alteration, and it was said the case of *Wood v. Saunders (ubi sup.)* was an authority for that. I do not think it is anything of the sort. If the judgment of Hall, V.C. is looked at in the 23rd vol. of the Weekly Reporter, where it is fully set out, instead of in the short note in the Law Reports, it will be seen that what he went on was the terms of the express grant as construed by the various surrounding circumstances disclosed on the face of the deed. It is sufficient to mention one. He considered that the grant of a right of sewage was limited to the present house, because among other reasons the power to alter or convert or make any material or substantial change in that house was expressly negatived by the terms of the deed itself; that is to say, the deed required the house to remain as it was, and the grant of a right of sewage must be considered with reference to the house so remaining. In the present case I do not see anything in the section in terms mentioning the house or premises being in the state in which they were at the time. In the case of an easement, where you have to consider the extent of the easement not by the terms of the grant, because the grant is *ex hypothesi* lost, but simply from what has been done, there is no way of ascertaining the grant except by what has been done under it; but where you have the grant in existence before you, then you do not require to measure it by what has been done under it, you leave the terms of the grant to speak for themselves. In *Williams v. James* (16 L. T. Rep. N. S. 664; L. Rep. 2 C. P. 577) Willes, J. says: "The distinction between a grant and a prescription is obvious. In the case of proving a right by prescription the user of the right is the only evidence. In the case of a grant the language of the instrument can be referred to, and it is of course for the court to construe that language, and in the absence of any clear indication of the intention of the parties the maxim that a grant must be construed most strongly against the grantor must be applied. Accordingly in *South Metropolitan Railway Company v. Edin* (16 C. B. 42), where a grant was produced without stating

the object of the grant, it was the opinion of the judges that the grant was general, and that the way in that case might be used to any part of the land to which the way was granted." Then again, in the case which Mr. Davey mentioned this morning of the *United Land Company v. Great Eastern Railway Company* (29 L. T. Rep. N. S. 498; L. Rep. 17 Eq. 158) it was held that a right of way over a railway was *prima facie* general, and not restricted to purposes to which the land was applicable at the time the right was granted. [His Lordship read the head-note in that case.] Then again, in the case of *Newcomen v. Coulson*, to which I referred Mr. Davey this morning, and which was read, the Master of the Rolls put a very clear interpretation on the word "lands." It was said there that he was dealing simply with the construction of the Inclosure Act, and the award in that particular case, and so he was; but the observations he made on the meaning of the word lands did not turn on its meaning as used there, but on the general meaning of the word lands, just as the word "lands" is used in the interpretation clause as one of the things to which the word "premises" in the 48th section extends. He pointed out there that land meant land in its condition for the time being, and it is not less land in the meaning of the award or the Act because afterwards persons proceed to build houses upon it. That was a case of a right of way to land. In the present case I am dealing with a right to have sewage flowing away from land. It seems to me, for the reasons given by the Master of the Rolls, that the right to have sewage flow from land means a right to have it flow from the land with such houses upon it as may be existing at the time the right is being exercised, and we have nothing to do with the houses existing upon it at the time the grant is made. Then in a more recent case which I will refer to without going into detail (*Finch v. Great Western Railway Company*, 41 L. T. Rep. N. S. 731; 5 Ex. Div. 254), the whole law was fully gone into, and *Newcomen v. Coulson* recognised and followed. Those cases satisfy me beyond all doubt that the proper construction to be put on the word "premises" as used in this section is not premises in the state in which they are at the time the grant was made, the Act passed, or the arrangement come to, but that it means the premises in all time according to the state in which they are at the time. It was said that it was almost impossible to believe that such can be the true construction of the Act, because the result is so disastrous to the board. To begin with, if it was within their powers its turning out badly for them would not affect it, but it seems to me that in reality there was nothing improvident or unreasonable about it. Whether the terms arrived at were good or bad I have no means of judging, but it seems to me the board were in a position to judge what burden the existence of the sewer would under all the circumstances under which it might be used cast upon them; and I see no reason to doubt that they considered that 10% a year, coupled with the cost, which must have been considerable, of making the drains stipulated for was a fair payment in return for what was required. It is quite true that events have taken place afterwards which were not in the contemplation of the parties that would make it desirable to throw a larger burden upon the person who owns the

houses here which drain through this system of sewage of the local board, but it does not appear to me that that affects the question in reality at all. There is one other observation which I wish to make. At the time when this Act was passed other Acts were passed giving similar powers under similar circumstances. Of course it may be said that the construction of one Act does not throw much light on the construction of other Acts. But I think it not immaterial to refer to the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), which was passed in 1847; the 34th section contains a provision that "any owner or occupier of any lands beyond the limits of the special Act . . . may with the consent of the commissioners first obtained in writing, upon payment to them of a reasonable sum of money to be agreed upon between them . . . cause to branch into and to communicate with any sewers belonging to the commissioners any sewer or drain in respect of the said property which may be lawfully made therefrom, of such size and manner of communication as the commissioners approve of." Now the reasonable sum referred to there must necessarily be a reasonable sum to be paid at the time once for all, satisfying everything that would have to be paid to obtain the privileges conferred by the Act. And though the words of that section are different from the 48th section of the Public Health Act, yet they show that at that time what was contemplated was a provision made once for all like the provision which I consider was contemplated by the 48th section of the Public Health Act. [His Lordship then examined the evidence upon the point whether the agreement had been entered into on the footing that the local board would be permitted to continue to discharge their sewage into the Thames, and concluded:] It seems to me that the operation of the deed was not in any way limited or intended to be limited to the time when the sewage flowed into the Thames by the old outfall, and therefore that that part of the contention cannot be supported. Under these circumstances the action must be dismissed with costs.

Solicitors for the plaintiffs, *A. Scott Lawson*, for *C. T. Phillips*, Windsor.

Solicitors for the trustees of *Mr. Vansittart's* will, *G. L. P. Eyre and Co.*, for *Long, Durnford*, and *Lovegrove*, New Windsor.

Solicitors for the other defendants, *Longbourne, Longbourne*, and *Stevens*; *Markby, Wilde*, and *Burra*.

#### QUEEN'S BENCH DIVISION.

*Tuesday, March 25, 1884.*

(Before *DAY* and *SMITH, JJ.*)

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF OVER DARWEN v. THE JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER. (a)

*Highways—Maintenance of main roads—Contribution by county authority—Borough having no separate court of quarter sessions—"County"—The Highways and Locomotives Act 1878 (41 & 42 Vict. c. 77), ss. 13, 14, 38—The Highway Act 1862 (25 & 26 Vict. c. 61), s. 2.*

*By the 13th section of the Highways and Locomo-*

*tives Act 1878 (41 & 42 Vict. c. 77) it is provided that "for the purposes of this Act and subject to its provisions any road which has, within the period between the 31st day of December 1870 and the date of the passing of the Act, ceased to be a turnpike road, and any road which, being at the time of the passing of the Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road, and one half of the expenses incurred from and after the 29th day of September 1878 by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction."*

*By the 38th section "in this Act 'county' has the same meaning as it has in the Highway Act 1862 and 1864."*

*By the 2nd section of the Highway Act 1862 (25 & 26 Vict. c. 61) "the word 'county' in this Act shall not include a 'county of a city' or 'a county of a town,' but where a county, as hereinbefore defined, is divided into ridings or other divisions, having a separate court of quarter sessions of the peace, it shall mean each such division or riding, and not the entire county, and for the purposes of this Act all liberties and franchises, except the liberty of St. Alban's, which shall be considered a county, and except boroughs as hereinafter defined, shall be considered as forming part of that county by which they are surrounded, or, if partly surrounded by two or more counties, then as forming part of that county with which they have the longest common boundary; the word 'borough' shall mean a borough as defined by 5 & 6 Will. 4, c. 76."*

*A part of a road which ceased to be a turnpike road in 1877, being situate within the limits of the borough of O. D., a highway area within the meaning of the 13th section of the Highways and Locomotives Act 1878, the highway authority of O. D. sought to recover from the county authority of the county of L., in which O. D. is geographically situate, one-half of the expenses of the maintenance of the said road, which they alleged to be due to them under the 13th section of the Act of 1878.*

*Held, on special case stated by consent, that the word "county" in the said section was used in a geographical sense, and not in the sense assigned to it in the 2nd section of the Highway Act 1862 (excluding boroughs), and that the piece of road in question being situate in the county of L. within the meaning of the section, the county authority were bound to contribute to its maintenance.*

*THIS was a special case stated for the opinion of the court by agreement between the parties in an action in which the mayor, aldermen, and burgesses of the borough of Over Darwen sought to recover from the justices of the peace for the county of Lancaster the sum of 185l. 13s. 6d., being one-half of the total amount of expenses incurred by the said corporation as highway authority of the said borough in the repair of*

(a) Reported by *J. SMITH, Esq., Barrister-at-Law.*



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a certain road within their area, which they alleged they were entitled to recover from the said justices under the 13th section of the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77).

The special case was, so far as material, as follows:—

The plaintiffs in this action are the mayor, aldermen, and burgesses of the borough of Over Darwen, in the county of Lancaster (hereinafter called "the corporation") and are the highway authority of the said borough, and the said borough is a highway area within the meaning of the Highways and Locomotive Amendment Act 1878.

The defendants are the justices of the peace for the county of Lancaster (hereinafter called the "county authority"). The said justices assembled in annual general session pursuant to the provisions of 38 Geo. 3, c. 58, are the county authority as defined by the Highways (and Locomotives Amendment) Act 1878, and the said justices assembled as aforesaid at the annual general session held on the 26th Dec. 1878 did by order declare under the powers in them vested by the 20th section of the last-mentioned Act, that the contributions towards the expenses incurred in repairing the main roads within the hundred of Blackburn should be paid out of a separate rate to be raised and charged upon the said hundred of Blackburn.

The parties have agreed to concur in stating the facts and circumstances in the form of a special case for the opinion of the High Court of Justice, Queen's Bench Division, in manner hereinafter appearing.

The town of Over Darwen was incorporated on the 22nd March 1878, prior to which time, and as from the year 1854, it was a local board district under the Public Health Acts 1848 to 1875; at the time of its incorporation it consisted solely of the township of Over Darwen, but by the Over Darwen Improvement Act 1879 the borough boundaries were extended so as to include part of the township of Lower Darwen.

The Bolton and Blackburn turnpike road was constructed by turnpike trustees under an Act passed in the eleventh year of the reign of His Majesty King George the Fourth, intituled "An Act for more effectually repairing and improving the road from Bolton-le-Moors to Blackburn, in the County Palatine of Lancaster, with two branches of road therefrom, and for making and maintaining a branch of road to or near the village of Lower Darwen," which Act was renewed in 1862 by an Act intituled, "An Act for repairing and maintaining the road from the borough of Bolton to the borough of Blackburn, and a branch road connected therewith in the County Palatine of Lancaster."

The said Bolton and Blackburn road passes through the borough of Over Darwen.

The whole of the said roads constructed under the provisions of the Acts in the fourth paragraph hereof mentioned have ceased to be turnpike roads, the last collection of tolls having taken place on the 20th July 1877, and the last meeting of the trustees on the 19th Dec. 1877.

The said borough has no separate court of quarter sessions, but the townships or parts of townships comprised within its boundary are assessed and contribute to the said separate rate

raised and charged upon the said hundred of Blackburn.

The Towns Improvement Act 1847 has not been incorporated with any local Act in force within the borough.

In 1878 was passed the Highways and Locomotives Amendment (41 & 42 Vict. c. 77), s. 13 of which enacts that:

For the purposes of this Act and subject to its provisions any road which has within the period between the 31st day of December 1870 and the date of the passing of the Act ceased to be a turnpike road, and any road which being at the time of the passing of the Act a turnpike road may afterwards cease to be such, shall be deemed to be a main road, and one-half of the expenses incurred from and after the 29th day of September 1878 by the highway authority in the maintenance of such road shall as to every part thereof which is within the limits of any highway area be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction.

The said corporation, as such highway authority as aforesaid, have, under sect. 13 of the said Act, 41 & 42 Vict. c. 77, demanded from the said justices payment of one-half of the expenses incurred by the said corporation as such highway authority as aforesaid for the year ending the 25th March 1883 in the maintenance of so much of the said Bolton and Blackburn main road as is situate within the borough aforesaid.

For the purposes of this case it is admitted that the said road has been and is satisfactorily maintained within the said borough. It is also agreed that no objection shall be taken to an order for payment as hereinafter mentioned, upon the ground that no formal certificate of such satisfactory maintenance has been in fact given.

The total amount of expenses incurred by the corporation as such highway authority upon the said road within their area within the said period is 371l. 6s. 11d., and one-half thereof amounts to the sum of 185l. 13s. 6d.

The county authority refuses to pay the said sum or any part thereof.

The question for the opinion of this honourable court is: Whether the said county authority, under the circumstances above stated, is liable by virtue of the Highways and Locomotives Amendment Act 1878, or otherwise, to pay out of the said county rate the said sum above demanded, or any part thereof.

In case the court shall be of opinion that the said county authority is so liable, judgment with costs is to be entered for the plaintiffs; otherwise for the defendants with costs.

The 38th section of the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77) is, so far as material:

In this Act "county" has the same meaning as it has in the Highway Acts 1862 and 1864, except that every liberty not being assessable to the county rate of the county or counties within which it is locally situate shall, for the purposes of this Act, other than those relating to the formation and alteration of highway districts, and the transfer of the powers of a highway board, be deemed to be a separate county.

The 2nd section of the Highway Act 1862 (25 & 26 Vict. c. 61) is:

The word "county" in this Act shall not include a "county of a city" or a "county of a town," but where a county, as hereinbefore defined, is divided into ridings



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or other divisions having a separate court of quarter sessions of the peace, it shall mean each such division or riding and not the entire county, and for the purposes of this Act all liberties and franchises, except the liberty of Saint Albans, which shall be considered a county, and except boroughs as hereinafter defined, shall be considered as forming part of that county by which they are surrounded, or if partly surrounded by two or more counties, then as forming part of that county with which they have the longest common boundary; the word "borough" shall mean a borough as defined by the Act of the session holden in the fifth and sixth years of King William the Fourth, chapter seventy-six, "for the regulation of municipal corporations in England and Wales," or any place to which the provisions of the said Act have been or shall hereafter have been extended.

*Henn Collins*, Q.C. for the plaintiffs.—The borough of Over Darwen is clearly entitled under the 13th section of this Act to be paid by the county authority one-half of the expenses incurred in the maintenance of this road, since it is admitted in the case that it is a road which ceased to be a turnpike road between the 31st Dec. 1870 and the passing of the Act. [DAY, J.—On what point do the defendants rely?]

*Gorst*, Q.C. (with him *Blair*).—The defendants rely upon the interpretation clause of the Act of 1878. The 38th section says that the word "county" is to have the same meaning as in the Highway Acts 1862 and 1864, and the meaning of the word in those statutes is given in the 2nd section of the Act of 1862, the Act of 1864 making no alteration on this point. That section excepts boroughs from liberties and franchises which are to form part of the counties by which they are surrounded, and says that boroughs shall not form part thereof. This piece of road in respect of which the plaintiffs are claiming is in the borough of Over Darwen, and, as the borough of Over Darwen does not form part of the county of Lancaster, the road which is part of the borough is not situate in the county, and therefore the county authority are not under the section liable to make any payment in respect thereof. At the time the Act of 1878 was passed the turnpike trusts were expiring, and the rural highway areas through which the old turnpikes passed were becoming liable for the expenses of their maintenance. The object of the Act was to relieve these rural areas, and to effect this it provided that half the expense was to be paid to them by the county and half of the rest from the Consolidated Fund, leaving them only one-fourth of the expense. This intention of the Legislature is quite clear and intelligible, and it is equally clear that no Act would ever be passed with the object of relieving populous boroughs from the expense of the maintenance of their own streets. The borough of Over Darwen is here seeking to receive a contribution from the county in order to be relieved from all but one-fourth of the expense of the maintenance of its main streets. The court will therefore look narrowly at these statutes, and if possible exclude boroughs from the operation of this 13th section of the Act of 1878. The 2nd section of the Act of 1862 excludes boroughs from their counties. [DAY, J.—The section seems to treat boroughs as either liberties or franchises. Otherwise it is ungrammatical.] It is ungrammatical, but there looms out of the section an intention to exclude boroughs from counties, and that being so, this road is not situate in a county within the meaning of the 13th section. If Over Darwen were in the county the county authority could make bye-laws

as to this road within it, so as, for instance, to erect a gate across it in the main street; but they have no such power, the right to make bye-laws resting with the Over Darwen authorities.

*Henn Collins* in reply.—In the 13th section of the Act of 1878 the word "county" is used as a geographical expression, and not in any technical sense such as is suggested. It was not the intention of the Legislature to exclude such boroughs as Over Darwen from the operation of this section. The whole of the section is not set out in the case. It goes on, "Provided that no part of such expenses shall be included in (1) any precept or warrant for the levying or collection of county rates within the metropolis, subject and without prejudice to any provision to be hereafter made; or (2) any order made on the council of any borough having a separate court of quarter sessions under sect. 117 of the Municipal Corporation Act 1835." Therefore, if the borough of Over Darwen is excluded from getting a contribution from the county under this section, it will be compelled, as it has no separate court of quarter sessions, to contribute fully to the county rate, and will at the same time have to bear all the expense of the maintenance of its own streets, and this could never have been intended by the Legislature. Further, this case is concluded by the case of *The Justices of Lancashire v. The Mayor, &c., of Rochdale* (44 L. T. Rep. N. S. 316; 45 Ib. 425; 49 Ib. 368; 6 Q. B. Div. 525; 8 Ib. 12; 8 App. Cas. 494). There this point was taken in argument and disregarded by the noble and learned Lords who decided the case. [DAY, J.—If, in reading this Act, the word "county" is taken as a geographical expression, would it not include all boroughs, including those having separate quarter sessions, which cannot be called on to contribute to the county rate? No, the 13th section applies only to every part of such road "which is within the limits of any highway area," and the 14th section describes highway areas as follows: "The following areas shall be deemed to be highway areas for the purposes of this Act; that is to say, (1) urban sanitary districts, (2) highway districts, (3) highway parishes not included within any highway district or any urban sanitary district. Then the 38th section says that "urban sanitary district" means in the Act the districts declared to be urban sanitary districts by the Public Health Act 1875, "except that for the purposes of this Act no borough having a separate court of quarter sessions, and no part of any such borough, shall be deemed to be or to be included in any such district." The streets, therefore, of boroughs having separate courts of quarter sessions are not within the limits of any highway area, and so not within the operation of the 13th section. Such boroughs therefore neither contribute anything to nor receive anything from the county authority or the county rate. Lastly, the decision of the House of Lords in *The Justices of the West Riding of Yorkshire v. The Mayor, &c., of Sheffield* (49 L. T. Rep. N. S. 786; 8 App. Cas. 781) is inconsistent with the plaintiffs' argument, although it is true that the point does not appear to have been taken in that case.

DAY, J.—This case comes before the court in the form of a special case stated by agreement between the parties, and raises for our consideration a point which is by no means free from

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difficulty, and in this case the difficulty does not arise from the intricacy of the facts set out in the special case, but from the inconvenient language used and the inconvenient form of legislation adopted by the Legislature in the enactments which we have to consider in connection with the facts. In endeavouring to find out their meaning we are directed from one statute to another, and, as if this were not complicated enough, the individual sections to which we are directed are difficult to understand on account of the badness of the grammar in which they are expressed. On the best construction I am able to put upon these statutes and these sections I think that the plaintiffs are entitled to judgment. The claim put forward by the plaintiffs is based on the 13th section of the Act of 1878 set out in the special case, and they allege that they are the highway authority of the highway area within the limits of which is a part of a road—being one of the roads with which the section was intended to deal—in the maintenance of which they have as such highway authority incurred certain expenses, and they further say that the defendants are within the meaning of the section the county authority of the county within which such road is situate, and that they are therefore entitled under the section to be paid by them one-half of the expenses so incurred in the maintenance of the road. Now *prima facie* no question arises at all if the defendants are really the "county authority of the county in which such road is situate;" but the learned counsel for the defendants very properly at the commencement of the argument called attention to the fact that the Legislature have later on in the statute said what they meant by the word "county" therein. It is interpreted by the 38th section of the Act, in which we find that the word is in this Act to have the same meaning as it has in the Highway Acts 1862 and 1864. We have, therefore, to turn back to the Act of 1862 to find its meaning, and in the 2nd section of that Act we find these words, which we have to construe and, if possible, discover what they mean. "The word 'county' in this Act," says the section, "shall not include a 'county of a city' or 'a county of a town,' but where a county as hereinbefore defined is divided into ridings or other divisions having a separate court of quarter sessions of the peace, it shall mean each such division or riding, and not the entire county." So far this is a definition by saying what the "word" is not to mean, which is, as far as it goes, intelligible; but then the section goes on, "and for the purposes of this Act all liberties and franchises, except the liberty of St. Albans, which shall be considered a county, and except boroughs as hereinafter defined, shall be considered as forming part of that county by which they are surrounded." Therefore boroughs, it seems, are excepted from the class called "liberties and franchises," which are to be considered as forming part of the county by which they are surrounded, and, difficult as it really is to come to the conclusion that this is an enactment of the Legislature to the effect that boroughs are not considered as forming part of the counties in which they are situate, I suppose that that was the meaning of the Legislature. I am not able to put any other meaning upon the words, nor can I guess what they mean other than this. I can

only suppose that the Legislature did pass this Act meaning that boroughs were not to be included in the counties by which they are surrounded. The words really have no meaning in the strict sense of the term, but I am constrained to attempt to guess what the persons who framed this section meant and have utterly failed to convey. Boroughs then are not for the purposes of that Act to be deemed parts of the counties by which they are surrounded. Assuming that to be the meaning of the section, what bearing has it on this case? Does it mean that, whenever the word "county" is used, we are in construing the passage to eliminate boroughs from its meaning? It seems to me that it is not necessary to put so large a meaning as this on this definition section. I think that the use of the word "county" as a geographical expression may notwithstanding this section have still been retained by the Legislature, and that, where it is necessary that the word should have its ordinary geographical meaning, that meaning may nevertheless be assigned to it. Although then, where boroughs are spoken of in these Acts, they are not to be considered as forming parts of their counties, we may still assume, where it is necessary so to do, that the word "county" is used in a geographical sense, because it is difficult to see how a borough can be county at all except in a geographical sense, and the words used in the section show that the Legislature contemplated that both "a county of a city," and "a county of a town" might both be supposed to be in a county in some sense of the word, that is to say, in its ordinary geographical sense. Boroughs according to the section are not to be considered parts of their counties, but the section does not say that they are not to remain where they found themselves before the Act, or that this borough was after the passing of the Act no longer to be situate in the county of Lancaster. How does this affect the present case? I turn to the 13th section of the Act of 1878, and there I find that in the case of the roads there mentioned "one-half of the expenses incurred from and after Sept. 29, 1878, by the highway authority in the maintenance of such road shall as to every part thereof which is within the limits of any highway area be paid to the highway authority of such area by the county authority of the county in which such road is situate." I think that this means the county authority of the geographical county in which the road is situated; that is, in the present case, the county of Lancaster. This seems to me to be an intelligible meaning to put upon the words, and I think it is possible to reconcile this view with the meaning of the Legislature, since a borough may very well be no part of a county but may still be together, of course, with its roads within it. This view seems to me to reconcile the difficulties raised upon the one side and upon the other, for, further, on looking at the 14th section of the Act, we find a description of what areas are to be deemed highway areas, among them being "urban sanitary districts," and on turning to the 38th, the interpretation section, we find under the heading of "urban sanitary district," that for the purposes of the Act "no borough having a separate court of quarter sessions, and no part of any such borough, shall be deemed to be or to be included in any such district," while the latter part of the

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13th section provides that no part of the expenses of these roads is to be included by the county in any order made on the council of any borough having a separate court of quarter sessions. A borough, therefore, having a separate court of quarter sessions would not on the one hand be called upon to contribute to the county burdens, and on the other would not be within a highway area, and so at liberty to recover from the county a portion of the cost of repairing the roads within its limits. On the other hand, it would be very unreasonable that a borough which has no separate court of quarter sessions, and therefore does contribute to the county rate in respect of these expenses, should not have the benefit of getting its due contribution from the county towards mending the roads which pass within its limits. In this way I think it is possible to get a reasonable construction of the section, and on these grounds I think that the plaintiffs are entitled to our judgment in their favour.

SMITH, J.—This is an action brought by the mayor, aldermen, and burgesses of the borough of Over Darwen against the justices of Lancashire to recover 185l. 13s. 6d., which is one-half of the expenses they have incurred in the maintenance of a road which passes through the borough. The plaintiffs make their claim under the 13th section of the Highways and Locomotives Amendment Act 1878, and the sole point which arises for our decision is, whether the county authority of the county of Lancaster are within the meaning of this section the county authority of the county in which this road in question is situate, the objection taken being, that the road being situate in a borough, and a borough being

cluded from the meaning of the word "county" as defined by the 2nd section of the Act of 1862, the road is not situate in the county. Now this very point was taken in the case of *The Justices of Lancashire v. The Mayor, &c. of Rochdale* (44 L. T. Rep. N. S. 316; 45 L. T. Rep. N. S. 425; 49 L. T. Rep. N. S. 368; 6 Q. B. Div. 525; 8 Q. B. Div. 12; 8 App. Cas. 494), a case which went to the House of Lords, and there is no doubt that the learned counsel who appear for the respondents in this case, and who also took part in the Rochdale case, argued this point before the House of Lords, the result being that Lord Blackburn, in giving judgment in favour of the justices, said that he did not attribute much weight to it, while the other three members of the court discarded it altogether. Again, in the case of *The Justices of the West Riding of Yorkshire v. The Mayor, &c. of Sheffield* (49 L. T. Rep. N. S. 786; 8 App. Cas. 781) this point would have been decisive, but it does not appear on the face of the reports that the point was taken there, which is the more possible, as the learned counsel for the respondents took no part in that case. It becomes necessary, therefore, for us to determine the meaning of this 13th section with regard to this point that has been raised, and the view which recommends itself to me is this: The 38th section of the Act says that the word "county" is to have therein the same meaning as it has in the Highway Acts 1862 and 1864. We then turn to the 2nd section of the Act of 1862, and it seems to me that the difficulty raised by it is not insuperable. "The word 'county' in this Act," it is there said, "shall not include a 'county of a city,' or 'a county of a town,' but where a county as hereinbefore defined

is divided into ridings or other divisions having a separate court of quarter sessions of the peace, it shall mean each such division or riding, and not the entire county." I think that we may pause there, and say that that is the meaning to be attached to the word "county" by the Act of 1862, and that all the rest of the section refers only to what is to be done for the purposes of that Act, and is not really part of the definition of the word "county." Whether this is or is not a correct view I quite agree with all that my brother Day has said, and I think that the justices of Lancashire are the county authority of the county in which this road is situate within the meaning of this section, and are rightly called upon to pay the half share of the expenses of its maintenance which the section says is to be paid by them.

#### Judgment for the plaintiffs.

Solicitors for the plaintiffs, Pritchard, Englefield, and Co., for C. Costeker, Over Darwen.

Solicitors for the defendants, Biddale and Son, for Wilson and Hulton, Preston.

Dec. 1 and 2, 1884.

(Before GROVE and HAWKINS, JJ.)

RIDGWAY (app.) v. WARD (resp.). (a)

*Bread, sale of—Baker not provided with scales and weights—Delivery of bread from a cart at a customer's house in pursuance of a previous order—6 & 7 Will. 4, c. 37, s. 7.*

By 6 & 7 Will. 4, c. 37, s. 7, "Every baker or seller of bread . . . who shall convey or carry out bread for sale in and from any cart or other carriage shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales, with proper weights . . . and in case any such baker or seller of bread . . . shall at any time carry out or deliver any bread without being provided with such beam and scales with proper weights . . . then, and in every such case, every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding five pounds."

*Held, that this section applies to cases where bread is delivered in pursuance of a previous order, and not merely to cases where the baker sends out bread for sale in a cart.*

CASE stated by justices.

1. The appellant was convicted before us at a petty sessions held at Cheadle on the 23rd May 1884, on an information which charged "that he being a baker of bread carrying on business at Longton, on the 10th April 1884, at the parish of Draycott, did unlawfully cause his servant to carry out and deliver bread from a cart without being provided with a correct beam and scales, with proper weights, contrary to 6 & 7 Will. 4, c. 37, s. 7."

2. The following facts were proved before us:

(1.) The appellant, George Ridgway, is a grocer, provision dealer, and baker, carrying on business amongst other places at a shop in Longton. On the 10th April 1884 the appellant's manager caused his servant, one Bernard Swainey, to take and deliver to Miss Ratcliffe, a customer who resided at Draycott, which was some miles distant from the shop of the said George Ridgway at

(a) Reported by H. D. BOWEN, Esq., Barrister-at-Law.

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RIDGWAY (app.) v. WARD (resp.).

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Longton, amongst certain articles of grocery, a quartern loaf of bread from a cart, not at the time being provided with weights and scales mentioned in the 6th and 7th sections of the Act.

(2.) The appellant's traveller had called at Miss Ratcliffe's house on the 9th April 1884, and had taken from her an order for a quartern loaf of bread at the price of 5d., and certain articles of grocery which were together under the value of 10l.

(3.) The order so given by Miss Ratcliffe was entered in a book by the appellant's traveller at the time, and was on the same day given by him to the manager of the appellant's shop at Longton to make up.

(4.) The goods ordered by the customer of the traveller, including the quartern loaf of bread, were selected and appropriated by the manager on the 10th April 1884. The loaf was, immediately prior to being placed with the remainder of the goods set apart for the customer, weighed by the manager, and found to be of the required weight of 4lb.

(5.) The goods so ordered were delivered by Bernard Swainey, a servant of the appellant, to Miss Ratcliffe, on the 10th April, who paid the traveller on the 23rd April 1884 for the goods supplied in pursuance of the order given on the 9th April preceding.

(6.) The usual course of dealing between the appellant and Miss Ratcliffe was that the traveller should receive an order for goods on one Wednesday, that the goods should be delivered on the following day, and that payment should be made by Miss Ratcliffe for such goods to the traveller on his next subsequent visit.

(7.) The cart from which Bernard Swainey, the appellant's servant, delivered the goods to Miss Ratcliffe was despatched by the manager, on the morning of the 10th April 1884, and contained parcels of goods, all of which had been previously ordered by customers in a similar manner to those ordered by Miss Ratcliffe, and contained no bread or articles which had not been so ordered.

(8.) The loaf of bread so ordered and delivered to Miss Ratcliffe was afterwards weighed by her own scales, and found to be of the full weight of 4lb.

3. It was contended on behalf of the appellant that he was not obliged to provide his cart with weights and scales when he went to deliver the bread under the circumstances set forth. That the sale took place when the order for the loaf of bread had been given and accepted, and the loaf had been appropriated.

4. It was also contended that 6 & 7 Will. 4, c. 37, s. 7, applied only to bakers or sellers of bread who should convey and carry out bread for sale, and their journeymen, servants, or persons employed by them.

5. We considered it doubtful whether under the circumstances set forth the sale was complete until delivery, and we considered that in point of law there was nothing to alter the defendant's position from that of a baker to a carrier. We also thought that the circumstances in *Robinson v. Cliff* (34 L. T. Rep. N. S. 689; 1 Ex. Div. 294; 45 L. J. 109, M. C.) were so nearly identical with the circumstances in this case that we were bound on the authority of that case to convict, and we accordingly convicted the defendant in the penalty

of 1s. and costs, and agreed to grant a case on the application of the defendant's solicitor.

6. If our decision is right the conviction is to stand, but if otherwise the summons is to be dismissed.

*John Rose* for the appellant.—The Legislature intended to provide for the sale of bread under two different circumstances, one being when the sale takes place in the baker's shop, and the other when the baker is hawking bread in a cart; and the Act does not apply to such a case as this, where there is a delivery of a specific loaf previously sold. [HAWKINS, J.—When do you say the loaf was sold?] No doubt that is a difficult question to answer, but I submit the sale took place when the loaf was appropriated by the baker to that particular order. It is not necessary for me to go so far as to say that the sale was completed so as to include the right of rejection by the purchaser. The vendor may be the agent of the purchaser for the purpose of selecting the goods sold (Benjamin on Sales, 2nd edit. p. 265), and in this case the selection of the loaf by the appellant's manager was a selection by the purchaser's agent under the circumstances of this case. I admit that, unless I can distinguish the case of *Robinson v. Cliff* (34 L. T. Rep. N. S. 689; 1 Ex. Div. 294) from this case, it is an authority against my contention, but there the bread was taken out for sale in the cart, and there was no previous order; the facts are entirely different. The judgment of Denman, J. in that case is in favour of the contention that the statute does not apply to a case where the bread is delivered in pursuance of a previous sale.

*Dec. 2.*—GROVE, J.—In this case, which was argued yesterday by Mr. Rose on behalf of the appellant, I have come to the conclusion that the appeal must fail. The appellant was convicted on an information which charged him with having unlawfully caused his servant to carry out and deliver bread from a cart without being provided with a correct beam and scales with proper weights, contrary to 6 & 7 Will. 4, c. 37, s. 7. The facts proved were, that the appellant's manager, the appellant being a grocer, provision dealer, and baker, having a shop at Longton amongst other places, caused his servant to deliver to a customer, who resided some miles distant from the shop at Longton, certain articles of grocery and a quartern loaf of bread from a cart not at the time being provided with weights and scales. The appellant's traveller had called at the customer's house on the 9th April 1884, and she gave him an order for a loaf of bread and certain other articles of grocery. The order was entered in a book by the traveller at the time, and on the following day the goods, including the loaf of bread, were selected and set apart by the manager, and on the same day they were delivered to the customer. The usual course of dealing between the appellant and the customer was, that the traveller should receive an order for goods on one Wednesday, that the goods should be delivered on the following day, and that payment should be made to the traveller on his next subsequent visit. The cart from which the appellant's manager delivered the goods was despatched by the manager on the morning of the 10th April, and contained parcels of goods, all of which had been previously ordered in a similar manner to those

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ordered by Miss Ratcliffe. The question is, whether the cart ought to have been provided with scales. It was contended that the statute only applies to a baker who, besides selling bread in his shop, sends a cart round the country hawking bread. The contention on the other hand is, that it applies to any baker who delivers bread to a customer, whether ordered before or not. The 6th section enacts that "every baker or seller of bread, beyond the limits aforesaid, shall cause to be fixed in some conspicuous part of his, her, or their shop, on or near the counter, a beam and scales with proper weights or other sufficient balance, in order that all bread there sold may from time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid." That section is material to this case, inasmuch as it shows what the object of the statute is; but the section on which this case turns is the 7th, which provides that "every baker or seller of bread, beyond the limits aforesaid, and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with, and shall constantly carry in such cart or other carriage, a correct beam and scales with proper weights or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his or her journeyman, servant, or other person, may from time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid; and in case any such baker or seller of bread, or his or her journeyman, servant, or other person, shall at any time carry out and deliver any bread without being provided with such beam and scales with proper weights or other sufficient balance, or whose weights shall be deficient, &c." Now it is contended on behalf of the appellant that the true construction of this section is, that it only applies to a baker who hawks bread about; that is to say, it only applies when the whole transaction of sale takes place when the bread is delivered, and that it does not apply to those cases where the bread is delivered in consequence of a previous order. I am of opinion that this construction is too limited, and that the Act goes further. It is extremely important, when any difficulty arises on the construction of a statute, to look at the object sought to be effected by the Act. Here the object of the Act was to provide that whenever the bread is delivered the purchaser is to have an opportunity of seeing it weighed. If this were not so the Act would to a great extent be inoperative, because I think the majority of people order what bread they require before it is sent round for delivery in the baker's cart, and all such cases would be outside the Act if the true construction is that the Act only applies to those cases where the whole transaction of sale takes place at the time when the bread is delivered. In my opinion the whole object of the statute is to enable the customer to have the bread weighed when it is delivered. I need not decide whether it would be necessary for the baker to be provided with scales and weights on delivery in a case where the customer goes to the shop, sees the loaf weighed, and then, instead of taking it away, asks the baker to send it; but probably such a case would not be within the meaning of the section; that is not the case here. If the first part of the 7th

section stood alone, which provides that every baker or seller of bread who conveys or carries out bread for sale in and from any cart or carriage shall be provided with weights and scales, it might be said that it applied only to those cases where the bread was taken out for sale and not merely for delivery; but the object of the Act is clearly indicated by the words, "in order that all bread sold by every such baker or seller of bread, and by his or her journeyman, servant, or other person, may from time to time be weighed in the presence of the purchaser or purchasers thereof." Then the section goes on to enact that, in case any such baker or seller of bread shall at any time "carry out and deliver any bread without being provided with such beam and scales," &c.; and I think those words "carry out and deliver" are important as showing clearly that the object of the Act is to provide an opportunity to the customer of having the bread weighed on delivery. This also seems to be the view taken by the court in the case of *Robinson v. Cliff* (*ubi sup.*). Bramwell, B. there says: "The statute is somewhat peculiar in its provisions and contains minute regulations. I incline to think that the counsel for the appellant was so far correct in contending that the earlier part of sect. 7 is applicable to hawkers of bread only, and that sect. 6 relates to bakers who keep shops; but then it seems to me clear that the penal clause in sect. 7 applies to the sale and delivery of bread by both classes of bakers. I doubt whether the appellant took out the bread in his cart 'for sale;' but, at any rate, he took it out for the purpose of delivery; and the words in the penal portion of the 7th section are 'shall at any time carry out and deliver any bread,' which must mean delivery after a previous sale, and therefore the appellant is liable to be convicted for an unlawful delivery, even although the words 'for sale' be read in after the words 'carry out.'" In the same case Mellor, J. says: "The statute seems to have contemplated three occasions upon which a customer ought to have an opportunity of weighing the bread which he buys—first, it may be sold at a shop; secondly, it may be sent out and sold to promiscuous customers; thirdly, it may be delivered at the house of a customer who has given a previous order. It is proper that a customer on each of these occasions should have the opportunity of protecting himself by causing the bread to be weighed; and if the baker were not obliged to provide himself with scales, the customer might have no means of ascertaining whether the proper weight is delivered to him." It is true that the judgment of Denman, J. is based on different grounds, but I do not think it really assists the appellant's contention in this case. He says: "In my opinion the words 'for sale in and from any cart or other carriage' in the 7th section were inserted in order to prevent it from extending to cases where the bread is merely in transit from one place to another, or is being taken out for charitable purposes, as, for instance, to be given to the poor, or where it is carried about for delivery in baskets without a cart." I agree that the section would not apply where there is no sale, as in the case of a gift to a poor person or some charitable institution, for then the baker can give more or less as he pleases. At any rate the judgments of Bramwell, B. and Mellor, J. are directly applicable

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to this case. No doubt the facts in that case were different, because there the baker, or his servant, went to the customer's house to get an order, and it may be said that there was no previous bargain and sale, but the judgment of the court did not turn on that point. Mr. Rose contended that the sale of the bread in this case should be construed in the same way as any mercantile sale, and referred to Benjamin on Sales, p. 265, 2nd edition, where there is a quotation from Blackburn on Sales, that "where from the terms of an executory agreement to sell unspecified goods the vendor is to despatch the goods, or do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the despatch or other act has commenced, for then an application is made finally and conclusively by the authority conferred in the agreement, and, in Lord Coke's language, 'the certainty, and thereby the property begins by election.'" But, in my judgment, the question whether the property passed at any particular moment is not material to the decision of this case, because, as I have said before, the object of the Act was to prevent fraud, and to give the purchaser an opportunity of having the bread weighed at the time of delivery. I am therefore of opinion that the conviction must be affirmed.

HAWKINS, J.—In the course of the argument I had considerable doubt whether the statute applied to this case, but I have come to the conclusion that it does, and that this conviction must be affirmed. The 4th section of the Act enacts that all bread shall be sold by weight, the words being, "that from and after the commencement of this Act all bread sold beyond the limits aforesaid shall be sold by the several bakers or sellers of bread respectively beyond the said limits by weight." The 6th section provides that every baker shall cause to be fixed in some conspicuous part of his shop, on or near the counter, a beam and scales, with proper weights, in order that all bread there sold may from time to time be weighed in the presence of the purchaser. Then comes the 7th section, where it is enacted "that every baker or seller of bread beyond the limits aforesaid, and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales, with proper weights or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his or her journeyman, servant, or other person, may from time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid." It is clear from those words that the object of the Act is that the bread should be sold by weight, and that the purchaser should have an opportunity of seeing that it was of the proper weight. The same section then goes on to say that, "in case any such baker or seller of bread, or his or her journeyman, servant, or other person, shall at any time carry out and deliver any bread without being provided with such beam and scales, &c.," he shall be liable to a penalty. So that the first part of the section throws on the baker a liability to provide proper scales and weights, and the latter part imposes a penalty if he should "carry

out or deliver" any bread without being provided with scales and weights. Now, apply these sections to the present case. I do not think the case of *Robinson v. Cliff* covers this case, because there the facts were entirely different. In that case it is perfectly certain there had been no sale until the cart drove up to the house of the customer. The baker there went to the customer's house, or shop, and asked how much bread was wanted. There was no previous contract of sale whatever; the baker had taken out bread for sale, and not bread which had previously been sold, and there was a complete bargain and sale at the time of delivery. That is different from the present case. Here it was contended that the cart did not carry out bread for sale. The customer gave the order to the traveller, who passed it on to his master, and the baker's manager took a loaf from the shelf, weighed it, and put it aside for the express purpose of sending it to the customer. Although the bread was selected by the baker to comply with that particular order, there was no obligation on the customer to take that specific loaf. Could an action of trover or detinue have been maintained against the baker for that particular loaf? I think not. The object of the statute is, that the purchaser should have an opportunity of seeing the loaf weighed, and in this case I do not think the purchaser had such an opportunity. It would be straining the law to say that the baker was the agent of the customer to select the loaf. There was an order for a loaf, and a contract to supply a loaf, but there was no loaf appropriated until it was delivered in fulfilment of the contract. I think the word "deliver" in the statute means a delivery in pursuance of a previous contract for sale, and when the baker so delivers bread he should be provided with a proper beam and scales, with proper weights. If Miss Ratcliffe had gone herself, or sent her servant, to the baker's shop, and either she or her servant had seen the loaf weighed and put aside, and asked the baker to send it, I am far from saying that it would have been necessary for the baker to be prepared to weigh it again on delivery. I think the statute applies whenever there is a delivery in pursuance of a previous order and contract for sale, and I agree with my brother Grove that this conviction must be affirmed.

*Conviction affirmed.*

Solicitors for the appellant, Purkis and Co., agents for A. B. Sword, Hanley.

Wednesday, June 11, 1884.

(Before MATHEW and DAY, JJ.)

THE IMPROVEMENT COMMISSIONERS FOR THE DISTRICT OF NEWTON-IN-MAKERFIELD v. THE JUSTICES OF THE PEACE FOR THE COUNTY PALATINE OF LANCASTER. (a)

*Highway—Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 13—Expiration of turnpike trusts in 1877—Disturnpiked road—18 & 19 Vict. c. c.—Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), ss. 47, 49, 50, 51—Cesser of turnpike road—Contribution from county to repair.*

*By the Newton District Improvement Act 1855 (18 & 19 Vict. c. c.), which incorporated the*

(a) Reported by H. D. BOWEN, Esq., Barrister-at-Law.



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*Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), the maintenance of all the highways within a district which was traversed by a turnpike road running from Warrington to Wigan, became vested in commissioners, who were the "highway authority" for the district, which was a "highway area" within the meaning of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 13.*

*The turnpike trust expired in 1877. On a claim being made by the commissioners under sect. 13 of the Highways and Locomotives (Amendment) Act 1878, that the "county authority" should contribute one-half of the expenses incurred by the commissioners as the "highway authority," it was contended on behalf of the justices, who were the "county authority," that the section did not apply, because the local Act of 1855 had caused a ceaser of the character of the turnpike road with respect to that part which traversed the Newton district, and that the section applied only to those roads which wholly ceased to be turnpike roads between 1870 and the passing of the Act.*

*Held, that, notwithstanding the local Act of 1855, the road did not cease to be a turnpike road within the meaning of sect. 13 of the Highways and Locomotives (Amendment) Act 1878 until 1877, when the turnpike trust expired, and therefore one-half of the expenses incurred by the commissioners maintaining the road within their district must be paid by the county authority.*

#### SPECIAL CASE.

1. The plaintiffs in this case are the Improvement Commissioners for the district of Newton-in-Makerfield, in the county of Lancaster (hereinafter called the commissioners), and are the highway authority for the said district, and the said district is a highway area within the meaning of the Highways and Locomotives (Amendment) Act 1878.

2. The defendants are the justices of the peace for the county of Lancaster (hereinafter called the said county authority), the said justices assembled in annual general session pursuant to the provisions of 38 Geo. 3, c. 58, are the county authority as defined by the Highways and Locomotives (Amendment) Act 1878, and the said justices assembled as aforesaid at the annual general session held on the 26th Dec. 1878, did by order declare under the powers in them vested by the 20th section of the last-mentioned Act that the contribution towards the expenses incurred in repairing the main roads within the hundred of West Derby should be paid out of a separate rate to be raised and charged upon the said hundred of West Derby.

3. The parties have concurred in stating the facts and circumstances hereinafter mentioned in the form of a special case for the opinion of the High Court of Justice, Queen's Bench Division.

4. The said commissioners were incorporated by the Newton District Improvement Act 1855 (18 & 19 Vict. c. 100), which Act incorporates amongst other Acts the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34).

5. The commissioners' district comprises the limits of the parish of Newton-in-Makerfield, in the county of Lancaster.

6. The district is traversed by a road running from south to north from Warrington to Wigan.

7. The said road was maintained under the powers of a private Act of 13 Geo. 1, c. 10, and 20 Geo. 2, c. 8, 10 Geo. 3, c. 70, 33 Geo. 3, c. 164, 53 Geo. 3, c. 131, 3 Will. 2, c. 74, and 35 & 36 Vict. c. 85, and was known as the Warrington and Wigan turnpike-road.

8. Upon the passing of the Newton District Improvement Act 1855, the maintenance of all streets and highways within their district, including the said road, became vested in the commissioners by virtue of sects. 47, 49, 50, and 51 of the said Towns Improvement Clauses Act, and the trustees of the said turnpike road thereupon ceased to repair the said road within the limits of the said district.

9. The Warrington and Wigan Turnpike Trust expired in 1877.

10. In 1878 was passed the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 13 of which enacts that,

For the purposes of this Act and subject to its provisions any road which has within the period between the 31st Dec. 1870 and the date of the passing of this Act ceased to be a turnpike road, and any road which being at the time of the passing of this Act a turnpike road may afterwards cease to be such, shall be deemed to be a main road, and one half of the expenses incurred from and after the 29th Sept. 1878, by the highway authority in the maintenance of such road, shall as to every part thereof which is within the limits of any highway area be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction.

11. Separate accounts of the expenses of the maintenance of the said road during a period between the 25th March 1882 and the 25th March 1883 have been duly kept by the commissioners in the form prescribed by the county authority, and have been audited by the Local Government Board auditor, and forwarded to the county authority within the time prescribed.

12. The accounts so audited show an expenditure on the said road for the period aforesaid of 121l. 1s. 8d., one-half of which is 60l. 10s. 10d.

13. It is admitted, for the purposes of this case, that all the requirements of sect. 18 of the said Highways and Locomotives (Amendment) Act 1878, and all other requirements of or directions issued by the said county in respect thereof, have been duly complied with, and that no objections shall be taken to an order for payment as hereinafter mentioned upon the ground that no general certificate of such satisfactory maintenance has been in fact given.

14. The said commissioners, as such highway authority as aforesaid, have under sect. 13 of the said Highways and Locomotives (Amendment) Act 1878 demanded from the said justices, as such county authority as aforesaid, payment of the said sum of 60l. 10s. 10d., being one-half of the said sum of 121l. 1s. 8d., the expenses incurred by the said commissioners between the said 25th March 1882 and the 25th March 1883 in the maintenance of such part of the said road as is within the limits of the said district.

15. The said justices, as such county authority, refuse to pay the said sum or any part thereof.

The question for the opinion of the court is:

Whether the said county authority, under the circumstances above stated, is liable by virtue of



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the Highways and Locomotives (Amendment) Act 1878, or otherwise, to pay out of the said county rate the said sum above demanded or any part thereof.

In case the court shall be of opinion that the said county authority is so liable judgment is to be entered for the plaintiffs with costs; otherwise for the defendants with costs.

*Wills, Q.C. (A. Glen with him) for the plaintiffs.*—The road ceased to be a turnpike road since 1870, viz., when the turnpike trusts expired in 1877. The special legislation in 1855 did not deprive the road of its character as a turnpike road; it remained a turnpike road until the expiration of the trusts. He cited the following cases:

*The Justices of Lancaster v. Mayor of Rochdale*, 40 L. T. Rep. N. S. 368; 8 App. Cas. 404;

*The Justices of the West Riding v. The Queen on the prosecution of the Mayor, Aldermen, and Burgesses of Sheffield*, 40 L. T. Rep. N. S. 786; 8 App. Cas. 781.

*Gorst, Q.C. (Blair with him) for the defendants.*—Sect. 13 of the Highways and Locomotives (Amendment) Act 1878 does not apply, because the road ceased to be a turnpike road before 1870. In the *Rochdale case* (*ubi sup.*) the House of Lords held that the road had not ceased to be a turnpike road and become a "main road" between 1870 and 1873, within sect. 13. The present case is identical with that of the *Rochdale* and *Halifax* road in the *Rochdale case*. A piece was cut off the Wigan and Warrington road in 1855, and in 1877 the trusts expired. The court is now asked to hold the county liable for the repair of the piece cut off in 1855. To satisfy the terms of sect. 13 the whole road must cease to be turnpike after 1870. In the *Sheffield case* (*ubi sup.*) the House of Lords held that some portion of road removed by a provision in the Turnpike Acts, and other portions removed by an agreement from the operation of the turnpike trusts, were still turnpike roads within the meaning of sect. 13 of the Act of 1878. So that, unless there is a distinction between the *Rochdale case* and the *Sheffield case*, they are not consistent. The distinction may be that in the *Rochdale case* several clauses of the Towns Improvement Clauses Act 1847 were incorporated, giving the management of the roads to the commissioners, whereas in the *Sheffield case* there was, as to two roads, the mere provision in sect. 34 of the Turnpike Act (6 Will. 4, c. 53), that no part of the money arising by virtue of that Act should be laid out on any highway in the town, nor should any toll be collected there. In this case the Towns Improvement Clauses Act 1847 is incorporated with the local Act.

*MATHEW, J.*—This is an action by the highway authority for the district of Newton, in the county of Lancaster, against the county authority, to recover contribution in respect of the expense of maintaining a road within the district of the plaintiffs. The road had been part of the turnpike road between Warrington and Wigan, and there had been with respect to that part of the road what I will describe compendiously as special legislation in the year 1855, the result of which was that the cost of maintaining that part of the road was transferred from the turnpike trust to the commissioners of Newton district. It appeared further in the statements of the case that

the turnpike trust in respect of the whole road from Warrington to Wigan had ceased in 1877. On that it was contended by the plaintiffs that the state of things had arisen which was contemplated by the Act of 1878, s. 13, viz., that the turnpike road had ceased to be a turnpike road within the meaning of that section, and that it followed that, according to the provisions of that section, the highway authority became entitled to recover contribution from the county authority towards the maintenance of the whole of the road, including that part of the road in question. It is agreed that all proper steps have been taken in maintaining the road and demanding contribution, and the defendants have refused to pay. The question is whether the plaintiffs are entitled to recover contribution or not. The case presented to us on the part of the plaintiffs by Mr. Wills in his argument, stated shortly, was this: There had been special legislation, no doubt, in 1855, with respect to the part of the road in question; but that special legislation did not cause that part of the road to cease to be part of the turnpike road, and no cesser within the meaning of sect. 13 took place until the turnpike trust expired. When that happened (in the year 1877), the Act which followed in the year 1878 became applicable, and the plaintiffs were entitled to recover. The argument presented on the other side by Mr. Gorst was this: The special legislation as to this part of the road had caused a cesser of the character of the turnpike road with respect to this part of it; sect. 13 can only apply to the case where the whole of the turnpike road ceases to be a turnpike road within the meaning of the Act, and as part had ceased to be turnpike road, and as the section only applies to the whole road, the section is not applicable at all, and the defendants are not liable. It is singular that in this discussion Mr. Wills relied with the utmost confidence on the *Rochdale case*, and on the *Sheffield case*, which he said logically followed as a consequence of the *Rochdale case*, and Mr. Gorst, with equal confidence, argued that the *Rochdale case* was in his favour, and he left the *Sheffield case* to take care of itself. He pointed out that the judgment of the Queen's Bench Division established his argument, and that the ground of the decision of the *Rochdale case*, by the court of which I was a member was, as he puts it, that there being a cesser, as it was admitted, of the turnpike character of part of the road, sect. 13 did not apply to such a case, and therefore Mr. Gorst said his point was established. Having taking part in that decision, I was astonished at his gloss on it, for I am sure it was not my intention, nor that of Williams, J., to decide anything like that which Mr. Gorst understood the case to determine. The language of the judgment cannot be clear, as Mr. Gorst misunderstood it; but, if the judgment were to be delivered again, I should be content to express the meaning of the court in the language in which it was conveyed. What we meant to decide was this: that the special legislation in that case with respect to part of the road was not a cesser within the meaning of sect. 13. It was said that we drew a distinction between a part of the road and the whole of the road. Our conclusion would have been exactly the same if the whole of the turnpike road had come under the operation of the

special legislation. We thought that the provisions made by the special legislation for the maintenance of that part of the road did not cause it to cease to be a turnpike road, and that it was a turnpike road not only in a technical, but a physical sense. It was a main artery of communication between two great towns, and it did not seem to me to cease to be a turnpike road because, on the town having sprung up beside the borough, the Legislature thought fit to specially legislate with respect to that part of the road which lay within the borough. Our judgment was a short one. Mr. Gorst says it was misunderstood in the Court of Appeal, and we were supposed to have decided that there had been a cesser as to part of the road, and that therefore the cesser as to part precluded the operation of sect. 13. But I cannot adopt that view. I think the Court of Appeal appreciated precisely what we had decided, and the Court of Appeal differed from us. The Court of Appeal thought the special legislation had determined the road. We thought it had not. That was the difference between us, and that was presented to the House of Lords. It is an extremely narrow point on the construction of the word "cease" in sect. 13. The House of Lords took the view of the Queen's Bench Division, and differed from the Court of Appeal, also appreciating clearly the point of difference between the two inferior tribunals. The *Sheffield* case presented in one respect the same point which had been argued in the *Rochdale* case, the only material difference between the two being that in the *Sheffield* case there had been cesser by expiration of the turnpike trust. The case was argued in the House of Lords with all that fullness and aptness of illustration and learning which we invariably expect from Mr. Wills, and he convinced the House of Lords, and it was impossible (if I may say so) not to have been convinced by his argument. The ground of the decision is clear. The argument was, that the special legislation in that case, which applied to one of the roads, and the agreement which applied to another of the roads, had no operation to extinguish the character of turnpike road that the whole road possessed. Again, it was said that the character of a turnpike road is physical as well as technical. Lord Blackburn entirely adopted the view that the effect of the special legislation and the agreement was not to destroy the character of any portion of the road as a turnpike road. The effect of the legislation and the effect of the agreement was only to provide another source for the maintenance of a part of the turnpike road. So it was held that the highway authority was entitled to call on the county authority for contribution on the ground that on the expiration of the turnpike trust sect. 13 came into operation. That being so, this case comes before us, and seems to be concluded by the *Sheffield* case. There is no material technical difference between the special legislation in that case and this. The object was the same, to provide a special fund for the maintenance of part of the road, because of the additional burden put on that part of the road by reason of it being within the borough dealt with by the special legislation. The case is on all-fours with the present one. In that case, as in this, there was an expiration of the turnpike trust; in that case, as in this, in

1877 the road was remitted to its original character and came under the operation of the Act of 1878, which provided for its maintenance. It is said that the Legislature can hardly have intended to transfer the burden, which had so long been borne by the Newton Commissioners, to the county. We have nothing to do with that, and have only to deal with the Act of Parliament. But I can see good reason why the Act should have been passed dealing with such a case as the present. The case falls within the terms of the Act, and our judgment must be for the plaintiffs with costs.

DAY, J.—This case seems to me to be concluded by authority. Sect. 13 of the Highways and Locomotive Amendment Act 1878 has received a judicial construction in the case of *Justices of Lancaster v. Mayor of Rochdale*; and I understand that decision to be simply that the words "any road" used in that section must be taken to mean the whole as distinguished from part of such turnpike road, and consequently that, whether part of a turnpike road has or has not ceased to be a turnpike road after the 31st Dec. 1876, yet so long as any other part remains turnpike road the county are not liable for the costs of any repairs under sect. 13. That decision seems to me to be quite consistent with the present contention of the plaintiffs, which is, as I understand it, to the effect that this Wigan and Warrington turnpike road, so considered as a whole, and irrespective of any previous dealing with such part as passes through or lies within the Newton district, ceased to be a turnpike road by reason of the efflux in 1877 of the time within which the turnpike trust was limited, and that, consequently, sect. 13 applies; and that, therefore, one-half of the expenses incurred by the highway authority (here the plaintiffs) in the maintenance of such road shall as to every part thereof which is within the limits of any highway area (here the Newton district) be paid to the highway authority of such area by the county authority (here the defendants). I should have been prepared—bound as I am by the judicial interpretation put upon the words "any road" as used in sect. 13, by the House of Lords in the case already cited—to hold that the present contention of the plaintiffs is well founded, even in the absence of any further authority; but the matter seems to me to be definitely concluded in favour of the plaintiffs by the further judgment of the House of Lords in the case of *Justices of the West Riding v. Corporation of Sheffield*, which cannot be substantially distinguished from the one before us. I may add that I think the decision in the *Sheffield* case follows logically upon the decision in the *Rochdale* case, although no doubt the mischief contemplated and averted by the learned Lords in the former case necessarily followed upon their judgment in the latter one.

*Judgment for the plaintiffs.*

Solicitors for plaintiffs, *Field, Roscoe, and Co.*  
Solicitors for defendants, *Ridsdale and Son.*

**CROWN CASES RESERVED.**

Saturday, Nov. 29, 1884.

(Before Lord COLERIDGE, C.J., GROVE, J., HUDDLESTON, B., MANISTY and MATHEW, JJ.)

REG. v. WELLARD. (a)

*Public place—Indecent exposure—Witnesses of offence trespassing at time of commission—Place to which public have access, but no legal right of access.*

*In order to support an indictment for indecent exposure in a public place, it is sufficient to show that the offence was committed in a place where an assembly of the public is collected.*

CASE stated by the justices of the peace for the County of Kent:—

At the Court of General Quarter Sessions of the peace, holden in and for the county of Kent at Maidstone, on the 3rd day of July, 1884, Frederick Wellard was indicted, tried, and convicted of the misdemeanour of indecently exposing his person to divers liege subjects of the Queen in a certain open and public place, to wit, a marsh in the parish of Northfleet.

The evidence showed that the prisoner Frederick Wellard, in the middle of the day on the 28th May last, called some seven or eight girls of the ages of eleven and eight and thereabouts, who were at play near Northfleet Church, and told them that if they would go down into the marsh with him he would give them a halfpenny. On this the girls all went down into Northfleet Marsh with him, following him. They first went along a public footpath for some distance, and then came to a row of willow trees growing at a certain angle with the path, there the prisoner and the girls turned off the footpath on to the marsh where there was no path. There was another row of trees a little distance off, the prisoner and the girls went in on the grass land between the two rows of trees till they came to a fallen tree about one hundred and seventy paces from the footpath, and out of sight of it. At the fallen tree the prisoner lay down on the ground and there intentionally exposed his person indecently to all the seven or eight little girls together, who were close to him, and he invited them to touch his person, and used disgusting language. No one but the girls saw this exposure, nor could anyone have seen it from the footpath. As the girls were on the footpath on their way to the fallen tree they saw some boys bathing in the water two or three hundred yards off on the other side of the marsh. These boys saw the girls while the girls were on the footpath, but lost sight of them for a short time when they turned off. The boys dressed quickly and came up as soon as they could after the girls to the fallen tree, there they found prisoner lying down after his exposure of his person to the girls. The girls were there also. These boys saw nothing improper, as the prisoner had turned round on their approach, and was lying on his stomach. When the prisoner and the girls turned off from the footpath towards the fallen tree they were, legally speaking, trespassing, but all persons who desired to do so were in the habit of going on to the marsh, and no one interfered with them or hindered them, or made objection.

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law

The question for the court is whether on these facts the jury were justified in finding that the prisoner exposed himself indecently in a "public place."

Sentence was deferred. The prisoner was let out on bail to come up for judgment at the next quarter sessions.

JOHN G. TALBOT, Chairman of the Court of Quarter Sessions.

F. J. Smith, on behalf of the prisoner, contended that there was no evidence to support the conviction, for the act of indecency was not committed in a place of public resort, or in a place where it was visible to the public. In *Reg. v. Thallman* (33 L. J. 58, M. C.; L. & C. 326) it was held that it is an indictable offence to commit an act of indecency where a great number of persons may be affected by the criminal act, but here the act was committed on private land, out of sight of any place to which the public had a right to resort. [Lord COLERIDGE, C.J.—There is the case of *Reg. v. Holmes*, 32 L. J. 122, M. C., where it was held that the inside of an omnibus was a public place.] In that case the omnibus was passing along the highway. No private property, unless it is within the view of the public, can be a public place. In *Turnbull v. Appleton* (45 J. P. 469) a conviction for gaming in a place to which the public were permitted to have access was upheld, although the place upon which the offence was committed was private property, but that was a conviction under the Vagrancy Act of 1875, which amended the old Vagrancy Act (5 Geo. 4, c. 83), by adding the words "in any open place to which the public have or are permitted to have access." The former Act only referred to "any street, road, highway, or other open and public place," and the court doubted whether the conviction could have been sustained had that Act not been amended. In *Reg. v. Watson* (2 Cox C. C. 376) the prisoner had exposed himself to a young girl in Paddington churchyard, and although that is undoubtedly a public place, the court held that the indictment could not be sustained. The present case was one which certainly ought to be brought within, but at present it was not within the reach of the law. In *Langrish v. Archer* (47 L. T. Rep. N. S. 548; 10 Q. B. Div. 44; 52 L. J. 47, M. C.) had the railway carriage, in which the gaming was being carried on, been shunted into a siding, it could not have been held to be "an open and public place to which the public have or are permitted to have access," as was in that case held: (see *Re Freestone*, 1 H. & N. 93; 25 L. J. 121, M. C.) In *Reg. v. Harris* (40 L. J. 67, M. C.) a urinal was held to be a public place, but it was found in the case that it was open to the public. In order that a place may be a public place, it is necessary that the public should have a right of access to it, or that it be within view of the public from a place to which they have a right of access; and, as here it was found that the prisoner and all the witnesses of the act of indecency were trespassers at the time the act was committed, the jury could not find that it had been committed in a public place.

Lord COLERIDGE, C.J.—I am of opinion that in this case the conviction must be affirmed. This is an indictment at common law, apart from any statute, which charges the prisoner with the misdemeanour of indecently exposing his person to

divers liege subjects of the Queen in a certain open and public place, to wit, a marsh in the parish of Northfleet. That is the indictment. The offence undoubtedly was committed before seven or eight girls together, and the sole question is whether on the facts which are stated, the jury were justified in finding that the prisoner had indecently exposed himself in a public place. The evidence is, that the offence was committed in a field on a grassy spot between two rows of trees, where the indecent act could not be seen from the footpath which led near to the spot; it was committed in a place to which the public had no legal right of access. Still they had always been in the habit of going upon this marsh, and no one interfered with them or hindered them, or made any objection. The question is whether, under these circumstances, in a place thus described, this indecent exposure was an indecent act committed in a public place. Now Mr. Smith has been asked by me several times during the course of the argument, whether he can define either affirmatively or negatively, in a matter of this kind, what is a public place. He has not given us any affirmative definition, and has been disposed to contend that, in no place where there is a collection of persons, and I suppose he must go so far as to say a collection of however many persons, if there is no legal right on the part of those persons to be in such place, can a person who is guilty of an indecent act in the presence of the people assembled be found guilty of the misdemeanour of indecently exposing himself in a public place. I am of opinion that such a negative argument as this will not hold good, and that it is sufficient to show that the place is such a place as this marsh, to which the public have access, though they have no legal right of access thereto. In my opinion the offence is complete, as against public morality, if it is committed in any place where an assembly of the public is collected. There is a difficulty to my mind certainly in giving an affirmative definition as to what is a public place, but I am by no means certain that the publicity of the spot where the offence takes place has anything to do with it. This, however, is clear, that what is a public place will vary from time to time; that is to say, that a place may be a public place at one time for the purpose of having an offence committed in it, and may not be a public place at another time for that purpose. The question is, whether at the time the offence is committed the place is a public place in the natural and ordinary sense of the term. In *Rex v. Crunden* (2 Camp. 89) M'Donald, C.B. points out in a short and, if I may say so, good judgment, the obvious sense of what I have been endeavouring to give as my opinion. There it appeared that on a Sunday afternoon the defendant had bathed opposite the East Cliff at Brighton, undressing and dressing himself upon the beach; that till within a very few years of the commission of the offence there were no houses near this spot, and when Brighton was a fishing village whole regiments of soldiers used to bathe there at the same time; that at the time the offence was committed there was a row of houses erected on the cliff, from the windows of which the defendant might be distinctly seen as he undressed; and when Brighton grew up, that which was before a place where bathing could take place

without any observation became a place where it could not so take place, and the Lord Chief Baron says: "Nor is it any justification that bathing at this spot might a few years ago be innocent. For anything that I know a man might a few years ago have harmlessly danced naked in the fields beyond Montague House, but it will scarcely be said by the learned counsel for the defendant that anyone might now do so with impunity in Russell-square. Whatever place becomes the habitation of civilised men, there the laws of decency must be enforced." That appears to be exceedingly good sense, and to be a guiding statement of the law which may fully guide us in this case. Here is a place which persons, though they may be legal trespassers, do go upon, and no one interferes with them. In a place, therefore, where the public go without interference, a man takes seven or eight little girls and exposes himself to them. I am of opinion that the prisoner exposed himself indecently in a public place, and that it was not necessary in the present case to prove that the place in which he committed this offence was a place to which the public had a legal right of access. It was clearly a place where an indecent act took place in the presence of several persons, and, in my opinion, the conviction must be affirmed.

GROVE, J.—I am of the same opinion. Mr. Smith has contended, and in fact has been obliged to contend, that, in order that a place may be a public place, it must be a place to which the public have a legal right to go. Now the only case which at all supports such a contention is the case of *Turnbull v. Appleton* (*ubi sup.*), but that does not go so far as to say that, had the statute there not contained the words "in any open place to which the public have or are permitted to have access," the *locus in quo* would not have come within the words "open and public place" in the statute. There it was held that under the words "place to which the public are permitted to have access" which were imported into a former statute, an infringement of the statute had taken place. It is said that there would have been some difficulty had those words been omitted, and the words in the previous statute had been relied upon, namely, "any street, road, highway, or other open and public place;" and that "any open and public place" would then have been *ejusdem generis* with "any street, road, or highway." But even then it would not follow that the words "public place" when standing alone must necessarily mean a place to which the public have a right to go. Do they not mean a place which is public, and open to the public, whether as of right or not? It is found in the case that persons going to this place were legally trespassing, but it is also found that no one ever interfered with them; and does not that come within the plain meaning of the words "open and public place?" Whether it does or does not is, to my mind, a question of fact, and here this is found to have been an open place, round which there was nothing in the shape of an inclosure to sever it from the general publicity of the marsh. Unless, therefore, there is some decision limiting an open and public place to a place to which the public have a right to go—and none has been cited to us—I am of opinion that this case comes within the ordinary and reasonable meaning of the principle which makes it a misdemeanour to

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outrage public decency and morality, and that the conviction was right.

HUDDESTON, B.—I am of the same opinion. It must be remembered that this is an indictment for a nuisance, and the principle is well established which is laid down in Blackstone and in Hawkins' Pleas of the Crown, viz., that whatever openly outrages decency, and is injurious to public morals, is a common nuisance, and indictable as a misdemeanour at common law. Now in this case the indictment has, in accordance with this general principle, alleged that the act was done in a certain public and open place. I agree with the Chief Justice that it is not clear that an act of indecency is not an offence if it is committed before a number of persons, even if the place in which it is committed is a private place. But here the question is whether, it having been found that the place was open, and that all persons who desired to do so were in the habit of going on to the marsh, and no one interfered with their doing so, the prisoner was guilty of an act of indecency in a public place. The marsh was perhaps a place where people ought not to go, but the prisoner himself took several people there, and in my opinion he made the place public so far as the commission of the offence was concerned, and was rightly convicted.

MANISTY, J.—I am of the same opinion, and I only wish to state that I entirely agree that it is not necessary, in order to support a common law indictment for indecent exposure in an open and public place, to show that the place where the offence was committed was a place to which the public have a legal right of access.

MATHEW, J.—I am of the same opinion, and I concur with my learned brothers in the opinion that this offence may be committed at common law without the selection of a place over which the public have rights. To my mind there was abundant evidence to justify the jury in finding that this was such a public place as was meant by the indictment, and I am therefore of opinion that the conviction should be affirmed.

*Conviction affirmed.*

Solicitors for the prisoner, *Dollman and Pritchard*, agents for *Hayward and Smith*, Rochester.

*Saturday, Nov. 29, 1884.*

(Before Lord COLERIDGE, C.J., GROVE, J., HUDDESTON, B., MANISTY and MATHEW, JJ.)

REG. v. BUTT. (a)

*Falsification of Accounts Act 1875—Making and concurring in making false entry—False memorandum handed by collector to employer's cash clerk—Memorandum copied by cash clerk into cash-book—38 & 39 Vict. c. 24, s. 1.*

*B., a collector in the employment of N., collected on the 22nd Feb. from Sheppard 8l. 14s. 10d. due to N. The ordinary course of business was for B., at the end of each day, to account to E., N.'s cash clerk, for moneys collected during the day, E.'s duty being to enter payments accounted for by B. in the cash-book. On the evening of the 22nd Feb. B. gave E. a slip of paper on which he had written, "Sheppard, on account, 5l.," which*

*E. copied into the cash-book, believing it represented the whole amount collected by B. from Sheppard.*

*Held, that B. was rightly convicted under sect. 1 of the Falsification of Accounts Act 1875.*

CASE stated by the Deputy-Recorder of Poole, which was as follows:—

The prisoner was tried before me at the Midsummer Quarter Sessions for the Borough of Poole on 5th July 1884, on an indictment (a copy of which is appended to and forms part of this case) framed on the 1st section of the Falsification of Accounts Act 1875 (38 & 39 Vict. c. 24).

The evidence was, that the prisoner, who was employed as a clerk and traveller by J. J. Norton at Poole, collected on the 22nd Feb. a sum of 8l. 14s. 10d., which was due to his employer from W. Sheppard, of Bournemouth, for which he gave him a receipt, which was produced at the trial. On his return to Poole the same evening he went to his employer's office, and according to custom rendered an account of the money he had received during the day to Mr. Norton's cash clerk, a man named Elford. The prisoner wrote out on a slip of paper (which was produced) various sums he had received, but instead of putting down the 8l. 14s. 10d. which he had had from Sheppard, he wrote "Sheppard, on account, 5l." Elford said that he then innocently either copied this sum from the prisoner's memorandum, or that the prisoner read it out to him from the memorandum, he could not remember which, into Mr. Norton's cash-book, in which consequently there appeared the false entry "W. Sheppard, 5l.," instead of, as it should have been, an entry of a payment by Sheppard of 8l. 14s. 10d. The cash-book with this entry in it was produced at the trial. At the time when he delivered the memorandum, or read its contents out, to Elford, the prisoner knew that in the ordinary course of business the items as communicated by him would be entered in his employer's books.

At the close of the case for the prosecution, the prisoner's counsel submitted that I ought not to leave the case to the jury, as no offence had been committed by the prisoner within the terms of the statute.

I held that the case came within the statute, but agreed to reserve the point for the consideration of the court.

I accordingly left the case to the jury, directing them that the prisoner himself would be guilty of making a false entry in Mr. Norton's cash-book if he, with intent to defraud, gave Elford, who was an innocent agent in the matter, the memorandum to copy into the cash-book, or read its contents out to him for that purpose.

The jury found the prisoner guilty. I respited judgment, and admitted him to bail, to come up for judgment at the next sessions.

The question for the consideration of the court is, Whether the prisoner committed an offence within the above statute? If he did not, then the conviction is to be quashed; otherwise the conviction is to stand.

CHRISTOPHER RAWLINSON, Deputy-Recorder of Poole.

By the Falsification of Accounts Act 1875 it is enacted:

That if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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servant, shall wilfully and with intent to defraud destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or shall wilfully and with intent to defraud make, or concur in making, any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding seven years, or to be imprisoned with or without hard labour, for any term not exceeding two years.

C. W. Matthews contended, on behalf of the prisoner, that it was not made out that there had been any false entry made or caused to be made by the prisoner. The cash-book only purported to show the moneys which the collectors accounted for to the cash clerk, and the prisoner had accounted for 5*l.*, and therefore the entry was not false. The cash-book was to show the transaction between the collector and the cash clerk, and this was a true entry of the transaction that took place. Even assuming the entry to be a false entry, the prisoner did not make it, and the prosecution must rely on his having concurred in making it; but the cash clerk was innocent of the falsity of the entry, and therefore there could not have been any concurrence in making it. One mind cannot concur, for concurrence implies that there must have been agreement between the minds which concurred in doing an act, and here the case found that there was no agreement between the collector and the cash clerk. The statute was not passed in order to punish the giving of false information, but to prevent the making of false entries in books to which clerks have access. The collector here had no access to the cash-book. A collector in Manchester who telegraphed to his firm in London false information as to a debt collected could not be convicted of making a false entry, if the cash clerk in London made an entry according to the information telegraphed. The cash-book only showed that which it was intended to show, namely, what happened between the collector and the cash clerk, and the prisoner had been guilty of no offence within the statute.

LORD COLERIDGE, C.J.—The defendant in this case is indicted under the 1st section of the statute 38 & 39 Vict. c. 24, an Act to amend the law with reference to the falsification of accounts, and that section enacts that if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud falsify any book or account which belongs to his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in any such book or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be punished in a certain way. Now the facts here are, that the prisoner was a collector of money, and from time to time he had to render an account of the money collected by him to another person in his master's employment. It appears to me to be immaterial whether the money was paid over at the same time when he rendered such accounts. What was done here was, that he received 8*l.* 14*s.* 10*d.* from a particular gentleman, that he accounted for 5*l.* of this sum only, and that he wrote on a slip of paper words which he knew would be understood to mean that he had received from a person

named Sheppard the sum of 5*l.*, that he gave or read out the contents of this slip of paper to the cash clerk, and that the cash clerk copied this sum from the slip of paper into Mr Norton's, his employer's, cash-book, in which consequently there appeared the false entry, "W. Sheppard, 5*l.*" instead of, as it should have been, an entry of a payment by Sheppard of 8*l.* 14*s.* 10*d.* It is admitted that in the ordinary sense of the word that was a false entry, and it is equally clear that with the making of that false entry the prisoner had something to do. It is contended, however, that the statute is not broken because the person who made the entry did not know it was false, and the person who did know it was false did not make the entry. There is high authority that where a man who knew of the falsity of the representation he was making, made such representation by means of an agent who was ignorant of its falsity, there was no fraud (*Cornfoot v. Fowke*, 6 M. & W. 358); but that was in a civil action, and is, I believe, a decision not universally approved of. This is clearly a false entry as far as Sheppard is concerned. It purports to represent receipts from the persons who have been entered as making payment of such receipts, and it seems to me clear that the prisoner either made it with the innocent hands of Elford, or concurred in the innocent hands of Elford making it. I am of opinion that this conviction was perfectly right, and must be upheld.

GROVE, J., HUDDLESTON, B., and MANISTY and MATHEW, JJ. concurred. *Conviction affirmed.*

Nov. 29 and Dec. 20, 1834.

(Before Lord COLERIDGE, C.J., GROVE, J., HUDDLESTON, B., MANISTY and MATHEW, JJ.)

REG. v. POWELL. (a)

*False pretences—Obtaining premium on policy of insurance—Policy treated as lapsed—Suppression of material facts—Knowledge by prisoner of facts which would have prevented payment—Misrepresentation by conduct.*

P., an agent of a life assurance company, received from V. the premium for the year 1883 to 1884, on a policy effected by V. with the company in 1881, but, instead of giving V. the official receipt, gave him an informal receipt, appropriated the money and returned the official receipt to the company, who treated the policy as lapsed.

On the 7th April 1884, P. called on V. for the premium for the year 1884 to 1885. V. being then unable to pay, P. called again on 21st April, the days of grace allowed by the policy having to the knowledge of V. expired on the 15th April, and told V. that payment on that day "would be effectual," and V. understood that P. was to "apply to the company to let the policy go on." The company were in the habit of allowing lapsed policies to be revived, upon the payment of overdue premiums; and upon the representations thus made by P., V. paid him a sum of money. Upon a case reserved at the trial of an indictment which charged P. with having obtained this sum of money by false pretences:

*Held, by the majority of the court, that P.'s conduct*

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.



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*on the 7th and 21st April amounted to a representation that the policy had not lapsed nor become void, and that he had authority to say that the payment on the 21st would keep the policy alive for another year, and that there was, therefore, sufficient evidence to support the conviction. Grove and Manisty, JJ. dissentientibus, on the ground that the payment of the premium in 1883 to P., as agent of the company, was a payment to the company, and that the policy had not therefore lapsed or become void, except so far as both V. and P. knew that it had lapsed on the 15th April.*

CASE stated by the Recorder of Grantham, which was as follows:—

At the quarter sessions for the borough of Grantham, held before me on the 31st Oct. 1884, the defendant, Walter Powell, was tried for obtaining money under false pretences from one David Vellam.

The indictment charged that Walter Powell, on the 21st April 1884, unlawfully, knowingly, and designedly did falsely pretend to one David Vellam that a certain policy of insurance on the life of the said David Vellam, effected with the Western Counties and London Life Assurance Company at Plymouth, of which company the said Walter Powell was then agent, was then in full force and existence and not lapsed nor become void, and that the current year's premium thereon was then due and payable, and that he, the said Walter Powell, as an agent of the said company, was then entitled to receive the same premium from the said David Vellam, by means of which said false pretences the said Walter Powell then and there unlawfully, knowingly, and designedly did obtain from the said David Vellam a certain sum of money amounting to the sum of 3*l.* 2*s.* 8*d.* the moneys of the said David Vellam, with intent thereby then to defraud, whereas in truth and in fact the said policy of insurance on the life of the said David Vellam was not then in existence, but had lapsed and become void, nor was the premium for the then current year due and payable, nor was the said Walter Powell entitled to receive the same premiums from the said David Vellam as he the said Walter Powell did then so falsely pretend to the said David Vellam as aforesaid, and the said Walter Powell at the time he so falsely pretended as aforesaid well knew the said pretences to be false, &c.

The defendant was an agent to the Western Counties and London Life Assurance Company, his business was to obtain applications for policies of insurance, and also to collect the annual premiums due from persons insured in the company; for these services he was paid by commission.

The said David Vellam had in the year 1881 insured his life in the said company through the agency of the defendant at an annual premium of 4*l.* 1*s.* 8*d.* The premium on the policy of insurance was payable annually on the 1st April.

By the terms and conditions indorsed on the back of the said policy it was provided that it should become void if any yearly or half-yearly premium should be in arrear for the space of fifteen days.

By a memorandum at the foot of the said terms and conditions notice was given that no renewal receipt for any policy would be regarded by the

company as a valid except the usual receipt issued from the office and signed by two directors and the secretary.

It was the duty of the defendant to receive from the said David Vellam the premiums as they annually fell due. For this purpose he was intrusted each year with the company's form of receipt duly signed, and it was his duty on payment of the money to countersign this receipt and hand it over to the assured.

In the beginning of April 1883 the said David Vellam duly paid his premium to the defendant and received from him in acknowledgment an informal receipt signed by the defendant. Vellam several times asked for the official receipt, but the defendant always made excuses for not giving it.

The defendant did not account to the company for the premium of 1883, and returned the official receipt to the company to be cancelled. The company thereupon treated the policy as lapsed.

On the 7th April 1884 the defendant called on Vellam saying that he had called for the premium due on the 1st April for the year 1884-5. Vellam replied that he was unable to pay then, as he had not the money, but that he hoped to be able to obtain the money before the 15th April.

On the 21st April the defendant again called on Vellam for the premium. Vellam then paid the defendant the sum of 3*l.* 2*s.* 8*d.* on account. It was in respect of the obtaining of this sum that the defendant was indicted.

On the 21st April the days of grace had expired. Vellam was aware of this. He considered that his policy had been in force up to the 15th April. The defendant told him that the payment on the 21st April "would be effectual." Vellam also understood that the defendant was to "apply to the company to let the policy go on." These were in Vellam's language the inducements which led him to pay the 3*l.* 2*s.* 8*d.* to the defendant.

The company were in the habit of allowing lapsed policies to be revived on the payment of overdue premiums provided they were satisfied as to the state of the health of the assured.

There was no evidence before me to show what in such cases were the duty and authority of their agents.

It was contended by the defendant's counsel that there was no evidence to show that the money had been obtained through the pretence charged in the indictment, or through any misrepresentation of existing facts.

I ruled that, if the defendant represented to Vellam that he had power to receive the payment of the 21st April 1884 as a practically effectual payment of the annual premium on the policy, and that he thereby induced Vellam to pay the 3*l.* 2*s.* 8*d.*, such representations, if false to the knowledge of the defendant, would be a false pretence within the terms of the indictment, and I so directed the jury.

The prisoner was convicted, and I passed a sentence of six months' imprisonment with hard labour, but respited execution of the judgment and discharged the defendant on recognisance of bail to render himself in execution.

The questions for the opinion of the court are:

1. Whether I ought to have directed a verdict of not guilty.
2. Whether my direction to the jury was incorrect.

If the court answer either of these questions in



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the affirmative the conviction is to be quashed; otherwise to stand affirmed.

GILBERT GEORGE KENNEDY,

14th Nov. 1884.

Recorder of Grantham.

*Lindsell* (with him *Waddy*, Q.C.), on behalf of the defendant, submitted that there was no evidence to support the indictment with which the defendant was charged; and contended that the company, by their agent, having been paid the premium for the year 1883 to 1884, the policy, although treated as lapsed, had not in fact lapsed. The question was, whether on the 21st April 1884 the defendant knew that the policy had in fact lapsed, and, inasmuch as the policy had not lapsed, he could not possibly be convicted of falsely pretending that it had not lapsed. The prosecution were driven to rely, in support of the indictment, upon the conduct of the defendant, and whatever the defendant knew with regard to the policy, no conduct of his which represented that which proved to be in fact true could be held to be a false representation; and, with regard to the representation as to his authority to receive the premium, if the policy had not in fact lapsed, he was the person entitled as agent of the company to receive it, and was guilty of no false pretence.

*Cur. adv. vult.*

Dec. 20.—*MANISTY, J.*—This is an indictment which charges the defendant with having on the 21st day of April 1884 obtained a sum of money from one Vellam by means of certain false pretences. It is necessary to state the circumstances under which the false pretences are alleged to have been made. Before doing so, however, I may say that the defendant was an agent to the Western Counties and Life Assurance Company for obtaining applications for policies of insurance and for collecting the annual premiums due from persons insured in the company; and it was his duty to receive from Vellam the premiums as they annually fell due upon a policy which Vellam had effected with the company. The charge against the defendant is that on the 21st April 1884 he falsely pretended to Vellam that a premium was due from Vellam on his policy for the year 1884 to 1885; that such policy was in full force and existence and not lapsed nor become void; and that he was entitled to receive that premium. By means of this alleged false pretence he is charged with having obtained the sum of 3*l.* 2*s.* 8*d.* on the 21st April 1884 from Vellam. Now, can this charge be sustained? The question is whether any representations were made by the defendant to Vellam which were false to the knowledge of the defendant but not to the knowledge of Vellam, by means of which Vellam was induced to make the payment—the facts being that in April in the previous year the defendant had received from Vellam the premium on his policy for that year, and had not accounted to the company for it, he having given to Vellam an informal receipt, and returned the official receipt to the company to be cancelled. By the terms of the policy no renewal receipt for any policy would be regarded by the company as valid except the usual receipt issued from the office, and whether the defendant embezzled the money he received or not is not before us. It is found, however, that it was the duty of the defendant to receive the premiums as they annually fell due, and what are the facts with regard to the alleged false

pretence? On the 7th April, within the days of grace, the defendant called on Vellam for the premium due on the 1st. Vellam replied that he was unable to pay then as he had not the money, but he hoped to be able to obtain it before the 15th April, when the days of grace would expire. There is no false pretence there, and the premium for the previous year had been paid to the authorised agent of the company, but not accounted for by him. In my opinion, that payment in 1883 was a good payment as against the company and the policy was in force on the 1st April 1884. It is only by compounding what may have been an offence in 1883 with what may have been an offence in 1884, namely, the embezzlement, if such it was, of the two premiums, that this charge is attempted to be substantiated. But embezzlement is not the charge with which the defendant is indicted. The only day on which it is said that any false pretences were made was on the 21st April, when the defendant again called on Vellam. On that day Vellam paid the defendant not the whole amount, but 3*l.* 2*s.* 8*d.* on account, and it is in respect of that sum that the defendant is indicted. Now, what is the false pretence? And here is where we come to what is to my mind the essence of the whole pretence alleged. Did he make any false pretence to Vellam; if so, what was it? On the 21st April the days of grace had expired. Vellam was aware of this. He was aware that the policy had lapsed, and the false pretence alleged is that the defendant falsely pretended that the policy was in full force. Both parties knew it had lapsed. Vellam “considered that his policy had been in force up to the 15th April; the defendant told him that the payment on the 21st April would be effectual.” Effectual for what? And that must not, in my judgment, be taken without what follows, and we must not pick out one or two words from which to arrive at it. What did that mean? Why, that “I, the agent, will undertake that the policy shall be renewed.” There is no such charge here, however; the charge is that he falsely pretended that the policy was in full force. Had he been indicted for falsely pretending that he could get the directors to renew the policy, it might be different; but the indictment charges him with having falsely pretended that he was entitled to receive the premium. So he was entitled to receive it, but subject to his getting the approval of the directors to the renewal of the policy. Vellam understood that the defendant was to apply to the company to get the policy renewed. He knew that unless the company was applied to the policy would not be renewed, and in Vellam's language “these were the inducements which led him to pay the 3*l.* 2*s.* 8*d.* to the defendant.” The company were in the habit of allowing lapsed policies to be renewed on the payment of overdue premiums, provided they were satisfied as to the state of the health of the assured, so that both parties knew that all that could be done was to get the directors to consent to the renewal of the policy. Upon the state of facts applied as I apply them, I am at a loss to see how there can be any evidence of a false pretence as charged in the indictment. It may be he is liable to be indicted for embezzlement at this moment, if he put the premiums into his pocket, but that is another thing. I am of opinion that this conviction cannot be sustained, upon the evidence, and

I also think that there was a misdirection on the part of the learned recorder. His direction to the jury was this: "I ruled that if the defendant represented to Vellam that he had power to receive the payment of the 21st April 1884 as a practically effectual payment of the annual premium on the policy, and that he thereby induced Vellam to pay the 3l. 2s. 8d., such representations, if false to the knowledge of the defendant, would be a false pretence within the terms of the indictment." Now, the defendant received that payment, as it is found, subject to the approval of the directors; it is found that he did not take it as "a practically effectual payment," and that he could only intercede with the directors. I think that that was a misdirection, and that upon both these grounds the conviction cannot be sustained.

HUDDESTON, B.—I regret that I am unable to agree with my brother Manisty. The facts appear to be these: that Vellam in 1881 insured in this office through the defendant. I presume that all the premiums were paid until the month of April 1883, and in that month Vellam paid to the defendant the amount of the premium then due, and I agree with my brother Manisty that the payment may have been effectual; but the defendant embezzled that money—at any rate, he failed to pay it to the company; and what I must now consider is what the company did in that state of things. Vellam having paid the money to the defendant, the defendant appropriated it to his own use, and returned the official receipt to the company to be cancelled. That receipt is a document signed by two of the directors and the secretary, and delivered to the defendant in order that he might deliver it to Vellam; and it is found as a fact that the defendant, having embezzled the money, in order to conceal the embezzlement did not give the receipt to Vellam, but returned it to the company, who treated the policy as lapsed. Now, the defendant knew that the policy had been treated as lapsed, but Vellam did not know that; and when the defendant came to Vellam on the 7th April 1884, Vellam did not know that the company had treated the policy as lapsed. Consequently, when the defendant called for the premium on that day, Vellam was under the impression that his policy was in full force and existence. Not being in a position to pay on the 7th April, on the 21st April the defendant comes again to Vellam, and at that time the policy of 1883 had lapsed, and there was no policy in existence of 1884. Now, what did the defendant really represent when he came then? He represented this, that "your policy is in existence, although the days of grace have expired, and if you pay me now your payment will be effectual." Effectual for what? Why, a policy for the year 1884 to 1885, when the defendant knew there was no policy of that date. "If you pay it now, you will be able to keep the policy in existence, and I am authorised to say so." He was not authorised to say so, and when I look at the charge in the indictment, that, in my opinion, is supported in every way by the evidence. The company had done all they could to make the policy a lapsed policy, for they had treated it as a lapsed policy. The defendant said that a payment made on the 21st April "would be effectual;" that is to say, he represented that the current premium was then due, whereas it was not then due, and he further

represented that he was entitled to receive the premium. He was not entitled to receive the premium when the policy of 1883 had lapsed, and how could he be authorised to receive the premium of 1884 under such circumstances? Then, as to the question whether the learned recorder misdirected the jury, what is the meaning of "a practically effectual payment?" That, in my opinion, was to say that the payment would practically be sufficient to keep the policy alive, notwithstanding that the days of grace had expired. It is not necessary that the representation should be made in actual words. In *Reg. v. Giles* (34 L. J. 50, M. C.), Blackburn, J. said, "It is not requisite that the false pretence should be made in express words if the idea is conveyed." What is the idea which is conveyed from the words used, and the conduct of the defendant here? It is that "I can put you in the same position, if you pay this money, as you would have been in had the policy not lapsed." In my opinion, there was no misdirection, and the false pretence with which the prisoner was charged is fully sustained by the evidence, and the conviction was therefore right.

GROVE, J.—I agree in this case with my brother Manisty. It appears to me that the defendant is not shown to have been guilty of the false pretence alleged in the indictment. Now, what are the requisites which are necessary in order to sustain an indictment for false pretences? They are, first, that the representation is false in fact; secondly, that it is false to the knowledge of the person making it; and, thirdly, that the goods or money were obtained by reason of the false pretence. Now, was the pretence here false in fact, if taken to refer to the policy of 1883? I think that the alleged pretence was true, because in 1883 to 1884 the policy had not lapsed, and I agree with my brother Manisty that, although the defendant did not give the official receipt, yet that, he being the authorised agent to receive moneys, that payment was a good one, and an action could have been sustained, had Vellam died during that year, to recover the amount for which he was insured under the policy. Now, it is said that at the foot of the policy notice is given "that no renewal receipt for any policy would be regarded by the company as valid except the usual receipt issued from the office and signed by two directors and the secretary." It may be that they would not accept, for the better regulation of their business, as evidence of any renewal any receipt except the official receipt. But would that free them? Suppose that the defendant had received a premium in due time, and had said he could not give the official receipt for it, as he had left such receipt in his office, and had then absconded. Could not Vellam's representatives have recovered under the policy, in the case of his death during the year, in respect of which that premium was paid? My brother Manisty agrees with me that they could, and I do not understand my brother Huddleston to disagree with that. It is an important fact, and it is, in my opinion, a fact that the policy of 1883 had not lapsed. Then, what is the false pretence alleged here? The representation is not that the company had treated the policy as lapsed. The alleged representation is that the policy had in fact lapsed; there is no allegation that the defendant falsely pretended that the company had treated the policy

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as lapsed. The representation alleged was that the policy was "then in full force and existence, and that he, the said Walter Powell, as an agent of the said company, was then entitled to receive the same premium." I say that, as far as the year 1883 to 1884 is concerned, that representation was true. Therefore, if he made that representation, he made a true representation, and he cannot be indicted for that. The allegation in the indictment is that "in truth and in fact the said policy of insurance on the life of the said David Vellam was not then in existence, but had lapsed and become void." But if the defendant said what he is alleged to have said he spoke the truth, and I do not see that there is any false pretence as alleged. It is the false representation whereby he obtained the sum of 3*l.* 2*s.* 8*d.* in respect of which he is indicted; and I know it is said by my brother Huddleston that in applying for the premium of 1884 to 1885, the defendant must be taken to have implied that the policy of 1883 to 1884 was in existence. Well, if he did, he was right; it was not void, and you cannot make a thing false by joining to it a truth. It is possible that he may have repented, or it may have been by oblivion on his part, and he may have subsequently settled the matter with the company. I do not say it is probable, I say it is possible. As far as the year 1883 to 1884 is concerned, we do not know whether the policy was actually treated by the company as lapsed. Now, we go on to the year 1884 to 1885. It is alleged that the defendant, "at the time he so falsely pretended as aforesaid, well knew the said pretences to be false." Now the premium for the year 1883 to 1884 was paid by the defendant in due time, but an informal receipt was given, and the company thereupon treated the policy as lapsed. But that is not the question; they only treated it as lapsed upon the money not being given to them by the defendant. *Non constat*, if the money had been ultimately given to them they would have continued to treat the policy as lapsed. I think that they could not in law have done so. Now, the conversation was in respect of the renewal of the policy from 1884 to 1885. It is said by my brother Huddleston that the calling and asking for the premium of that year was a pretence that the policy had continued to live during 1883 to 1884. I will assume that that may be considered to be implied, though it is a strong thing to do. If, then, it is to be so implied, the policy was alive, and the defendant is not to be indicted for that. He could only be indicted on the ground that the policy had really lapsed, and, therefore, as it does not appear that it had lapsed, I do not think he can be indicted for that statement. The case goes on, "Vellam replied that he was unable to pay then, as he had not the money; but that he hoped to be able to obtain the money before the 15th April. On the 21st April the defendant again called on Vellam for the premium." Now, this is the day on which the false representation is alleged to have been made, and that is, in my opinion, another reason why what happened on the 7th April cannot be brought in. It is said that "on the 21st April the defendant again called on Vellam for the premium. Vellam then paid the defendant the sum of 3*l.* 2*s.* 8*d.* on account. It was in respect of the obtaining of this sum that the defendant was indicted." So, not only does the indictment lay the offence on the 21st April, but it is fixed on that day by this

statement. How, then, can we consider what happened on the 7th April? The offence is not a compound of what happened on the 7th and 21st, but of what he is assumed to have said by his conduct on the 21st. Now, what is said? On the 21st April Vellam knew that the policy had lapsed; but from the conduct of the company, as stated in the case, "the company were in the habit of allowing lapsed policies to be revived on the payment of overdue premiums." Therefore, though legally lapsed, according to the practice of the company, it had not necessarily lapsed, because it was the practice of the company, under certain circumstances, to continue policies; so that, though it might be an incorrect term to use to say that a policy was alive, it was however, not necessarily a false statement in fact. Now, what did the defendant actually say? He said that the payment on the 21st April "would be effectual." Suppose it had stopped there. Both parties knew that the policy had lapsed, but they both knew of the habit of the company. The real representation was that it "would be effectual." Now, what did Vellam understand? "Vellam also understood that the defendant was to apply to the company to let the policy go on." Can anything be more explicit than that? Is it a representation that the policy had lapsed when the defendant received the money for the very purpose of applying to the company to let the policy go on? The representation alleged is that the policy had actually gone, and was irrevocable, and yet that the defendant represented it as still existing, and is that allegation proved by these facts? What is the meaning of the words "will apply," do they not amount to an assurance that the policy is not alive, but that he will endeavour to make it alive. "The time for the policy has expired; I will apply to the company, and I have no doubt the company will renew," in effect says the defendant. It seems to me that the evidence wholly fails, whether you take what happened on the 7th and 21st together or separately, to make up a false pretence as charged in the indictment. I am of opinion, therefore, that the offence here alleged in the indictment is not sustained, and that, though the defendant may have embezzled the money, he is not guilty of the false pretence with which he is charged. Suppose that the defendant did say that "he had power to receive the payment of the 21st April 1884 as a practically effectual payment of the annual premium on the policy," he only meant it in the sense in which the company generally renew their policies, as found in the case; and I do not see anything in the case to show that that would be false, because in all probability it would be true. I am, therefore, of opinion that the direction of the learned recorder to the jury was wrong, and that the conviction should not be affirmed.

COLERIDGE, C.J.—This is a curious example of how the same state of facts may produce absolutely different results upon educated minds. From the commencement of the case I have had no doubt in my mind, and it seems to me to be a clear case of false pretences. I am perfectly content to take what my brother Grove has said is necessary to constitute the offence of obtaining goods or money by false pretence to be requisite, and I agree with him that there must be a representation of some fact which is not only untrue, but which is false to the knowledge of the person making it, and that it must be on such

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THE PLUMSTEAD DISTRICT LOCAL BOARD v. SPACKMAN.

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representation that the goods or money are obtained. I do not gather that I shall be stating what is unfair if I state this, that, whatever the true legal effects of the circumstances down to the 21st April 1884 may be, the person who parted with his money on that day was unaware of those facts. I will not discuss what was the legal effect of the circumstances previous to that date, and whether the company could, or could not, treat the policy as gone, because the proper receipt was never given. Vellam knew, from the terms and conditions on the back of the policy, that if the premiums were in arrear for a certain time the policy would become void. He therefore knew that unless he did what he ought to do, and which he knew he had not done, the company might treat the policy as gone. So far as the policy of 1883 was concerned, he believed that he had paid the premium, and that the company had got it. The facts were otherwise, and it is said that the company had no right to treat the policy as gone. It may be so, but the defendant did not know it; he knew that he had not given the receipt he ought to have given. Now, the facts show that the money was obtained by reason of the statement made on the 21st. When the premium was applied for, Vellam believed—a belief induced by the statements of the defendant—that, unless the company chose to treat the policy as lapsed, it was still a good and valid policy. The company had treated the policy as lapsed, but that he did not know and the defendant did. It is admitted that, supposing the policy was not in existence, that may be a false pretence, because it was the obtaining a payment in respect of a policy that Vellam believed had continued and was continuing in existence. To my mind, the evidence is as cogent as it can be, that, had the defendant told the truth, it cannot be supposed that Vellam would have parted with his money. On the 7th April Vellam could not pay the premium, and the days of grace expired on the 15th. Nothing seems to have taken place, but on the 21st the defendant calls again. It is true that on the 21st there is not a repetition in terms of the representation which was made on the 7th; but the representation which was made on the 21st must be taken, in my judgment, as connected with the representation which was made on the 7th, because, without considering the representation which was made on the 7th, the representation made on the 21st would have had no effect. That being so, on the 21st Vellam pays the defendant this money, and the defendant tells him that it “would be effectual.” What is the meaning of “effectual” under the circumstances? Surely the meaning is that, “You have a policy which was valid up to the 15th. This, however, is the 21st; but, according to the ordinary course and practice of the office in which the policy is, if you pay me this money your policy will go on.” It is as if a man comes to me and says, “You pay me so much money,” and I say, “If I do, will that discharge my debt?” and he says, “Yes, it will.” The defendant also told Vellam that he must communicate with the office, and that, if he did, the policy would be effectual. It appears to me that the conduct on the 7th, being used, as it must be, to explain the conduct on the 21st, there was conduct on the 21st sufficient to effect the representation that, the policy being still in existence, the payment on that day would be effectual to keep it alive. Now,

that policy had for a year been treated by the company as lapsed. That fact was concealed by the defendant from Vellam, and, supposing that upon that representation the money was obtained, it appears to me that all the elements of a false pretence are perfectly made out. It is said that the learned Recorder misdirected the jury because he told them that “If the defendant represented to Vellam that he had power to receive the payment of the 21st April 1884 as a practically effectual payment of the annual premium on the policy, and that he thereby induced Vellam to pay the 3l. 2s. 8d., such representation, if false to the knowledge of the defendant, would be a false pretence within the terms of the indictment.” He did so represent; and can anyone question that the facts which were unknown to Vellam were known to the defendant, and that, if they had been known to Vellam, the money would undoubtedly never have been paid? I am of opinion that there was no misdirection. I agree that it is very likely another form of indictment would have been a surer and better mode of procedure, for it seems as if the money had been embezzled. The result, however, is that, as two of my learned brothers think with me that the conviction should be affirmed, though two of them think that it should not, the conviction must be affirmed.

MATHEW, J. formed one of the majority of the court, but was absent when the judgments were delivered.

*Conviction affirmed.*

Solicitors for the defendant, *Merediths and Co.*, agents for *A. H. Ruston*, Chatteris, Cambridgeshire.

## Supreme Court of Judicature.

### COURT OF APPEAL.

June 21, 23, and July 12, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.J.J.)

THE PLUMSTEAD DISTRICT LOCAL BOARD v. SPACKMAN. (a)

*Metropolis—Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), s. 75—“General line of buildings”—“Decided by the superintending architect of the Metropolitan Board of Works”—Jurisdiction of magistrate—Architect’s decision.*

*By the 75th section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) it is provided that “no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds fifty feet, . . . such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being,” and in case any building, &c., be erected without the consent of the board, com-*

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

plaint is to be made to a justice, and "if the said complaint shall be proved to the satisfaction of the justice," he shall make an order directing the demolition of any such building, "or so much thereof as may be beyond the said general line so fixed as aforesaid."

*S.*, the owner of a house in the High-road, Lee, Kent, the frontage of which did not exceed fifty feet in distance from the said road, without obtaining the consent of the Metropolitan Board of Works, commenced to erect a building extending the frontage of the house to the road. Subsequently the superintending architect of the Metropolitan Board of Works for the time being fixed the general line of buildings, of which *S.*'s house formed part, in such a position that *S.*'s new building projected beyond it, although it did not extend beyond the line of a stable, chapel, and shops abutting on the same road, east and west of the ends of the general line of buildings fixed as aforesaid.

*Held*, by Bowen and Fry, L.JJ. (dissentiente Brett, M.R.), on a case stated by a metropolitan police magistrate, that, on the hearing of a summons for a breach of the 75th section of the Metropolis Management Amendment Act 1862 (25 & 26 c. 102), the magistrate is bound by the architect's certificate as conclusive, and has no jurisdiction to consider for himself what is the general line of buildings.

*Judgment of the Queen's Bench Division* (50 L. T. Rep. N. S. 690) affirmed.

*The Vestry of St. George's, Hanover-square, v. Sparrow* (10 L. T. Rep. N. S. 504; 16 C. B. N. S. 209), and *Simpson v. Smith* (24 L. T. Rep. N. S. 100; L. Rep. 6 C. P. 87), disapproved.

*Bauman v. The Vestry of St. Pancras* (L. Rep. 2 Q. B. 528) approved.

This was an appeal from a judgment of Lord Coleridge, C.J., Stephen and Mathew, JJ., reported 50 L. T. Rep. N. S. 690.

A case had been stated for the opinion of the High Court of Justice by Robert Henry Bullock Marsham, Esq., one of the magistrates of the police courts of the metropolis, sitting for the district of Greenwich, in the county of Kent, in accordance with the statute 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), the facts thereof being, so far as material, as follows:—

On the 9th March 1883 a summons was issued in the Greenwich Police Court, on the prosecution of Francis Freeman Thorne, a surveyor and officer of the Plumstead District Board of Works, against Arthur John Spackman, of 8, Newton-terrace, High-road, Lee, in the county of Kent, for that on the 15th Jan. 1883, and on divers other days, he unlawfully did erect or raise a building, structure, or erection in or on the north side of a certain street, place, or row of houses, called Newton-terrace, High-road, Lee, aforesaid, and adjoining or forming part of the premises known as No. 7, Newton-terrace, aforesaid, of which he was the owner, without the consent in writing of the Metropolitan Board of Works, and beyond the general line of buildings in such street, place, or row of houses as decided by the superintending architect to the Metropolitan Board of Works for the time being, contrary to the 75th section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102).

On the hearing of the summons, on the 30th March 1883, the following facts were either proved or admitted:

The defendant was the owner of the house and premises, No. 7, Newton-terrace, mentioned in the said summons. The said house forms one of a terrace of nine houses, seven of which belong to the defendant, in the High-road, Lee, known as Newton-terrace. The frontage of the said house mentioned in the said summons, as well as the line of frontage of the other houses of the terrace, does not exceed fifty feet in distance from the said High-road.

The defendant had, on or about the date mentioned in the said summons, without obtaining the consent of the Metropolitan Board of Works (which consent had in fact been refused), commenced to erect, and had proceeded with the erection of, a building upon the forecourt of No. 7, Newton-terrace, aforesaid, thereby extending the frontage of that house to the High-road. The complainant thereupon wrote a letter to the defendant requiring him to desist from the said erection. The defendant replied declining to do so, and on the 22nd Feb. 1883 the complainant again wrote, threatening proceedings against the defendant as soon as his board should have obtained the certificate of the superintending architect of the Metropolitan Board of Works, deciding the position of the general line of buildings of which the said premises formed part, in accordance with the 75th section of the Metropolis Management Amendment Act 1862.

On the 15th Feb. 1883 the complainant, representing his said board, and the defendant both attended by appointment before Mr. George Vulliamy, the superintending architect of the Metropolitan Board of Works, and were both heard by him with reference to the position of the said line of buildings, and afterwards the said Mr. George Vulliamy published his certificate with a plan thereto attached. [The certificate and plan were annexed to the case.]

Upon the south-east corner of the ground, abutting on the High-road at the west of the said plan, but not indicated thereon, is a wooden structure on brick foundations, consisting of a stable with a coach-house and dwelling-rooms above, and used by the occupiers of Hurst Lodge. This stable is at the spot at which the general line of buildings laid down by the said certificate ends, and is the only building between that spot and the grounds of Hurst Lodge, which extend for a considerable distance along the High-road, and the building, which is an old building, projects as much as the defendant's new building does. To the east of the spot for which the superintending architect has proposed to lay down a general line there is a chapel, shown on the plan, which abuts on the High-road, and projects in front of the building line laid down as much as the defendant's new building does, and immediately to the east of the chapel is a row of twenty houses and shops, all of which abut on the High-road.

The erection put up by the defendant in front of No. 7, Newton-terrace aforesaid, extended considerably beyond the general line of buildings as fixed by the said architect in his certificate, but not beyond the line of the stable, chapel, and shops before mentioned.

It was contended by the counsel who appeared

for the complainant: (1) That the position of the general line of buildings, within the meaning of the 75th section of the Metropolitan Management Amendment Act 1862, was the line fixed and decided to be such by the superintending architect, and that it was not open to the magistrate for the purpose of deciding the question raised by the said summons, and by way of reviewing the said architect's decision, to draw any new line of buildings, or to alter or re-define the line fixed by him; (2) that, in the event of the magistrate deciding that it was open to him to review, and determining to review the said architect's decision, the "general line of buildings," within the meaning of the said section, did not mean the general line of buildings of all the houses on the north side of the High-road, Lee, but meant the line of the buildings forming Newton-terrace, or of the houses between Brandram-road and Belgrave-villas, or, at most, of the houses between Brandram-road and the boundary of Hurst Lodge, indicated on the said plan; and that he was bound, as a matter of law, to confine his attention to the said limited portions of the High-road, and could not take into consideration the buildings east and west of the said portions.

It was argued on the part of the defendant by the counsel representing him that the magistrate was bound, before deciding the said summons adversely to the defendant, to determine for himself the said general line of buildings, and to find, as a fact, what was the position of the general line of buildings of the said High-road at and about the part where the defendant's building was, and that he ought not to convict the defendant or order the demolition of his building unless it was, in his opinion, as well as in that of the superintending architect, beyond the general line of building, and he referred to the case of *Simpson v. Smith* (24 L. T. Rep. N. S. 100; L. Rep. 6 C. P. 87) on the point.

The defendant further contended that the buildings to the east and west of the particular part to which the certificate of the architect applied ought to be taken into consideration in deciding on the general line, and that the line as laid down by the architect was not a general line, but a particular line arrived at by selecting just that portion of the road at which the buildings for the time being happened to stand back, and that the magistrate was not bound, as a matter of law, to confine his attention to the limited portion of the road suggested by the complainant, and that, on the contrary, if it was a question of law and not one of fact, he was bound, as a matter of law, to take into consideration the buildings east and west.

The magistrate decided against the complainant, and in favour of the defendant's contention upon both points of law, thinking the case of *Simpson v. Smith* applicable, and the other question to be one of fact, and that he was not bound, as matter of law, to confine his attention to the portions of the road suggested by the complainant, and he adjourned the hearing to allow of his visiting the premises and deciding for himself the true position of the general line of buildings, and whether it was necessary to take into consideration the other buildings in order to arrive at a general line.

After personally visiting the locality of the said

premises the magistrate gave his decision that the general line of buildings, as defined by the said architect, was not the true general line of buildings in the street, place, or row of houses in which the defendant's building was situate, and held that it was necessary, as contended by the defendant, in order to arrive at a general line, to take into consideration the position of the said stable or of the other buildings to the east of Brandram-road above mentioned, or of all of them, and after full consideration of all the facts decided that the defendant had not built beyond the true general line of buildings, but stated that, had he confined his attention to the houses forming Newton-terrace, or to the houses between Brandram-road and Belgrave-villas, or between Brandram-road and the boundary of Hurst Lodge, his decision would have been the same as that of the said architect, there being no question whatever that in that particular position no building projects beyond the line laid down by the architect; but in his opinion, after viewing the spot, there was no ground, in fact, for selecting that portion of the road, and laying down a special line for it, and he therefore dismissed the summons, subject, however, to the opinion of the High Court upon the case.

The magistrate also found, as a fact, that if the true position of the general line was a question of fact for him, the defendant's building did not project beyond it.

The questions for the opinion of the court were:

1. Whether the magistrate was bound by the architect's certificate as conclusive, or ought, as he did, to have considered for himself what the true general line of building was. 2. Whether he was bound, as a matter of law, in considering the general line of buildings, to confine his attention to the portions of the road suggested by the complainant; and if on either question his decision was in the opinion of the court wrong, the defendant was to stand convicted, and the magistrate was, on the case being remitted to him for the purpose, to make all further necessary orders on the application of the complainants for the demolition of the said building; but if the court, on the contrary, was of opinion that on both the points of law his decision was correct, the order dismissing the summons was to be confirmed.

The learned judges of the Divisional Court held that the magistrate was bound by the architect's certificate as conclusive.

The defendant appealed.

The statute 25 & 26 Vict. c. 102, s. 75, after repealing 18 & 19 Vict. c. 120, s. 143, and 7 Geo. 4, c. 142, s. 140, proceeds to enact in lieu thereof:

That no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being, and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent or contrary to the terms or conditions on which the same may have been granted, it shall be lawful for the vestry of the parish, or the board of



works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person, engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing . . . . .

*Charles, Q.C. and Channell* for the appellant *Spackman*.—The magistrate was not bound to accept the certificate of the superintending architect of the Metropolitan Board of Works as conclusive. The point was decided in *St. George's, Hanover-square, v. Sparrow* (10 L. T. Rep. N. S. 504; 16 C. B. N. S. 209) and in *Simpson v. Smith* (24 L. T. Rep. N. S. 100; L. Rep. 6 C. P. 87); though it is true that a contrary opinion was expressed in

*Bauman v. The Vestry of St. Pancras*, L. Rep. 2 Q. B. 528.

The complaint must be proved to the satisfaction of the magistrate, upon the hearing; there is no provision obliging the superintending architect to hear the parties, and, if his certificate is to bind the magistrates, the defendant may be convicted without even having been heard. They also cited

*Cooper v. Wandsworth Local Board*, 8 L. T. Rep. N. S. 278; 14 C. B. N. S. 180;

*Wandsworth v. Hall*, 19 L. T. Rep. N. S. 641; L. Rep. 4 C. P. 85;

*Paddington v. Snow*, 45 L. T. Rep. N. S. 475.

*Willis, Q.C. and J. L. Walton* for the respondent.—The general line is for the superintending architect to decide; and at the hearing before the magistrate that general line is to be considered as "so fixed as aforesaid," that is, fixed by the architect. It is clear that in the contemplation of the section the magistrate is not to go behind the architect's decision. They referred to

45 & 46 Vict. c. 14, s. 9;

*Tear v. Freebody*, 4 C. B. N. S. 228.

*Cur. adv. vult.*

July 12.—*BRETT, M.R.*—In this case there arises an extremely difficult question, and one on which there has been much difference of opinion. A summons was taken out against the appellant *Spackman* for erecting a building beyond the general line of buildings in the street in which the building was. The superintending architect of the Metropolitan Board of Works had given his certificate as to what was the general line of buildings in the street, but the magistrate saw the street and came to the conclusion that the general line was not as certified. He therefore declined to make an order that the building should be pulled down. It is said on behalf of the respondents that the certificate was conclusive, and that the magistrate had no jurisdiction to enter upon the question as to what was the general line of buildings, but was bound to make the order if, as a fact, the building in question was beyond the certified line. It is difficult to express the importance of the considerations arising upon this contention. A man

builds a house on his own land and at his own cost on a spot adjoining a street. It may be that everyone who sees it would say that he had not built beyond the line, and had not contravened the real object of the statute. It may be that the architect may certify that he has done so, the architect taking a too strictly mathematical view, and even acknowledging that his view is a purely professional one; and yet it is said that the owner is to be forced to pull the building down; and even though the architect has made a mistake, the legal tribunal before which the matter comes is bound to make an order to do this monstrous injustice. It may be that this is the law. It may be that we shall have to come to the conclusion that the Legislature has inadvertently committed this great injustice, but at the outset my mind revolts against such an interpretation of the statute, and struggles against such a conclusion. The matter depends upon sect. 75 of the Metropolitan Management Amendment Act 1862. Without doubt, the words of the section are capable of the strict construction contended for—I say are capable of it; but in 1864 *Erle, C.J. and Willes, Byles, and Keating, JJ.*, after fully considering the matter, acted on this rule of construction:—If the words of an Act of Parliament, although capable of an interpretation which would work manifest injustice, can possibly, within the bounds of a grammatical and reasonable construction, be otherwise construed, then the court ought not to attribute to the Legislature what is a clear, manifest, and gross injustice. Those learned judges that I have named, acting on this principle, gave an interpretation to this section. The section then came before the Court of Queen's Bench, of which *Cockburn, L.C.J.* was a member, and the opinion of the Court of Common Pleas was dissented from. Afterwards the same question came again before the Court of Common Pleas, the court consisting of *Willes, Keating, JJ.*, and myself. Nothing has been urged in the argument of this case which was not urged before us then; we had before us the remarks of the Lord Chief Justice in the case in the Queen's Bench, and we most anxiously considered them; we considered carefully the words of the statute, and we gave a deliberate judgment that the Legislature did not mean to destroy the value of a man's own money expended on his own property without the usual safeguards. I think it is impossible to suppose that the Legislature intended to make a single person the sole arbitrator of a man's right of property in his own land. I think it is inconceivable that this should be so when we know in what trivial cases there is an appeal from one court of justice to another. Looking through the Act, I can find no provision that the architect must even hear either party or any evidence before giving his certificate. I can see no answer to the objection that, after a man has built his own house on his own land at his own cost, an architect sitting in his own room, without even hearing the parties or seeing the property, may make an order so that all that has been done must be pulled down and destroyed. I think it is begging the question to say that the result of upholding this decision will be to make the architect an arbitrator; there is really nothing in the Act to make him so. I do not wish to go through the arguments again, I indorse the judgment of *Willes, J.* What is the line of buildings



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is a reality, a fact. How is it to be determined? Let us suppose a road in which there are no houses. Two or three first owners build their houses back from the road. The architect may give his certificate after the next owner has built his house, and he may be obliged to put it back, and then the architect may change his mind, and in the next case may give a certificate of an altogether different line of buildings. It is said that he is more competent than the magistrate to decide this question; yet it is admitted that as to all other points that may be raised the magistrate may decide, but not as to this one. I am bound to state what is my strong conviction on this subject, and it is this—that according to the decision of the Divisional Court clear and gross injustice is done. In my opinion the true construction of the 75th section is to give power to the architect to decide, but not to prevent the magistrate from saying that his decision is unjust. I therefore think that this appeal should be allowed.

Fry, L.J.—The judgment which I am about to read is that of myself and Bowen, L.J. The questions in this case, which has been stated by a metropolitan magistrate, arise on the construction of the 75th section of the statute 25 & 26 Vict. c. 102, which deals with the general line of buildings in the streets and other places in the metropolis. The first question stated by the magistrate is, whether he is bound by the architect's certificate as conclusive, or ought to have considered for himself what the true general line of buildings was. This is a point which has been several times before the courts prior to the decision now under appeal, and which has elicited a great diversity of opinion. In the case of *St. George's v. Sparrow* (*ubi sup.*) and *Wandsworth v. Hall* (*ubi sup.*) eminent judges of the Court of Common Pleas expressed an opinion that the certificate of the architect was not binding on the justice, and in the case of *Simpson v. Smith* (*ubi sup.*) the court decided the question in accordance with their previously expressed opinion. But on the other hand, in the case of *Bauman v. St. Pancras*, Lord Cockburn, C.J. and Mellor, J. criticised the case of *St. George's v. Sparrow*, and expressed the opinion that the certificate of the architect was final and binding on the justice. In such a diversity of opinion on the point in controversy, we think that the Queen's Bench Division were right in considering that they were not precluded by authority from determining the question on its merits. We shall pursue the same course, not regardless of the views enunciated by the various judges who have expressed their opinions, but supported by remembering that in our conclusion, whatever it may be, though we must differ from some great authorities, we must also be in accordance with others. Before proceeding to the section in question it is desirable to observe that a general scheme for regulating the buildings in the metropolis was introduced by the Act of 1855 (18 & 19 Vict. c. 120); that that Act laid down certain general rules as to buildings, and created a body of district surveyors to give effect to these rules; that it placed the Metropolitan Board in a certain position of headship over the district boards (sect. 55 *et seq.*); that it required the Metropolitan Board to appoint an officer, termed a superintendent architect of metropolitan buildings (sect. 62), to whom (unless otherwise ordered)

the district surveyors were to make returns, and who was to exercise a supervision over the proceedings of the district surveyors, and to receive from them the fees paid to them (sects. 54 and 65); and that his signature, countersigned by the chairman, was made the proper evidence of the board's approval of any plans or particulars (sect. 58). Lastly, sect. 143 enabled any vestry or district board to pull down any buildings which projected beyond the regular line of buildings, leaving the question what was such regular line to be determined, if necessary, by a jury, on an action of trespass brought by the building owner against the board. In 1862 the Act in question was passed for the amendment of the Act of 1855. The 75th section repealed the 143rd section of the Act of 1855, and also the provision of an earlier Act with regard to one particular road in the metropolis, and then proceeded to deal with two distinct cases: first, the case of a person building beyond the general line, in case the distance of such line of buildings from the highway does not exceed fifty feet; and, secondly, the case of a person building within fifty feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds fifty feet. As the present question arises on the former of these cases, we may omit so much of the section as deals with the second case, and then the enacting words will be as follows: "No building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being, and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish, or the board of works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons, requiring the owner or occupier of the premises, or the builder, or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons, to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable." It appears to us that one line only is spoken of throughout this section—namely, the general line of buildings; that, as regards each case under discussion, one decision of that line only is referred to—namely, the decision of the architect—and that decision is to be valid for all the purposes of the section in such case; and the pointed reference to this decision of the architect in the direction to be given by the magistrate—namely, to pull down

the whole building, or so much thereof as may be beyond the said general line so fixed as aforesaid—appears to us to emphasise the proposition that the decision or fixing of the line by the architect is to be adopted by the magistrate if the rest of the case be made out to his satisfaction. If the architect and the magistrate are both to fix the line, it is conceivable that they may fix it differently. If they fix it in the same place no question can arise; but if they should fix it differently one or other of two cases must occur: If the architect's line be in advance of the magistrate's, the magistrate cannot act on his judgment and order the demolition of so much of the building as is in excess of his line—he can order only so much as is in excess of the architect's. If, on the other hand, the magistrate's line be in advance of the architect's, then, according to the contention of the appellants, the magistrate can order only so much of the building to be pulled down as is beyond his own line, whereas the statute speaks of the demolition of so much of the building as may be beyond the said general line as fixed by the architect. These observations seem to us to show that the statute not only contemplated only one line, but only one decision as to that one line in each particular case in controversy before the justice. It appears to us that there is nothing unreasonable or improbable in the conclusion that the power of finally determining this line should be vested in the superintending architect of the Metropolitan Board. He is, as we have already shown, an officer filling a responsible position under the Metropolitan Board; that board is itself entrusted with large powers of superintendence over the metropolis and over the vestries and districts. The question to be determined is one of a technical character, on which the Legislature might think an architect as good a judge as a magistrate, and it may have been thought that such a reference was more likely to secure uniformity of decision than leaving the question open to each magistrate before whom it might come. It seems to us improbable that the Legislature should have contemplated that the same line should be twice decided in each case between the building owner and the board, and that each decision should retain a certain validity, so that if the magistrate's line was behind the architect's the architect's should govern the extent of demolition, and if the architect's line was behind the magistrate's the magistrate's should prevail. The case would have been different if the second decision had been pronounced by way of appeal, and the magistrate who heard the appeal had been authorised to give effect to his decision by demolishing down to the line as ascertained by himself, which, as already shown, is not the case. It has been suggested that the Legislature are not likely to have required any proceedings before the magistrate if this question was not open to his decision, and if, to use the language of Erle, L.C.J., he was to act under the command of the superintending architect. But it appears to us that after the architect's decision several questions might arise and require judicial determination. The magistrate might have to determine (1) whether the building complained of was a building, structure, or erection within the meaning of the Act; (2) whether the distance of the line of buildings from the highway was less than

fifty feet; (3) whether the superintending architect had fixed the general line of buildings for the case in hand; (4) whether the Metropolitan Board had given any consent; (5) whether that board had imposed any conditions, and, if so, (6) whether these conditions had or had not been broken; (7) whether the thing complained of was beyond the line laid down; and (8) within what time it was reasonable that the demolition should be made. Several points have been raised incidentally as to the time, manner, and character of the decision to be given by the magistrate. The case before us is not addressed to any question as to the validity or propriety of the decision given by the architect, but only to the duty of the magistrate to consider the question for himself, and therefore these points do not require detailed discussion or final decision. It may be enough to observe that, in our opinion, any duty of deciding the line in question cast upon the architect ought to be performed by him with a due regard to the interests, no less of the building owner than of the public, both as regards the time when the decision shall be given, and the mode of arriving at the decision. We cannot think that the silence of the statute on the details of the architect's procedure exonerates him from this obligation, and we think that this obligation would rest on him equally whether his decision were final or not, for, on any construction of the statute, his determination of the line is a matter of moment to both parties, as the magistrate can never go beyond it. For these reasons, and notwithstanding the distrust which we always feel when differing from the Master of the Rolls, we are constrained to hold that the decision below was right, and that this appeal should be dismissed.

*Appeal dismissed.*

Solicitor for the Board of Works, *George Whale*.

Solicitors for Spackman, Shaw and Son, Greenwich.

*Monday, Dec. 8, 1884.*

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF OVER DARWEN v. THE JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER. (a)

ON APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Highway—County—Borough—Expense of maintenance of road—County in which road is situate—Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), ss. 13, 38—Highway Acts 1862 and 1864 (25 & 26 Vict. c. 61), s. 2, and (27 & 28 Vict. c. 101), s. 3.*

*By the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 13: "For the purposes of this Act, and subject to its provisions, any road which has within the period between the 31st day of December 1870 and the date of the passing of this Act" (16th Aug. 1878) "ceased to be a turnpike road . . . shall be deemed to be a main road; and one-half of the expenses incurred from and after the 29th day of September 1878 by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid*

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate . . . ."

By sect. 38: "In this Act 'county' has the same meaning as it has in the Highway Acts 1861 and 1864 (with an exception not here material).

By the Highway Act 1862 (25 & 26 Vict. c. 61), s. 2: "The word 'county' in this Act shall not include a county of a city or a county of a town, but where a county as hereinbefore defined is divided into ridings or other divisions having a separate court of quarter sessions of the peace, it shall mean each such division or riding, and not the entire county; and for the purposes of this Act all liberties and franchises . . . except boroughs as hereinafter defined shall be considered as forming part of that county by which they are surrounded . . . ."

By the Highway Act 1864 (27 & 28 Vict. c. 101), s. 3: "County shall include any division of a county that has a separate county treasurer."

The borough of Over Darwen in Lancashire is a highway area within the meaning of the Act of 1878, having no separate court of quarter sessions, and the townships or parts of townships comprised within its boundary are assessed and contribute to a separate rate raised and charged upon the hundred of Blackburn.

A road which ceased to be a turnpike road in 1877 passing through the borough, the highway authority sued the county authority to recover payment of one-half of the expenses incurred by the highway authority for the year ending 25th March 1883 in the maintenance of so much of the road as was situate within the borough.

Held, on a special case stated in the action, that the word "county" in 41 & 42 Vict. c. 77, s. 13, is used in a geographical sense, and therefore the county of Lancaster was the county in which the road was situate, and the defendants, the county authority, were liable.

Judgment of Day and Smith, JJ. affirmed.

THIS was an appeal by the defendants from the judgment of Day and Smith, JJ. (reported 51 L. T. Rep. N. S. 630), where the material parts of the special case are set out.

Gorst, Q.C. (Blair with him), in support of the appeal, used the same arguments as in the court below.

B. Henn Collins, Q.C. and W. H. Cross, for the plaintiffs, were not called upon.

BRETT, M.R.—The 2nd section of the Highway Act 1862 (25 & 26 Vict. c. 61) deals with the definition of the word "county," and the question to be determined is whether the provisions of that section are applicable to the phrase "the county in which such road is situate" in the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), s. 13. It seems to me that the word "county" in the Act of 1878 must have its ordinary meaning. If this is so, as it is admitted that the road and the highway area are in the county of Lancaster according to the ordinary meaning of the expression, it follows that the judgment of the Divisional Court ought to be supported. These Acts of Parliament deal with two different matters, geography and jurisdiction. The power of justices to make orders is a matter of jurisdiction, and the description of counties and other divisions of the country is a matter of geography. England is divided geogra-

phically into counties, and there is no part of the country that is not within a county. There are the well-known counties of England, the names of which are familiar, and there are also counties of cities and counties of towns. When one speaks of a physical thing like a road being situate in a particular place one is referring to the place where it is situate on the map which divides England into counties. I am therefore of opinion that the phrase, "the county in which such road is situate" in the Act of 1878 is descriptive, and is not altered by the definition clause in the earlier Act, and that the judgment of the court below is right, and ought to be affirmed.

COTTON, L.J.—The point to be settled by this appeal arises on the 13th section of the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), and we have to decide how we are to deal with the provisions of that section, having regard to the definition clause contained in sect. 38. The question is whether the main road referred to in the special case is situate in the county of Lancaster within the meaning of sect. 13. There is this difficulty, that by the definition clause in sect. 38, the word "county" is to have the same meaning as in the Highway Acts of 1862 and 1864. In drawing that section the draftsman appears to have been more cautious, for in dealing with the exception there provided for the words "locally situate" are used. Now, the definition clause in the Act of 1862 (25 & 26 Vict. c. 61, s. 2) provides that liberties and franchises "except boroughs" are to be considered as forming part of the county by which they are surrounded, and it is contended that by this exception boroughs are excluded from the county for all purposes. In my opinion this view is erroneous. I think the interpretation clause is not to be construed so as to give an interpretation inconsistent with the context. I think the words "for the purposes of this Act" may be meant to provide that certain powers which the county authority may possess are not to be exercised by them in boroughs, so as to interfere with the local authority. In my opinion it is a wrong construction to say that, because the road in question is in the borough, it is not situate in the county within the meaning of sect. 13. I am of opinion that it is a main road physically situated in the county of Lancaster, and I therefore agree that the judgment is right.

LINDLEY, L.J.—I am of the same opinion. We are asked to construe sect. 13 of the Act of 1878, not in its plain sense according to the meaning of the words, but in a sense which has to be got at by a puzzle. I think the road is a main road situate in the county of Lancaster, and that the decision of the court below is right.

Judgment affirmed.

Solicitors for plaintiffs, *Pritchard, Englefield, and Co.* for C. Costeker, Over Darwen.

Solicitors for defendants, *Ridsdale and Son*, for Wilson and Hulton, Preston.

CHAN. DIV.]

ACTON LOCAL BOARD v. BATTEN.

[CHAN. DIV.]

## HIGH COURT OF JUSTICE.

## CHANCERY DIVISION.

Wednesday, Nov. 19, 1884.

(Before KAY, J.)

ACTON LOCAL BOARD v. BATTEN. (a)

*Sewer—Drain—Vested in local board—Made for private profit—Public Health Act 1875, ss. 4, 13, sub-sect. 1.*

*Where land is laid out for building, houses built, and a street made, though not vested in the local authority, and a drain laid down in the street, which is intended to be connected with the houses, such drain is a "sewer" within the definition of that word in sect. 4 of the Public Health Act 1875—at any rate, after more than one house has been connected with it.*

*Where a man constructs a sewer down such a street as above-mentioned, for the use of all the houses in that street generally, the sewer is not, because the maker of it owns some of the houses and connects them with it, made by him "for his own profit" within the exception in sect. 13, sub-sect. 1, of the Public Health Act 1875.*

THIS was an action by the Acton Local Board to restrain the defendant from breaking into one of their sewers, and for damages for his having done so.

There had been a drain down a certain street called The Avenue, in the Acton district, which was laid out for building purposes, but which had not yet become a highway. Some of the houses in The Avenue were connected with this drain, but a good outfall could not be obtained for it. Accordingly Carr, who had originally owned the land, but had since sold a considerable part of it, still retaining two of the houses—7 and 9—wishing to make a sewer at a better level, entered into an arrangement with the Acton Local Board, by which the board undertook, if he made a sewer at a certain level, to receive the sewage which passed along that sewer, which was to go along The Avenue, and down a road called Blenheim-road, to a pumping station, and pump it into one of their main outfall sewers. To carry out this arrangement, Carr granted the board a lease of a piece of land on which they were to build a pumping station. The defendant Batten had at one part of The Avenue houses on both sides of the street. He was the owner in fee of them, and therefore the soil of The Avenue between these houses was entirely vested in him.

Carr entered into negotiations with Batten to obtain his leave to make his new sewer through his land. Batten gave his consent, but made it a condition that Carr should, at his own expense, connect Batten's houses with this sewer. Upon this understanding the sewer was in 1882 commenced, and in due time finished.

It appeared from an affidavit of Carr filed in this action on the 10th Nov. 1884, that, in or about September of that year, three houses were connected with the new sewer in The Avenue. These houses were above the defendant Batten's houses in the line of drainage. Two of them—7 and 9—belonged to Carr, and the other to a man named Fulton.

On the 15th Oct. 1884, Batten having in vain

asked Carr to carry out his part of the arrangement and connect his houses with the sewer, cut a piece out of the sewer and blocked it up. On the same day the board, by their clerk, wrote and protested against this, and some correspondence ensued.

On the 23rd Oct. the board restored this sewer, but it was blocked again by the defendant.

On the 24th Oct. the writ in this action was issued.

Graham Hastings, Q.C. and Pollard for the plaintiffs.

W. Pearson, Q.C. and Innes for the defendant.

KAY, J. stated the facts, observing that the local board had nothing whatever to with disputes between Carr and the defendant, the latter of whom, according to his story, had been extremely ill-treated by Carr; but Carr, although he had made an affidavit, was not a party to the action, and when any litigation arose, if it should, between Carr and the defendant, it would be time for the court to deal with that. He continued:—Now, I have to inquire as a question of fact whether at the time the writ was issued these three houses had been connected with this sewer. As to that there is no question. They had certainly been connected before the writ was issued. Well, were they connected before the drain was blocked on the 15th Oct.? The evidence is that they were connected in or about September, and there is no evidence on the side of Mr. Batten, who has filed an affidavit in this matter, that at the time when he blocked it these drains were not made. Therefore I draw an inference of fact from the evidence before me that the drains of these houses had been connected with the sewer before he blocked it on the 15th Oct. That being the state of the case, of course the only question between the local board and Mr. Batten is, Was this a sewer which was vested in them? The 13th section of the Public Health Act 1875 provides that there shall be vested in the local authority "all existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto, except," and then there are certain exceptions mentioned. The only exception which could possibly apply to this is "sewers made by any person for his own profit." Now, I have not the least doubt that this does not come within that exception, because Mr. Carr swears that he did not make this sewer for his own profit at all. He made it for the purpose of draining all the houses in this street, many of which did not belong to him in the least. It was no doubt for the purpose of draining his own houses among others, and the two houses which do belong to him have been connected with it. But if a sewer so made for draining a street of houses would be considered as a sewer made for the profit of the person who made it, because he owns some of those houses and connects them with it, all I can say is that every sewer in every street of every suburb of every town in England might be considered a sewer made for the profit of the person who constructed it. It is quite clear that is not the meaning of the Act. This sewer, then, is not within the exception in sub-sect. 1 of sect. 13. It was indeed very faintly argued, and I have not the least doubt in the world that it does not come within that exception. Then the main thing is, Is this a sewer? Now, it is said that it is not a

(a) Reported by A. J. HALL, Esq., Barrister-at-Law.

CHAN. DIV.]

HUNTER v. JOHNSON.

[Q.B. DIV.]

sewer, because there is not sufficient evidence that any house had been connected with it before the local board took the matter up, or at any rate before it was blocked up by the defendant on the 15th Oct. Although it is by no means so clear as I should like, I must infer from the evidence that the connection was made, at least as to these three houses of Fulton and Carr, before that 15th Oct. Therefore when the defendant took upon himself to block it, it was a drain evidently made for the purpose of being a sewer down a street which I understand has not yet become vested in the local board, and is not yet a highway, and the question is whether that is a sewer within the Act. Now, the words of the Act are as large as can be. First of all it says, in sect. 4, "drain" means "any drain of and used for the drainage of one building only." Then the next clause says: "Sewer" includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads, and not being a local authority under this Act." Therefore what is the meaning of the Act I cannot doubt. It was to give the largest possible interpretation to the word sewer, and most clearly to include a drain like this, laid down because of an intended street, actually, laid down and which was intended to be connected with all the houses in that street which required to be connected with it. That must be within the meaning of the word "sewer," at any rate, after more than one house has been connected with it. It seems to me to be reasonably clear that more than one house had been connected with it before the 15th Oct. The act done on that day was a wrongful act, and it is very clear that when this writ was issued any attempt to interfere with this sewer certainly was wrong without the leave of the Acton Local Board. Now, I repeat what I said before, that Mr. Batten may have been (I do not say he has been because Mr. Carr is not here) extremely ill-treated by Mr. Carr in this matter. Mr. Carr may not have carried out the arrangement under which Mr. Batten allowed this sewer to be made through his land. It might be quite a proper act as between Mr. Batten and Mr. Carr to intercept this sewer, or he may have any other remedy against Mr. Carr. About that I say nothing. The question here is not in the least between Mr. Batten and Mr. Carr. The question is whether the local authority, in whom this sewer is vested, have not acquired a right which, notwithstanding any wrong done by Mr. Carr to Mr. Batten, makes it an illegal act for Mr. Batten to stop this sewer without their leave. I think that is so, and accordingly I grant an injunction restraining the defendant from blocking or interfering with the sewer, otherwise than for the purpose of connecting his own houses with it. The damages have been agreed at 10*l.*, and I accordingly give that sum as damages. I must order the defendant to pay the costs.

Solicitors for the plaintiffs, *Hemsey and Hemsey*.

Solicitors for the defendant, *Batten, Proffitt, and Co.*

## QUEEN'S BENCH DIVISION.

Monday, June 16, 1884.

(Before MATHEW and DAY, JJ.)

HUNTER v. JOHNSON. (a)

*Elementary Education Acts 1870 (33 & 34 Vict. c. 75) and 1876 (39 & 40 Vict. c. 79)—Power to impose home lessons—Detention of child at school after school hours.*

*The master of a board school established under the Elementary Education Acts 1870 and 1876 is not authorised by those Acts in setting lessons to be prepared at home by children attending such school, and the detention of a child at school after school hours for not doing home lessons amounts to a criminal assault.*

THIS was a case stated by the justices of the borough of Bradford under 20 & 21 Vict. c. 43.

1. The appellant was a child ten years of age, residing with his mother, a widow, at Tyersal near Bradford. The respondent was head master of the mixed department of the Tyersal board school.

2. The said school was one of the schools of the Bradford School Board formed under the Elementary Education Act 1870 and amending Acts. The appellant attended the mixed department of the said school.

3. On and for some time previous to the 20th Sept. 1883 the school hours of the Bradford School Board open for the instruction of children of a similar age to the appellant were from 9 a.m. to 12 noon and from 2 p.m. to 4.30 p.m. during five days a week.

4. It had been the practice, in compliance with directions of the said school board, for some time previous to the said 20th of Sept. 1883, for the teachers of the different schools belonging to the board to set or give the children attending the schools "home lessons;" that is, scholastic work, exercises, and recapitulatory lessons, to do at their respective homes out of and beyond the school hours mentioned in the last preceding paragraph.

5. Previous to the 20th Sept. 1883 the mother of the appellant forbade him to learn or do home lessons, and notice thereof in the following form was served on the respondent:

Sir,—I beg to inform you that I have forbidden my child to do any more home lessons, and consequently request you not to set any more in future.—Yours respectfully, E. HUNTER.

6. On attending school on the 20th Sept. 1883, the appellant, in obedience to his mother's commands, had not learnt or done the home lessons given him the previous day, and he was kept in and prevented from leaving the school after the regular school hours for three-quarters of an hour by the respondent, and made to learn or do the home lessons. He was not kept in for any other reason or purpose.

On the 26th Sept. 1883 an information was duly laid on behalf of the appellant before one of Her Majesty's justices of the peace in and for the said borough, that the respondent on the 20th Sept. 1883 did within the borough aforesaid commit a common assault on the said Dick Hunter, contrary to the statute in that case made and provided.

A summons was duly issued on the said information, and the said information was heard before us, Thomas Adam Watson, Esq., Robert Kell, Esq., and Isaac Smith, Esq., three of the justices in and for the said borough, on the 6th Oct. 1883. Counsel

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

Q.B. Div.] GLEN v. CHURCHWARDENS AND OVERSEERS OF THE PARISH OF FULHAM. [Q.B. Div.]

for the appellant contended that, in face of the express notice and command of the mother, the giving and enforcing of "home lessons" to and against the appellant were illegal, and that a false imprisonment, and hence a common assault, had been committed on the appellant. The solicitor for the respondent contended that, assuming for the sake of argument that the respondent had no legal power to keep in the appellant for not having learnt or done "home lessons," yet no assault punishable by the criminal law had been committed.

The justices dismissed the summons, holding that no assault punishable by the criminal law had been committed. The case having been decided on this ground, the justices gave no opinion or decision with regard to the legality or otherwise of enforcing "home lessons."

The appellant contended that the justices should have convicted the respondent, but the respondent contended that the justices ought not in the event stated to have convicted the respondent of an assault punishable by the criminal law.

The question for the court is: Had the respondent under the facts stated any legal power to keep in the appellant for not doing "home lessons?"

If the court be of a negative opinion, then, Ought the justices to have convicted the respondent for an assault punishable by the criminal law?

If the court be of opinion that the justices ought to have convicted the respondent, the case is to be remitted to us the said justices that a conviction may be entered.

Given under our hands this 22nd day of May 1884.

THOMAS A. WATSON.  
ROBERT KELL.  
I. SMITH.

By sect. 74 of the Education Act 1870 every school board is empowered to make bye-laws for (*inter alia*) (1) requiring the parents of children between the ages of five and thirteen to cause such children to attend school, and (2) for determining the time during which the children are to attend school. Certain immunities from attendance at school are conferred upon children employed in labour.

The Bradford School Board made the following bye-law:

The time during which every child shall attend school shall be the whole time for which the school selected shall be open for the instruction of children of similar age including the day fixed by Her Majesty's Inspector for his annual visit.

*Sidney Woolf* for the appellant.—The question here is, whether the Elementary Education Acts, or the bye-laws made under them, give to school boards the authority to impose upon children home lessons, and to detain them in school after school hours if they are not learnt. The 74th section of the Elementary Education Act 1870 empowers the School Board to make bye-laws fixing the time during which the children are to attend school. On reference to the Education Act of 1876 it is clear a child can only be made to attend school during the time the school is open. The bye-laws having determined the hours during which the Tyersal board school should be kept open, the respondent clearly exceeded his powers in imposing home lessons and in detaining the appellant in school after the school hours were

over. With regard to the second question put by the justices, it is contended that an assault had been committed by the respondent. An assault is defined in Stephen's Digest of the Criminal Law, p. 162, as "the act of depriving another of his liberty without the consent of the person assaulted, or with such consent if it is obtained by fraud." He also referred to

1 Russell on Crimes, 5th ed. p. 60; and  
*Bird v. Jones*, 7 Q. B. Rep. 742.

The order imposing the home lessons and the detention of the appellant were both illegal acts, and the respondent ought therefore to have been convicted.

MATHEW, J.—I am of opinion that neither the Elementary Education Acts nor the bye-laws give any authority to the School Board authorities to impose upon children the duty of learning home lessons. The Acts must be construed strictly, inasmuch as they are a statutory interference with the liberty of the subject. After looking carefully at the Acts I am unable to find any power conferred upon the school authorities such as has been assumed by the respondent. A punishment was imposed upon the appellant for disobedience to an order which, as it seems to me, the respondent had no power to make. Having regard to the express protest of the mother and to the fact that the appellant was detained against his will, I think that an assault in law was committed, and that the respondent ought to have been convicted, but that the fine ought to be merely nominal. With this opinion the case must be remitted to the justices.

DAY, J.—I am of the same opinion.

*Appeal allowed.*

Solicitors for the appellant, *Indermaur and Brown*, for *R. Newton Rhodes*, Bradford.

Friday, Dec. 5, 1884.

(Before STEPHEN, MATHEW, and DAY, JJ.)

GLEN (app.) v. THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF FULHAM (resps.). (a)

*Rate—Validity of—Order under seal of district board requiring overseers to levy rate—"Issuing of such order"—The Metropolis Management Act 1855 (18 & 19 Vict. c. 120), ss. 158, 161.*

*On the 9th April 1884 the Fulham District Board of Works affixed their seal to certain orders or precepts addressed to the churchwardens and overseers of the several parishes within their district, requiring them to levy and pay over to the treasurer of the board the sums therein mentioned. On the same day the clerk to the board wrote to the overseers informing them that the precepts had been sealed, and were ready to be issued, but stating that before issuing the precepts he was instructed to ask the parish officers to furnish the board with a duly audited statement, and to pay over to the board the amounts collected in excess of the last year's precepts.*

*The precepts were retained by the district board, and were not, in fact, served upon the overseers until the 15th May 1884, on which day the overseers paid to the board the amount of the excess of the last year's precepts, and delivered a duly audited statement.*

(a) Reported by H. D. BONSAY, Esq., Barrister-at-Law.

Q.B. Div.] GLEN v. CHURCHWARDENS AND OVERSEERS OF THE PARISH OF FULHAM. [Q.B. Div.]

Before the precepts were served on the overseers, namely, on the 19th April 1884, the churchwardens and overseers signed three several rates or assessments, entitled respectively a lighting rate, a general rate, and a sewers rate, and these rates were allowed by two justices of the county of Middlesex on the 19th April 1884.

Held, by Stephen and Mathew, JJ. (Day, J. dissenting), that it was not necessary that the precepts should be actually served upon the overseers before the rates were levied, and therefore the rates were valid.

UPON appeal against a lighting rate, a general rate, and a sewers and metropolitan consolidated rate, made by a majority of the churchwardens and overseers of the parish of Fulham, the parties, pursuant to the provisions of the 12 & 13 Vict. c. 45, s. 11, by consent and by the order of Smith, J., dated the 18th July 1884, stated for the opinion of the court the following

## SPECIAL CASE.

1. The appellant is the occupier of a house and premises situate and being No. 40, Auriol-road, in the parish of Fulham, in the county of Middlesex, and is a member of the Fulham District Board of Works hereinafter mentioned.

2. The respondents are the churchwardens and overseers of the parish of Fulham.

3. The parish of Fulham is a parish within the district of the Fulham District Board of Works.

4. On or about the 17th March 1884 the clerk to the said district board wrote to the vestry clerk of the parish of Fulham a letter in the words and figures following—that is to say:

Board of Works for the Fulham District (Clerk's Office), Broadway House, Hammersmith, W., 17th March 1884.—Dear Sir,—In answer to your letter, dated this day, I beg to inform you that the amount of the metropolitan board's precepts is made up as follows:

	£	s.	d.
Main drainage ... ..	1390	18	4
Fire brigade ... ..	772	13	6
Bridge expenses ... ..	752	8	0
General improvements ... ..	2084	3	4
For all other purposes of the board	1434	7	1

28434 10 3

Yours truly, THOMAS E. JONES, Clerk to the Board.—C. J. Foakes, Vestry Clerk, Fulham.

5. On the 9th April 1884 the Fulham District Board of Works, acting pursuant to the 18 & 19 Vict. c. 120, ss. 158 and 174, affixed their seal to certain orders or precepts addressed to the churchwardens and overseers of the several parishes in their district, requiring such overseers to levy and pay over to the treasurer of such district board the sums therein respectively mentioned at or before the dates therein mentioned.

6. Four such orders or precepts purported to be addressed to the churchwardens and overseers of the parish of Fulham, requiring them to levy the sums hereinafter mentioned for general rate, lighting rate, and sewers rate and metropolitan consolidated rate respectively.

7. On the same 9th April 1884 the clerk to the Fulham District Board of Works, by direction of the said board, wrote to the vestry clerk of the parish of Fulham a letter in the words and figures following—that is to say:

Board of Works for the Fulham District (Clerk's Office), Broadway House, Hammersmith, W., 9th April 1884.—Dear Sir,—I am directed to inform the parish officers of

Fulham that the board have sealed precepts, which are now ready to be issued, for raising the following sums, viz.:

	£	s.	d.
General rate ... ..	25,140	16	11
Lighting rate ... ..	3,070	15	5
Local sewers rate ... ..	4,290	17	6

232,404 9 10

But before issuing the precepts I am instructed to ask the parish officers to furnish the board with a duly audited statement, and to pay over to the board the amounts collected in excess of the last year's precepts.—Yours faithfully, THOMAS ED. JONES, Clerk to the Board.—C. J. Foakes, Esq., Vestry Clerk, Fulham, S.W.

The audited statement and the excess referred to in the said letter are the audited statement and excess required to be handed over by the churchwardens and overseers of the district board in pursuance of sect. 161 of the Metropolis Management Act 1855 and sect. 14 of the Metropolis Management Act 1862.

8. The amount of the said excess was duly paid to the said district board, to wit, the sum of 753*l.* 6*s.* 11*d.*, on the 3rd, and the sum of 10*l.* on the 15th May 1884, and the said audited statement was duly delivered to such board on the 15th May aforesaid in pursuance of the said Acts.

9. The precepts so sealed as aforesaid were retained by the said district board, and were not in fact served upon the said overseers until the 15th May 1884.

10. Before the precepts were served as aforesaid, to wit, on the 19th April, the churchwardens and overseers of the said parish signed three several rates or assessments, entitled respectively "a lighting rate, at and after the rate of one penny in the pound; a general rate, at and after the rate of one shilling and one penny in the pound; and a sewers rate and a metropolitan consolidated rate, at and after the rate of sixpence in the pound;" and the said rates or assessments were allowed by two justices of the county of Middlesex on the same 19th April 1884. In each of the said rates the appellant was assessed as occupier of his house and premises aforesaid.

11. Notice of appeal against the said rates to the quarter sessions in and for the county of Middlesex was on the 17th June 1884 duly given by the appellant to the respondents. The grounds of appeal stated in the said notice are as follows: (1) That the said rates or assessments were and each of them was made by the said churchwardens and overseers without lawful authority; (2) that such rates and assessments were not nor was any of them made for the purpose of levying the amounts of any orders or order of the Fulham District Board of Works issued to the said churchwardens and overseers; and (3) that, whereas the orders of the said district board, in respect of which such rates or assessments were respectively made, were not issued to the said churchwardens and overseers until the 15th May last, the said rates had been made on the 19th April last, and notice that such orders would not be issued until certain conditions had been complied with (which said conditions were not complied with when the said rates or assessments were made), was given to the said churchwardens and overseers before they made the said rates or assessments.

12. The appellant contends that, for the reasons and on the grounds set forth in the notice and grounds of appeal aforesaid, the said



rates and assessments are invalid and ought to be quashed. The respondents contend that the precepts were sealed on the 9th April, and that any rates and assessments made after the said precepts were sealed were valid rates and assessments, although the said precepts had not actually been delivered to the respondents at the time, but were ready for delivery when and as soon as the excess referred to in paragraph 8 of this case had been paid. The respondents further contend that the sealing of the precepts on the 9th April, and the letter of the same date notifying that fact to the respondents, was an issuing of the precepts which justified the respondents in making the said rates and assessments.

13. The question for the opinion of the court is whether, under the circumstances aforesaid, the said rates are good and valid rates. If this court shall be of opinion that the said rates and assessments, or any of them, are valid, then the said appeal is to be dismissed as to such rate or rates, and the Court of Quarter Sessions shall and may adjudge accordingly. If the court shall be of opinion that the said rates, or any of them, are invalid, then the said appeal shall be allowed as to the rate or rates held to be invalid, and the Court of Quarter Sessions shall and may enter judgment that such rate or rates be quashed.

14. It is agreed that judgment in conformity with the decision of this court, and for such costs as this court shall adjudge, may be entered on motion by either party at the quarter sessions in and for the county of Middlesex next, or next but one, after such decision shall have been given.

By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 158, it is enacted that

Every vestry and district board shall from time to time, by order under their seals, require the overseers of their parish, or of the several parishes in their district, to levy and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this Act (and such orders may be made wholly or in part in respect of expenses already incurred, or of expenses to be hereafter incurred); and every such vestry and board shall distinguish in their orders sums required for, &c.

By sect. 161:

The overseers of the poor of every parish to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof, and shall for that purpose make separate equal pound rates upon their parish, or the part thereof upon which any sum specified in such order is required to be levied, in respect of each sum thereby ordered to be levied; that is to say, &c.

*Macmorran* for the appellant.—The overseers have no power to levy the rate until the precept is issued by the district board as required by sect. 161 of 18 & 19 Vict. c. 120. Sealing the precept is not issuing it within the meaning of the section. In fact, the board gave express notice to the overseers that the precept was not issued, and would not be issued until they paid over to the board the amounts collected in excess of the last year's precepts. The rate is therefore invalid.

*Tickell* for the respondents.—There is no express provision in the Act that the overseers may not levy the rate until the precept is issued. But, if it is necessary, I contend that the precept was issued within the meaning of the Act. It was

sealed by the board as required by sect. 158, and notice of this was given to the overseers by the letter of the clerk to the board on the 9th April 1884. The Act does not require actual service of the precept on the overseers.

*DAY, J.*—I am sorry that I have the misfortune to differ from my learned brothers in this case, and for that reason I somewhat mistrust my own opinion; but I have a strong view on the matter, and therefore I must express it. I quite appreciate the inconvenience that may arise if we hold that this rate is invalid; but an argument of that kind cannot be taken into consideration when the true construction of the statute is the question which we have to decide. The power to levy a rate was created by sect. 161, and that gives the overseers powers in these words: "The overseers of the poor of every parish to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof, and shall for that purpose make separate equal pound rates upon their parish, or the part thereof upon which any sum specified in such order is required to be levied, in respect of each sum thereby ordered to be levied; that is to say, a separate rate," &c. Now, this raises the question whether in the case before us any order has been "issued," and I am of opinion that it has not. It is quite true that the order was sealed, and was ready to be issued, but the district board of works designedly abstained from issuing it before the parish officers furnished them with a duly audited statement and paid over to them the amounts collected in excess of the last year's precepts, and it seems to me that the course which the board adopted was not at all unreasonable. The amount in excess of last year's precepts in the hands of the parish officers might be so small that it would not affect the amount to be levied; but, on the other hand, it might be so large that it would be unreasonable and improper to issue a precept until it was ascertained. Suppose, for instance, the amount in excess of last year's precepts in the hands of the parish officers had been 10,000*l.*, then it would have been only necessary to issue a precept for 20,000*l.* and not 30,000*l.*, which is the amount required in this case, and therefore it seems to me to be reasonable not to issue the precept until the parish officers have made a statement and paid over to the board the amounts collected in excess of last year's precepts. It also appears to me to be quite clear that the power of the overseers to levy the rate depends on the precept being issued. The district board had sealed the precepts and were prepared to issue them, and, in my opinion, there is a wide distinction between sealing and issuing a precept, just as there is between sealing and delivering any instrument. In one sense, the precepts had been communicated to the overseers, but they were distinctly told that they were not issued. I do not think the letter written by the clerk to the board, informing the parish officers that the precepts had been sealed and were ready to be issued, amounted to an "issuing" of the precepts within the meaning of the statute, and therefore I am of opinion that it is a bad rate.

*MATHEW, J.*—I think this rate is valid. The question is whether it was intended by the Act

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THE BOURNEMOUTH COMMISSIONERS v. WATTS.

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of Parliament to make the service of the precept on the parish officers a condition precedent to levying the rate, and I find nothing in the Act to that effect. The precepts were prepared and sealed under sect. 158, which enacts that "Every vestry and district board shall from time to time, by order under their seals, require the overseers of their parish, or of the several parishes in their district, to levy and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this Act (and such orders may be made wholly or in part in respect of expenses already incurred, or of expenses to be hereafter incurred); and every such vestry and board shall distinguish in their orders sums required for defraying expenses of constructing, altering, maintaining, and cleansing sewers," &c. That is the section under which the precepts were sealed, one of which required the parish officers to levy a rate of 64344. 10s. 3d. and to pay it over in four quarterly payments, and the other required them to levy a general rate of 25,140. 16s. 11d. and to pay it over by eight equal monthly instalments, and both these precepts were dated the 9th April 1884. Under those precepts the parish officers have made rates. It appears that at the date these precepts were executed there was some difference existing between the parish officers and the district board as to the retention by the parish officers of a sum of money which they had collected in excess of the last year's precepts, and, after the precepts had been sealed, the clerk to the board wrote to inform the parish officers that before issuing the precepts he was instructed to ask the parish officers to furnish the board with a duly audited statement, and to pay over to the board the amounts collected in excess of the last year's precepts. The parish officers do not appear to have complied with that request, and proceeded to make a rate, and I think, under the words of sect. 158, they had authority to do so. Then it is said, that by a later section—that is sect. 161—a condition precedent is imposed of issuing the precept, but I do not so read the section. I feel the difficulty my brother Day pointed out, but I have to construe the statute, and I do not think that the board had a right to withhold the document. I do not see the use of serving the precept on the parish officers, and therefore I think the rate is good and valid.

STEPHEN, J.—With the highest respect to my brother Day's opinion, I agree with my brother Mathew. The question lies in the narrowest possible compass. Sect. 158 says that "Every vestry and district board shall from time to time, by order under their seals, require the overseers of their parish, or of the several parishes in their district, to levy and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this Act." And sect. 161 says that "the overseers of the poor of every parish to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof." Now, the words differ in the two sections, but are they expressions which

mean the same thing or expressions which mean different things? As I read the sections, issuing is the same as sealing. Issuing is not sending the precept to the overseers, but issuing out of their own minds and sealing it. If it is brought to the notice of the overseers that the precept has been sealed, I think it is as good as if they had actually received it, and I think the precept was issued when it was sealed. On that ground alone I think this rate is valid. I am also glad to think that this interpretation is the most convenient, and my brother Day admits that. When I find that the construction I put on a statute is the most convenient it strengthens me in my opinion that the interpretation is the right one. I can well understand what my brother Day says as to the expediency of not issuing a precept until overseers have paid over the excess of the last year's precepts, but the board have the power to enforce payment. If the board had said, "We are prepared to seal the precepts, but shall not do so until the overseers pay over the excess of last year's precepts," I think they would have been within their right; and, besides that, they have the strongest power against the overseers personally if they do not pay the excess of last year's precepts. I am of opinion that the rate is valid.

Solicitors for the appellant, *Green and Hartcup*,  
Solicitor for the respondent, *John Haynes*.

Tuesday, Dec. 9, 1884.

(Before HAWKINS and SMITH, JJ.)

THE BOURNEMOUTH COMMISSIONERS v. WATTS. (a)  
*Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 150, 174, 257—Sewering private street—Cost exceeding 50l.—Contract not under seal—Recovery of amount apportioned from the frontagers.*

*Sect. 174 of the Public Health Act 1875 provides that every contract made by an urban authority, whereof the value or amount exceeds fifty pounds, shall be in writing and sealed with the common seal of such authority.*

*Where an urban authority employs a contractor to sewer a street under sect. 150 of the Public Health Act 1875, at a cost exceeding 50l., and pays the contractor for the work, and apportions the amount amongst the various frontagers, it is no defence, in an action by the urban authority against a frontager to recover the amount apportioned against him, to show that the contract for the work was not in writing under the seal of the urban authority.*

THIS was a case stated on appeal from the County Court of Hampshire holden at Bournemouth.

The action was brought to recover the sum of 7l. 16s., being the proportion alleged to be due from the defendant for the cost of making good and sewerage the Heathpoult-road, Bournemouth, the following being the particulars of the plaintiffs' claim annexed to the summons:

The plaintiffs demand payment of the following:	
Proportion in respect of Manley Lodge, of the cost of making good and sewerage the Heathpoult-road under sect. 150 of the Public Health Act 1875, as by the surveyor's apportionment .....	£ s. d. 7 13 0
Interest 5 per cent. per annum from the 17th Aug. 1883 .....	0 3 10
	£7 16 10

(a) Reported by W. P. EVERSLAY, Esq., Barrister-at-Law.

The case was tried on the 26th March 1884, when it was proved that the defendant was the owner of premises abutting on the Heathpount-road, Bournemouth, which is a street (not being a highway repairable by the inhabitants at large) within the district of the plaintiffs, as the urban sanitary authority, that was not sewered, levelled, paved, &c., to the satisfaction of the plaintiffs, and that notice pursuant to the Public Health Act 1875, sect. 150, had been served on the defendant, among others, to sewer, level, pave, &c., the said road. It was also proved that all the requirements of the section had been complied with by the plaintiffs, and that the work was not done by the defendant, but had been done by the plaintiffs pursuant to the 150th section.

The work was done partly by the staff of labourers and workmen in the regular permanent employ of the plaintiffs, and partly by contractors. The total cost of the work was 101*l.* 5*s.*, of which 75*l.* 14*s.* 4*d.* was the amount paid to such contractors. The sum of 101*l.* 5*s.*, being the expenses incurred by the plaintiffs in executing the work, was apportioned by the surveyor of the plaintiffs amongst the different owners fronting and abutting on the said road, amongst whom was the defendant, and he was served with notice of such apportionment, and did not appeal against it, the amount apportioned to him being the above-named sum of 7*l.* 13*s.*

No contract in writing under the seal of the plaintiffs for the work was entered into, and it was admitted that the plaintiffs had not complied with any of the provisions of sect. 174 of the Public Health Act 1875.

The defendant contended that the plaintiffs were not entitled to recover unless they proved that the requirements of the 174th section of the Public Health Act 1875 had been complied with by them, such section having been enacted for the benefit of the ratepayers and owners of property to protect them from improvident contracts on the part of the plaintiffs as the urban authority.

The learned judge reserved judgment, and on the 23rd April 1884 gave judgment for the plaintiffs, holding that the provisions of sect. 174 were directory only, and that the non-compliance therewith by the urban authority was no answer to the plaintiffs' claim.

The question for the court was whether the non-compliance with the provisions of sect. 174 by the urban authority was an answer to the plaintiffs' claim.

#### Public Health Act 1875 :

Sect. 150: Where any street within any urban district (not being a highway repairable by the inhabitants at large), or the carriage-way, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good or to provide proper means for lighting the same within a time to be specified in such notice.

If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in

manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses.

Sect. 174: With respect to contracts made by an urban authority under this Act, the following regulations shall be observed, namely: (1) Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority.

*Macaskie* for the defendant.—There was here no written contract under seal with the contractors who executed the works, and so the plaintiffs had no power to bind the rates for this work; they can only bind the rates in the manner pointed out by sect. 174. The plaintiffs, therefore, were bound to refuse to pay the contractors, and, as they have paid them wrongfully, they cannot recover from the defendant. The urban authority are trustees for the ratepayers, and can only bind the rates by contract in the manner which the Act prescribes. This is laid down by Page Wood, V.C., in *Frend v. Dennett* (5 L. T. Rep. N. S. 73); and this case was quoted with approval in the House of Lords in *Young v. The Mayor of Leamington* (49 L. T. Rep. N. S., at p. 3; 8 App. Cas., at p. 522). The observations of the judges in *Novell v. The Mayor of Worcester* (23 L. J. 139, Ex.) are to the same effect. No doubt, all these cases were actions by contractors against the local authority, but the principle involved in that class of case is the same as in the present. It may be said that the case of *Reg. v. The Mayor of Norwich* (32 W. R. 752) is an authority against me, but there the court were dealing with a discretionary power as to whether they should grant a *certiorari* to bring up and quash a resolution to pay certain sums, each over 50*l.*, to contractors for the cost of executing certain works, as no contracts had been entered into under seal, under sect. 174 of the Public Health Act 1875, the statute 7 Will. 4 1 Vict. c. 78, s. 44, after reciting that it was expedient to give all persons interested in the borough fund of any borough a more direct and easy remedy for any misapplication of such fund, enacting that any order of the council of any borough for payment of money out of the borough fund may be removed by *certiorari*. The granting of a writ of *certiorari* is purely discretionary, but in this case the provisions of sect. 174 are obligatory. [HAWKINS, J.—Your sole point is that, though the urban authority have paid the contractors, and the prices charged are reasonable, yet, because the plaintiffs have not put the contract into writing under their seal, they cannot recover the apportionment from the defendant. Is this payment such a misapplication of the funds that the court would bring it up by *certiorari* and quash it? If not, how can the defendant complain? It seems to me a legal payment.] Sect. 174 is imperative, and the plaintiff cannot go behind it. [SMITH, J.—You are in effect trying to dispute the apportionment; how can you do this now in the face of sect. 257?] That section only makes the apportionment conclusive after the lapse of three months, but the liability to pay at all is not touched:

*Heaketh v. Atherton Local Board*, 29 L. T. Rep. N. S. 530; L. Rep. 9 Q. B. 4.

*Tindal Atkinson*, for the plaintiffs, was not called upon.

HAWKINS, J.—The case states that the action

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was brought to recover the sum of 7l. 16s., being the proportion alleged to be due from the defendant for the cost of making good and sewerage a certain road. Now, there can be no doubt that, if the contract for doing this work had been under seal, the liability of the defendant would have been clear. But the objection is taken that part of the work was done under a contract not under seal, the work having been done partly by the staff of labourers and workmen in the regular permanent employ of the plaintiffs, and partly by contractors, there being no contract under seal for the work done by the contractors. The cost of the work done by the contractors was 75l. 14s. 4d. out of the total cost of 101l. 5s., the cost of the work done by the plaintiffs themselves being 25l. 10s. 8d.; hence the whole of the work was not required to be done by contract under seal. The County Court judge gave judgment for the plaintiffs, on the ground that the non-compliance with sect. 174 by the urban authority was no answer to the plaintiffs' claim, and the question he has left to us is, whether that judgment is right. Now the plaintiffs' claim was for one undivided sum of 7l. 16s. It is clear that no objection could have been raised if the claim was in respect of an apportioned part of 25l. 10s. 8d. the cost of the work executed by the plaintiffs themselves. Taking then the question as submitted to us, our answer is, that under no circumstances could the objection be an answer to a claim in respect of that portion of the expenses, and so the answer must be in the negative. But apart from that technical view of the case, if the whole of that 7l. 16s. had been apportioned in respect of the work that was done by the contractors under this contract not under seal, I am still of opinion that the objection would be no answer. The contractors have done the work, and the amount charged for it is admitted to be a reasonable amount, and the only objection is that the contract was not under seal. I think that, although sect. 174 may have afforded to the urban authority a right to set up the defence that the contract was not under seal, yet they were not bound to do so. So long ago as 1850 the case of *Reg. v. Prest* (16 Q. B. 32) was decided, in which it was sought to quash an order of the town council of the borough of Halifax, allowing certain payments to their town clerk for professional charges as a solicitor, on the ground that there was no retainer under the corporation seal. Lord Campbell in his judgment says: "I think that, as the business was done fairly and *bonâ fide* for the benefit of the ratepayers, and the sums have been *bonâ fide* paid to the town clerk, the question as to the form of the retainer is not material, and we have no authority to interfere and order the sums to be refunded." It is true that the court there were dealing with a discretionary power vested in them, but the judgments proceed upon the ground that there was no misapplication of the borough fund. That decision was followed in the case of *Reg. v. Mayor of Norwich* (30 W. R. 752). These authorities warrant us in coming to the conclusion that, though the urban authority might have resisted payment of the sum to the contractors, yet they were not bound to set up the defence that the contract was not under seal, and not having done so, and having paid for the work, they can charge the defendant with his proportion.

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SMITH, J.—This is an action by the urban sanitary authority of Bournemouth, to recover the sum of 7l. 13s. with interest thereon, being the amount apportioned to the defendant for the cost of making good and sewerage a road in which he was a frontager. The total cost of the work was 101l. 5s., and of this sum one component part, 25l. 10s. 8d., was in respect of work done by the urban sanitary authority themselves, and the other component part, 75l. 14s. 4d., was in respect of contractors' work executed under a contract that was not under seal. The question arises upon sect. 150 of the Public Health Act 1875, which provides that, if the frontagers do not execute the work they are required to do by that section, the urban authority may execute the works; that is, the urban authority may do the works by contract. In this case the urban authority, having executed part of the works by contract, have apportioned to the defendant the amount due from him. The defendant objects that the urban authority ought not to have paid for this work, because they ought to have set up as a defence to the claim of the contractors that the contract was not under seal. This, no doubt, would have been a good defence if the urban authority had chosen to dispute the contractors' claim: (*Hunt v. Wimbledon Local Board*, 40 L. T. Rep. N. S. 115; 4 C. P. Div. 48; *Young v. Mayor of Leamington*, 49 L. T. Rep. N. S. 1; 8 App. Cas. 517.) But, in my judgment, it is not incumbent on the urban authority to set up this defence. There is no law compelling them to set it up as a defence; they may do so, but here they have not chosen to do so. In my judgment, therefore, the money paid by the plaintiffs to the contractors was expenses incurred by them within sect. 150, and so is recoverable from the frontagers. I am fortified in this opinion by the judgments of my brothers Grove and Lopes, in the case of *Reg. v. The Mayor of Norwich (ubi sup.)*. But, if I am wrong on the above point, there is another objection equally fatal to the defendant. What the defendant is really trying to do here is to re-open the apportionment, because he says that of the sum of 101l. 5s. the plaintiffs had no right to apportion to him anything in respect of the sum of 75l. 14s. 4d. for work executed by the contractors. If that is so, sect. 257 of the Public Health Act 1875 is fatal to him, for it provides that, where such expenses have been settled and apportioned by the surveyor of the local authority, such apportionment shall be binding and conclusive, unless within three months from service of notice of the amount so apportioned the owner of the premises shall by written notice dispute the same. The defendant, in reality, by saying that out of the total sum of 101l. 5s. the plaintiffs ought not to have apportioned to him anything in respect of the sum of 75l. 14s. 4d., is trying to re-open the apportionment, which he is too late to do now. On both grounds this appeal fails.

Appeal dismissed.

Solicitors for the plaintiffs, Lovell, Son, and Pitfield, for James Druiitt, Bournemouth.

Solicitors for the defendant, Nodder and Gates, Salisbury.

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## HOUSE OF LORDS.

Thursday, Dec. 4, 1884.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN and WATSON.)

BERKELEY (pauper) v. THOMPSON AND OTHERS. (a)  
ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.*Bastardy—Jurisdiction—Service of summons in Scotland—Summary Jurisdiction (Process) Act 1881, sects. 4, 6, 8.**By the Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24), sect. 4, any process issued under the Summary Jurisdiction Acts may, if issued by a court of summary jurisdiction in England, and indorsed by a court of summary jurisdiction in Scotland, be served and executed within the jurisdiction of the indorsing court in like manner as it may be served and executed within the jurisdiction of the issuing court.**By sect. 6 a court of summary jurisdiction in England shall have jurisdiction by order to adjudge a person within the jurisdiction of the court to pay for the maintenance and education of a bastard child of which he is the putative father, notwithstanding that such person ordinarily resides or the child has been born, or the mother of it ordinarily resides in Scotland, in like manner as the court has jurisdiction in any other case.**By sect. 8 "process" includes any summons to appear to answer to any information or complaint.**Held (affirming the judgment of the court below), that sect. 4 of the Act did not apply to proceedings under the Bastardy Act of 1872, and that sect. 6 gave no power to serve a summons issued under that Act by justices in England on the putative father in Scotland.*

THIS was an appeal in *formâ pauperis* from a judgment of the Court of Appeal (Brett, M.R. and Bowen, L.J.), reported in 12 Q. B. Div. 261, and 50 L. T. Rep. N. S. 187, affirming a judgment of the Queen's Bench Division (Day and Smith, JJ.), reported in 50 L. T. Rep. N. S. 397.

The appellant, Isabella Berkeley, a resident in Sunderland, was delivered of a bastard child, and obtained from one of the justices of the borough an affiliation summons, requiring one Henry Duncan, of Greenock in Scotland, whom she alleged to be the father of the child, to appear before the justices of Sunderland to answer her complaint.

The summons was served on Duncan in Scotland, and he appeared by a solicitor to object to the jurisdiction of the court. The magistrates were of opinion that they had no jurisdiction, and dismissed the summons, but a rule was obtained in the Queen's Bench Division calling upon them to show cause why a *mandamus* should not issue to compel them to hear and determine the complaint.

The Divisional Court discharged the rule, and their judgment was affirmed, as above mentioned.

This appeal was then brought in *formâ pauperis*.

G. Bruce, Q.C. and H. B. Hans Hamilton appeared for the appellant, and contended that the service of the summons under sect. 4 of the Summary Jurisdiction (Process) Act 1881 brought the putative father within the jurisdiction within the meaning of sect. 6. The words are very wide,

and if it had been intended to exclude bastardy proceedings from the provisions of sect. 4 it should have been so expressed. "Process" has the widest possible meaning given to it in sect. 8, and includes a summons in a bastardy proceeding, which is therefore brought within sect. 4 of the Act of 1881. In *Reg. v. Lightfoot* (6 E. & B. 822) Lord Campbell, C.J. differed from the rest of the court, and though that case was decided on the statute 7 & 8 Vict. c. 101, the words of the Bastardy Act 1872 (35 & 36 Vict. c. 65) are for this purpose the same. The view taken by Lord Campbell is that for which we contend. This Act of 1881 was intended to deal with bastardy as a whole, and expressly to meet the hardship and inconvenience which were caused in the border counties by the former state of the law under which a woman might bring the putative father from Cornwall, but not from a few yards across the Tweed.

Poland, who appeared for the respondents, was not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: The learned counsel who represent the pauper appellant at your Lordships' bar have done their duty with zeal and with ability, but I do not think they have succeeded in creating in your Lordships' minds any doubt whatever as to the correctness of the order under appeal. To me it seems an extremely clear case. Now, I will observe two things at the outset. First of all, though a summary jurisdiction under the Bastardy Acts is given to justices, yet the bastardy law is one thing and the Summary Jurisdiction Acts are another; and this being a case of bastardy we shall have to consider the bastardy law in the first place, and then, if necessary, the application to that law of the Summary Jurisdiction Acts afterwards. Now, the bastardy laws beyond all question did not, before the year 1881, give to the justices any jurisdiction in a case of this kind, where the person summoned was a Scotchman domiciled, and not only ordinarily but actually resident in Scotland. Those Bastardy Acts were English Acts; they did not extend to Scotland, and did not contain any provisions whatever contemplating their execution in Scotland, and until the Act of 1881 I have not heard from the learned counsel any reference to any one of the Summary Jurisdiction Acts which gave a jurisdiction in bastardy cases, except to execute those bastardy laws which did not, as I have said, extend to Scotland. In the year 1856 the question arose before the Court of Queen's Bench in the case of *Reg. v. Lightfoot* (6 E. & B. 822) on the Bastardy Act of 1844, which, like the later Act of 1872, contained a provision that a woman who was the mother, or expected to be the mother, of a bastard child might make application to the justices having jurisdiction in the place where she resided for an affiliation order. And that was the condition, under all the Acts prior to 1881, of the woman's remedy; she was to apply to the justices at the place where she resided, and she was to apply under Acts which had no operation whatever in Scotland, and contained no provision for their execution in Scotland. Under those circum-

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stances the Court of Queen's Bench by three judges against one (no doubt the dissentient judge, Lord Campbell, C.J., was a very eminent judge) held that service of the process of the magistrates upon such an application by the woman meant service at all events within the jurisdiction of the courts and magistrates who were subject to that English legislation. Lord Campbell appeared to see his way to overcome that difficulty by putting what, I am bound to say, seems to me a very unusual and non-natural interpretation upon the clause of the Act which said, not in the usual negative words that it should not apply to Scotland or Ireland, but that it should "extend only to England and Wales." However that may be, the court decided that "service" meant service within the English jurisdiction. I do not of course mean within the jurisdiction of the particular magistrates, but within the jurisdiction of the law of that country to which alone the Act of Parliament applied. Now, whatever opinion might have been entertained between the year 1856 and the year 1872, as to the possibility of a court of higher authority than the Court of Queen's Bench reviewing that precedent and agreeing with Lord Campbell, the Legislature in 1872 dealt with the case by an amendment Act amending the bastardy laws in a manner which plainly proceeded upon the decision of the Court of Queen's Bench and assumed the correctness of that decision, because the 3rd section of that Act provided that a woman under the circumstances which brought the Bastardy Acts into operation might take her proceeding in the place where she resided, within certain periods of time—the first was before the birth of the child or within twelve months afterwards; the next was at any later time on proof that the alleged father had within twelve months after the birth paid money for the maintenance of the child; and the third period was "at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child"—an indefinite enlargement under that condition, that he had ceased to reside in England within twelve months after the birth of the child (that is the first period given for the proceeding), and then it is to be at any time within twelve months after his return to England. It is impossible to read that provision without seeing that that legislation proceeds upon the footing that the presence of the putative father in England is necessary for the jurisdiction to attach; and I must say, both with respect to the decision in *Reg. v. Lightfoot*, and with respect to that legislation, that they proceeded upon general principles; because the general principle of law is, *Ador sequitur forum rei*; not only must there be a cause of action of which the tribunal can take cognisance, but there must be a defendant subject to the jurisdiction of that tribunal; and a person resident abroad—still more ordinarily resident and domiciled abroad, and not brought by any special statute or legislation within the jurisdiction—is *prima facie* not subject to the process of a foreign court, he must be found within the jurisdiction to be bound by it. However, one need not rest upon general principles, because there is the decision, and there is the statute of 1872. Now the only other statute

which has been referred to as at all material before 1881 is that of 1879; and it appears to me that in the statute of 1879 a distinction between the ordinary summary jurisdiction of magistrates and the special summary jurisdiction in bastardy cases is recognised. Two sections of that Act were referred to, namely, the 51st and the 54th. The 51st section is clearly irrelevant. If it were supposed that those who framed it were particularly thinking of the bastardy law, they were thinking of it to exclude it, because the regulations contained in that section are expressly confined to the operation of future Acts. Now, the Bastardy Acts were existing. That section, therefore, neither has nor can have any application whatever to the matter. The 54th section shows that, in order to bring bastardy cases within the purview of the Act, the Legislature thought fit to make special provision, and it made that provision not by applying the Act in all points and for all purposes, as to matters of process and otherwise, to bastardy cases, but by applying the Act in a limited and special way: "This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for nonpayment of such sums;" that is, that the 21st section, which deals with those matters, shall be capable of application to steps which may be taken after an order in bastardy has been made, and not to the exercise of the jurisdiction to make that order. Then it goes on to add that it shall also "apply to the proof of the service of any summons, notice, process, or document in any matter of bastardy, and of any handwriting or seal in any such matter;" again a limited, a very limited, application of the Act to those cases. Now, those being the only sections in the Summary Jurisdiction Act of 1879 which have been referred to, we come to the statute of 1881, upon which it has been argued, first, that the 4th section gives a general jurisdiction to serve a summons and other process in English affiliation cases in Scotland without any limit whatever; and secondly, that the 6th section of the Act, which deals with this particular matter, is to be read as cumulative and not as containing the whole and sole provisions which the Legislature at that time thought fit to make by way of alteration of the previous bastardy laws. I confess that both arguments seem to me to be thoroughly unsound. In the first place, the 4th section is introduced and entirely governed by these words: "Subject to the provisions of this Act any process issued under the Summary Jurisdiction Acts may, if issued by a court of summary jurisdiction in England and indorsed by a court of summary jurisdiction in Scotland . . . be served and executed" in the manner there mentioned. Now, the learned counsel have contended that cases and persons which before were not within the jurisdiction of the English justices are brought within the jurisdiction of those justices by that section. To me it appears quite clearly that the section proceeds upon the assumption of jurisdiction under the Summary Jurisdiction Acts. How can the process be issued under the Summary Jurisdiction Acts if the Summary Jurisdiction Acts contain and give no power to issue such process? This point is not peculiar to bastardy cases: the argument seems to require



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that it should be taken that any process whatever which a court of summary jurisdiction can be induced to issue, though in a case manifestly altogether beyond its jurisdiction, and as to which the Summary Jurisdiction Acts give it no jurisdiction, is nevertheless to be served and executed in the manner provided for in Scotland. To me the natural meaning of the words "process issued under the Summary Jurisdiction Acts" is process issued under the jurisdiction given by those Acts, and in the manner which those Acts authorise and require. It is begging the whole question to say that those Acts give jurisdiction to issue a summons in this case. On the contrary, all the enactments which have been referred to show that the justices have no such jurisdiction. That appears to me to go to the root of the whole argument. Well, then, what else is there in the 4th section? Simply, "any process may be issued and indorsed," and so on. All that is machinery; it is such a process as is mentioned before, a process issued under the Summary Jurisdiction Acts. But the 4th sub-section appears to me to be very unfavourable to the argument, because, though neither there, nor in any other part of this section, is any reference made to bastardy, yet, by excluding the Act from applying in Scotland to any case which falls within the Summary Jurisdiction Act of 1844, it would in Scotland exclude the whole subject of bastardy proceedings, if indeed that term is properly applicable to anything which could be done in Scotland independently of the 6th section of this Act. A civil remedy of some kind, it is said, would be available in Scotland in favour of the woman. I doubt whether that is material, for it would be, as far as I can gather, a remedy of a different kind from an affiliation order in a bastardy proceeding. But at all events, of whatever kind it may have been, it was a civil proceeding, and beyond all question this 4th sub-section would have excluded any proceeding of that kind from the jurisdiction of a Scotch court under that 4th section. The next thing which I have to observe is, that these sections clearly do not give the jurisdiction, as I have said, but assume it. But the 6th section gives jurisdiction, and gives jurisdiction as to this particular class of cases. It is the only section in the Act which deals with those cases, and it deals with them in a manner which, to my mind, conclusively implies that nothing else in the Act was intended to give any such jurisdiction. When it was intended to give a new jurisdiction it was done in proper words. When the Act simply dealt with the mode of serving process issued out of court under other Acts, you must look at those other Acts to see whether there is jurisdiction or not. But this 6th section does say that "a court of summary jurisdiction in England, and a sheriff court in Scotland, shall respectively have jurisdiction by order or decree to adjudge a person within the jurisdiction of the court to pay for the maintenance and education of a bastard child, of which he is the putative father," and the other expenses there mentioned "notwithstanding that such person" (that is the putative father) "ordinarily resides or the child has been born or the mother of it ordinarily resides, where the court is English, in Scotland, or, where the court is Scotch, in England, in like manner as the court has jurisdiction in any other case." Those last

words clearly mean in any other case in which the court has jurisdiction. And therefore the effect of that 6th section is this, not to provide that in those cases a man who is alleged to be the father of a bastard child shall be capable of being compulsorily brought within the jurisdiction of a court to the jurisdiction of which he is not subject either *ratione personæ* or *ratione loci*, but that a Scotch Sheriff Court shall now have given to it, for the first time, the ordinary bastardy jurisdiction as against a person within the jurisdiction of that court, and that for that purpose the condition which is expressed in the Acts of 1844 and 1872, that the mother must apply to the justices of the place where she resides, is not to be applicable. The Scotch Sheriff Court is to have jurisdiction not over people in England, but over people within the jurisdiction of the Scotch Sheriff Court, notwithstanding that the mother ordinarily resides in England. Again, in England there might have been objections taken: first of all, if the father was found in a place where the mother did not ordinarily reside, that is cut off; the English justices, if he is within the jurisdiction of the court, may exercise jurisdiction over him; and there were other objections which, whether valid or not, the Legislature thought it at all events worth while to exclude, depending upon the place where the child might have been born, and depending upon the place where the putative father ordinarily resided, those are all excluded. But this jurisdiction is not given either in England or in Scotland as against a person not within the jurisdiction of the court, but only as against a person within that jurisdiction wherever he is. If he be either in England or in Scotland the section supplies the means of reaching him, and absolves the mother from difficulties to which she might otherwise have been subject, but of reaching him by means of a court within whose jurisdiction he is. Then I ought to mention that the words which follow, though no doubt they are applicable only to a "process to enforce obedience to such order or decree," yet are strong to show that the Legislature did not imagine that they had already been dealing with this subject, for they say that any such process "may be indorsed and executed in Scotland and England respectively in manner provided by this Act with respect to process of a court of summary jurisdiction," words which I think could hardly have been used if the previous clause, the 4th clause, as to process of a court of summary jurisdiction, had the operation which has been contended for. This it was attempted to meet by suggesting that the words "to adjudge a person within the jurisdiction of the court to pay for the maintenance" did not mean what they appear to say, that the person must be found within the jurisdiction of the court, but that they meant "constructively within the jurisdiction," because process had been served upon him in the manner provided by the 4th section. But he is not within the jurisdiction, because process has been served upon him. Even if the Legislature has thought fit to say that process may be served upon him for this purpose, the Legislature has not dealt with this specific matter at all, and has not said that a process served under the 4th section is to give jurisdiction when there is no jurisdiction without it. It has not even said



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that, when there is jurisdiction without it, such a person is to be deemed a person within the jurisdiction of the court. The jurisdiction of the court is independent of that. He is not within the jurisdiction of the court unless he is found there, unless it be that something else, either in the nature of the cause of action or otherwise, gives the court jurisdiction; so that the argument is really reasoning in a circle. It assumes that, notwithstanding these express provisions in the 6th section, the 4th section, which is merely for service of process, which is the general object of the Act, is meant to give an enlarged jurisdiction; and, having assumed that, it then applies the words "within the jurisdiction" to the jurisdiction so assumed to be enlarged. But the foundation of the argument fails. There are no words which give jurisdiction in the 4th section at all. The words of that section, leaving the question of jurisdiction to be determined *aliunde*, simply provide for the manner in which process competently issued by a court of summary jurisdiction under the Summary Jurisdiction Acts may be served in Scotland. I do not think it necessary to detain your Lordships further. I move that the appeal be dismissed. It being a pauper appeal, there will be no costs.

LORD BLACKBURN.—My Lords: I am of the same opinion. Whatever might have been the doubt as to whether the case of *Reg. v. Lightfoot* was right or not on the Act which was then in force, there can be no doubt, I think, after the Bastardy Law Amendment Act of 1872 which confirms that. That statute was passed on the supposition that the law as laid down in *Reg. v. Lightfoot* was the right law, and that a bastardy summons which was confined to England could only be served upon a person when he was in England. A part of the Act, namely sect. 3, enacts that there shall be a twelvemonth to issue process, but that if the man has left the country within that twelvemonth there may be an enlarged period after he returns. All that tends to show clearly that the Legislature was thinking that such was the law and that so it was. That being so, it is said (and for aught I know it may be correctly said) that there was a practical grievance to be met with in the border counties in this respect, that the man against whom the parish officers and the woman together might have got a summons might have crossed the border, and might be living on the other side of the border—perhaps he might have been originally resident on the other side of the border, but the woman might have come into England and had her child there. It was said that there was a grievance in this way, that he could laugh them to scorn. It may be that that was a grievance. I do not know whether it would be much of a one or not; but if the Legislature were going to pass an enactment to meet it there were two courses, either of which they might take. One would be to say, Where a person is in Scotland under such circumstances that if he were in England you could procure an affiliation order against him, we will give the power to a Scotch court to make it. That would be one way of doing it. That would naturally be accompanied by saying in the same manner that if a Scotchman has come into England, or an Englishman who has done the act in Scotland is resident in England, there

would in that case be a similar power given to the Scotch parochial authorities to get an order against him in England. That would be one mode; and it seems to me certainly that by sect. 6 of the Act of 1881 the Legislature has given that power in plain and express terms. Another way would be to say that a summons for an affiliation order, which by the law of England can only be served upon a person who is within the realm of England, might be served in Scotland by some process or other. It has been attempted to be argued that sect. 4 applies to that, and that it means to say that a summons, if duly indorsed by a court of summary jurisdiction in Scotland, might be served in Scotland. That point does not arise here at all, because the summons evidently never was indorsed. There is no pretence for saying that there was an indorsement by the Scotch court upon this summons. The parties in Sunderland all evidently thought that the Act of 1872, under which they had power to serve a summons out of the jurisdiction of the magistrates but within the realm of England, applied to the realm of Scotland (in that they were clearly mistaken), and they did not think of getting an indorsed summons. As to that, it occurred to me that there would have been some justice perhaps (whether it would have been worth while to pass an enactment for that purpose might be another question) in saying that where an Englishman had fled from England in order to escape process, and had gone into Scotland, you might follow him into Scotland and serve him in this particular manner; but I do not think that is what the Legislature were thinking of and intended to say. I do think that they have remedied all the real grievance by saying that there shall be a similar power to obtain an affiliation order from the sheriff against a man resident in Scotland. Sect. 6 carefully removes all the difficulties which stood in the way of getting such an order.

LORD WATSON.—My Lords: I have come without difficulty to the same conclusion. At the time when it was sought to institute the present suit against the respondent, the Bastardy Acts conferred, in my opinion, no jurisdiction upon the justices to cite before them or to make a party to a proceeding under these statutes, a Scotchman domiciled in Scotland and resident at the time in that country. In the present case the magistrates could only entertain such a proceeding at the instance of a woman who was resident within the limits of their local jurisdiction. The appellant was resident at the time within the jurisdiction of the justices before whom the summons was taken out, but the respondent was at that time domiciled and resident in Scotland. Then it is said that the jurisdiction of the courts of summary jurisdiction in England has been so enlarged by the statute of 1881 that it is now competent for such a court, in a proceeding like the present, to bring before it a domiciled Scotchman who is not in England at the time when the service is sought to be made upon him, and in support of that proposition two clauses in the Act of 1881 are relied upon. The first of these is the 4th, and I shall only say of that section of the statute that, in my opinion, it merely provides for and regulates the mode of service in the cases where the courts of summary jurisdiction either had previously possessed jurisdiction to issue suit, or

had that jurisdiction conferred upon them by the Act in question. The previous Summary Jurisdiction Acts gave no such jurisdiction as against the respondent. I quite concede that, if the 6th clause of the statute gave that jurisdiction against the respondent, then service could be made upon him in Scotland in terms of sect. 4. It is necessary therefore to look at the terms of sect. 6. Now, at the date of this Act justices in England and the sheriff in Scotland had jurisdiction in regard to allowances to a bastard child. The jurisdiction exercised in the two countries was not precisely of the same kind or quality I admit, but they had jurisdiction, so that the Legislature were not dealing with any new matter. They were either adding to the old matter, so as to make it a universal jurisdiction over Great Britain, as was contended by the appellant, or they were simply enlarging the jurisdiction of these courts within the two countries of England and Scotland respectively—enlarging the jurisdiction of the justices in the one and the jurisdiction of the sheriff in the other. The clause provides that they shall have jurisdiction to adjudge a person within the jurisdiction of the court to pay for the maintenance and education of a bastard child (to take the case of the English courts) notwithstanding these three things, first, that the mother shall not be ordinarily resident within the local limits of their jurisdiction (the words are “notwithstanding that the mother ordinarily resides in Scotland”); secondly, notwithstanding that the child has been born in Scotland; and thirdly, notwithstanding that the person alleged to be the father of the child shall also be ordinarily resident in Scotland. It appears to me that all the Legislature provides by this clause is, that in the future exercise of their respective jurisdictions the courts of the two countries shall not be impeded by any of these things being set up as a defence. I cannot find anywhere language from which by reasonable implication you can derive the inference that each and every court of summary jurisdiction shall exercise jurisdiction over the whole length and breadth of the island of Great Britain. A very large extension of the jurisdiction already existing in the two countries is conferred. In the case of England a woman who is ordinarily resident in Scotland, and whose bastard child has been born there, can sue a man who is ordinarily resident in Scotland, according to my view of the enactment, if she finds him at the time in any part of England. But the contention of the appellant that the words “ordinarily resides” mean not only “is generally to be found” in Scotland, but “is to be found” there at the time of service, would lead to very strange results, because in that case, if you did not look back and view this as an addition to the old jurisdiction, the result would be that any local court in England of summary jurisdiction could, at the instance of a woman ordinarily resident in Caithness, and whose child was born there, summon a man who was residing in Caithness at the time along with herself. I cannot put such a forced and strained construction upon the words of the Act. It appears to me that it was designed simply to enlarge the bounds of the old jurisdiction, so that those things which had been set up as defences against the exercise of the jurisdiction of the courts of the two countries should no longer impede that exercise. It was not intended to

confer that which I have already described as a universal jurisdiction within Great Britain. I have therefore no hesitation in concurring in the judgment proposed.

*Order appealed from affirmed; and appeal dismissed.*

Solicitors for the appellant, J. E. and H. Scott, for John Graham and A. T. Shepherd, Sunderland.

Solicitors for the respondents, Rooke and Sons.

### CROWN CASES RESERVED.

April 5, June 21, and Dec. 20, 1884.

(Before Lord COLERIDGE, C.J., GROVE, J., POLLOCK and HUDDLESTON, BB., HAWKINS, LOPES, STEPHEN, WATKIN WILLIAMS, MATHEW, DAY, and SMITH, JJ.)

REG. v. COX AND RAILTON. (a)

*Solicitor and client—Privilege—Communication prior to commission of crime—Indictment of client—Admissibility of evidence of solicitor—Professional employment.*

*Professional confidence and professional employment are essential to render communications between solicitors and their clients privileged. Where, therefore, the client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent, and a communication between a solicitor and his client, which was a step preparatory to the commission of a criminal offence, is admissible as evidence in the prosecution of the client for such offence.*

*In each particular case the court must determine upon the facts actually given in evidence, or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it. And every precaution must be taken not to hamper prisoners in making their defence, nor to enable knowledge to be acquired improperly, nor to compel unnecessary disclosures.*

CASE reserved for the opinion of this court in a prosecution for conspiracy tried before the Recorder of London at the February sessions of the Central Criminal Court.

The case was argued before five judges of this court on the 5th April, viz., Lord Coleridge, C.J., Hawkins, Stephen, Watkin Williams, and Mathew, JJ., and was subsequently reheard, on the 21st June, before ten judges, viz., Grove, J., Pollock and Huddleston, BB., Hawkins, Lopes, Stephen, Watkin Williams, Mathew, Day, and Smith, JJ.

The facts are fully stated, and the cases cited upon the argument fully dealt with, in the judgment of nine of the judges who formed the court at the hearing on the 21st June, Watkin Williams, J. having died previously to such judgment being delivered.

E. Clarke, Q.C., Gore, and Gill appeared on behalf of the defendants, and contended that, unless it was shown by some extraneous evidence

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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that this was not a professional communication, it was privileged, and no such evidence was offered; the rule being that "an attorney will not be allowed against his client's will to disclose matters of professional confidence, though himself willing to do so:" (Phil. on Evidence, p. 105.)

*Woollett and Willoughby* appeared in support of the conviction, and contended that a consultation by a client with his solicitor for the purpose of committing a crime could not be privileged, as it was not within the scope of his professional employment.

*Cur. adv. vult.*

Dec. 20.—STEPHEN, J. read the following judgment.—This case was tried before the Recorder of London at the February sessions of the Central Criminal Court. The defendants were convicted subject to a case reserved for our opinion. The case was argued first before five judges on the 5th April, and afterwards, on account of its great importance, before ten judges on the 21st June. We said on that occasion that we were unanimously of opinion that the conviction must be confirmed, but we deferred the statement of our reasons in order that they might be given with due fulness and deliberation. The facts were as follows: The two defendants, Richard Cobden Cox and Richard Johnson Railton, were indicted for a conspiracy with intent to defraud Henry Munster. The indictment was set out as part of the case. It contained six counts, and was objected to on grounds which we do not think it necessary to state, as we are all of opinion that some at least of the counts were good, and as the objections made to others were not insisted on in argument. The serious question was as to the admissibility of the evidence of a solicitor, which was given under the following circumstances: On the 9th April 1881 the two defendants entered into a partnership in the business of newspaper proprietors with respect to a newspaper called *The Brightonian*. In Feb. 1882 Mr. Munster brought an action against Railton for a libel which appeared in that paper. On the 24th June 1882 the action ended in a verdict for the plaintiff for 40s. and costs as between solicitor and client. The costs were taxed on the 18th Aug., and on the 20th execution was issued against Railton for the amount. The sheriff was met by a bill of sale from Railton to Cox, dated 12th Aug. 1882, and withdrew. An interpleader action to test the validity of the bill of sale was tried on the 15th Jan. 1883. At that trial the deed of partnership of 9th April 1881 was produced, bearing upon it an indorsement purporting to be a memorandum of dissolution of partnership, dated 3rd Jan. 1882. The case for the prosecution was that the bill of sale was a fraudulent bill of sale of the partnership assets, entered into between Railton and Cox while they were partners, for the purpose of depriving Mr. Munster of the fruits of his judgment, and that the memorandum of dissolution of partnership was indorsed on the deed, not on the 3rd Jan. 1882, when it bore date, but subsequently to Mr. Munster's judgment. In order to prove this case, Mr. Goodman, a solicitor, was called, who said (his evidence having been objected to, and the objection having been overruled): "On the 28th June, or thereabouts, Railton and Cox came to me. Railton said, 'I suppose you have heard the

result of the Munster case?' I said, 'Yes.' He said, 'Can anything be done to prevent the property being seized under an execution?' I said, 'Only a sale to a *bonâ fide* purchaser.' He said, 'Could the property be sold and I remain in possession as manager?' I said, 'No; you must go out of possession.' He said, 'That won't do. Can I give a bill of sale to Mr. Cox?' I said, 'You cannot, because of the partnership.' Railton said, 'Does anyone know of the partnership besides you and ourselves?' I said, 'No; not that I am aware of, only my clerks.' Cox said, 'Then you do not think a bill of sale will do?' I said, 'Certainly not.' They then asked my fee and paid it, and left the office. Nothing was said about a dissolution at that interview. The interview was with me as a solicitor, and I was paid my fee. It was expressly arranged that the partnership should be kept secret. Nothing either way was said about a dissolution." The question for our decision was whether this evidence was rightly admitted. We must take it after the verdict of the jury, that, so far as the defendants Railton and Cox were concerned, their communication with Mr. Goodman was a step preparatory to the commission of a criminal offence, namely, a conspiracy to defraud. The conduct of Mr. Goodman, the solicitor, appears to have been unobjectionable. He was consulted in the ordinary course of business, and gave a proper opinion in good faith. The question, therefore, is whether, if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted, the communication between the two is privileged. We expressed our opinion at the end of the argument that no such privilege existed. If it did, the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and that the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his criminal purpose. Consequences so monstrous reduce to an absurdity any principle or rule in which they are involved. Upon the fullest examination of the authorities, we believe that they are not warranted by any principle or rule of the law of England; but it must be admitted that the law upon the subject has never been so distinctly and fully stated as to show clearly that these consequences do not follow from principles which do form part of the law, and which it is of the highest importance to maintain in their integrity. We must also observe that decisions have been given—one by the Court of Common Pleas, and several by single judges sitting in the Crown Courts, or at Nisi Prius—which have afforded some countenance to the supposition that the law of England is committed to doctrines from which these consequences might be deduced. We propose accordingly first to state what, upon a full consideration of the cases, appears to us to be the principle upon which the present case must be decided, and then to examine the principal cases in which it has been applied, with the view of showing that our decision is not inconsistent with the great majority of them, though it undoubtedly does differ from others. The case which has

always been regarded as the great leading authority on the question of privilege of legal advisers is *Greenough v. Gaskell* (1 M. & K. 98), decided by Lord Brougham in 1833. The question in that case was whether a solicitor, Gaskell, charged with a fraud upon Greenough arising out of the affairs of Darwell, could be compelled to disclose to Greenough communications between Gaskell and Darwell, giving an account of the transactions which led to the commission of the alleged fraud, and it was held that he could not. In this case the rule as to professional communications was laid down in the following words: "If touching matters which come within the ordinary scope of professional employment, they" (legal advisers) "receive a communication in their professional capacity either from a client or on his account and for his benefit in the transaction of his business; or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness." Lord Brougham adds: "The foundation of this rule is not difficult to discover. . . . It is out of regard to the interests of justice, which cannot be upholden, and the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings." Lord Brougham then proceeds to comment on the terms of the rule so stated, and to show that many apparent exceptions to it are not really within its terms. This rule has been accepted and acted upon ever since, and we fully recognise its authority; but we think that the present case does not fall either under the reason on which it rests, or within the terms in which it is expressed. The reason on which the rule is said to rest cannot include the case of communications criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not "come into the ordinary scope of professional employment." A single illustration will make this plain. It is part of the business of a solicitor to draw wills. Suppose a person, personating someone else, instructs a solicitor to draw a will in the name of the supposed testator, executes it in the name of the supposed testator, gives the solicitor his fee, and takes away the will. It would be monstrous to say that the solicitor was employed in the "ordinary scope of professional employment." He in such a case is made an unconscious instrument in the commission of crime. It is probable that if cases of this kind had been present to Lord Brougham's mind when he delivered judgment in *Greenough v. Gaskell*, he would have inserted words by way of exception or explanation to express his meaning more explicitly; but the caution with which he worded the principle appears to us to have the same

effect as the insertion of such a qualification would have had. It seems to us, at all events, that the case which we are now considering falls neither within the letter nor the spirit of the description given by Lord Brougham of the privilege of legal advisers. We will now state in the order of time the cases which confirm us in this view. In *Follet v. Jefferyes* (1 Sim. N. S. 1) a defendant was interrogated as to letters written by her to her solicitor, said to have been intended to carry out a fraud. It was held that what she proposed to do was not fraudulent, but at the end of his judgment Lord Cranworth, then Vice-Chancellor, said: "It is not accurate to speak of cases of fraud contrived by the client and solicitor in concert together as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence, and no court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor." It is true that this is only a dictum, but it shows decisively how Lord Cranworth understood the rule on this subject, and this suggests another observation. In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud. To return to our former illustration. If A., proposing to forge a will, says to B., a solicitor, "Forge for me a will in the name of C.," he asks B. to commit a crime, which is not B.'s professional business. If he says "I am C., and I want you to make my will for me," he reposes no confidence in B., but, on the contrary, commits a gross fraud upon him. In 1851 the case of *Russell v. Jackson* (9 Hare, 387) was decided before Turner, V.C. It was alleged that a testator had left certain property upon a secret trust, and his solicitor was examined as to the existence of the trust and its nature. A motion was made to suppress his deposition, on the ground that he had been compelled to violate professional confidence in making it. Turner, V.C. held that the privilege did not exist at all as between different people claiming under the client, as the client's intentions were more likely to be carried out if his communication with his solicitor were known than if they were concealed. It was further objected that the disclosure of the communication "might lead to the disclosure of an illegal purpose." Sir George Turner observed on this that he thought that the communication could not be protected on that account. He added: "On the contrary, I am very much disposed to think that the existence of the illegal purpose would prevent any privilege attaching to the communication. When a solicitor is a party to a fraud, no privilege attaches to

the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor, and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law." In 1857 the case of *Gartside v. Outram* (26 L. J. 113, Ch.) was decided by Lord Hatherley, then Sir W. Page Wood. It was a case in which a firm of woolbrokers sought to restrain a man who had been their sale clerk from disclosing their transactions. He replied that the transactions were fraudulent. The Vice-Chancellor delivered a judgment, which we think is well summed up by the head-note: "Confidential communications involving fraud are not privileged from disclosure." The following observations in the judgment appear to us very weighty, and bear directly on the present question: "The true doctrine is that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part. Such a confidence cannot exist." He afterwards refers, by way of illustration, to the question of professional confidence: "As regards the question before courts of justice, when the question has been whether a witness ought to disclose that which has been communicated to him, I think the authorities largely preponderate for allowing no such protection, even in one of the most confidential relations—that between attorney and client," and, after referring to some cases which we shall examine more fully hereafter, he says that he adopts as his own language used in argument in the case of *Annesley v. Anglessea* (17 Howell St. Tri. 1139) by Serjeant Tisdall: "I shall first beg leave to consider whether an attorney may be examined to any matter which came to his knowledge as an attorney. If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it. No private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed contrary to the laws of the society to destroy the public welfare." The Vice-Chancellor quotes with approbation parts of the judgments of the judges in the same case, and to much the same effect. The last of this series of cases to which we shall refer appears to us to be directly in point in the present case. It is part of the case of *Reg. v. Orton*. Orton was indicted for perjury in denying that he was Orton, and affirming that he was Tichborne. He gave Mr. Holmes, a solicitor, instructions to prepare a will disposing of the property to which he said he was entitled, and as part of the evidence against him consisted in the alleged resemblance of his handwriting to that of Orton and its alleged difference from that of Tichborne, the instructions for the will were tendered for the purpose of enforcing this argument. They were objected to on the ground of professional privilege, and the court dealt with the matter as follows:—Cockburn, C.J.: "We must assume *prima facie* for the purpose of the inquiry, but only for that purpose, that the purpose which the defendant had in seeking to obtain these estates, which he proposed here to dispose of by the will for which he gives instructions to Mr. Holmes, was a fraudulent purpose,

that of obtaining estates to which he was not entitled. Then the principle on which we proceed is this: that where anything is done, any communication made from a client to an attorney, with reference to a fraudulent purpose, the privilege does not exist. The fraudulent character of the communication takes away the privilege. Now here, assuming hypothetically for the mere purpose of the argument, that which is the subject-matter of this inquiry, which the jury will eventually have to determine, that the defendant was engaged in a fraudulent scheme to acquire estates to which he was not entitled, and gives instructions for a will, by which will these estates which he thus fraudulently seeks to acquire are to be disposed of, and amongst other things these estates, or portions of them, are intended to be given to his attorney and other persons who are co-operating with him in this scheme. Now, inasmuch as this would be for the purpose of having the effect of stimulating the attorney to more activity and earnestness in assisting him to carry out this scheme, which we assume for the purpose is based on fraud and iniquity, then that is *dehors* the privilege. If he had told his attorney beforehand that he was seeking to acquire estates to which he was not entitled, and employed the attorney for the purpose, the attorney, however innocent—in the one case of course he would not be innocent; but, assuming the attorney knew nothing of the iniquity or wickedness of the purpose, but believed himself honestly employed—yet if the client had a dishonest purpose in view in the communication he makes to his attorney, with the view of making the attorney the innocent instrument of carrying out the fraud, it deprives the communication of the privilege. So I think here that if the communication has not for its immediate object the carrying out of a fraud, but still affects the accomplishment of it by inducing the attorney to take greater care and to use more diligence and be more careful than he otherwise would be in the furtherance of the thing, it still comes to the same thing. Of course in deciding such a question we must for the purpose assume that the purpose was a fraudulent one, because that is the way the case is presented to us. Of course we are not pronouncing any opinion as to the affirmative. We have still the inquiry involving that question, but whatever further inquiry there may be I think it is admissible." Mellor, J. agreed. Lush, J. said: "I am disposed myself to put it on this wider ground, and to hold that the law does not allow under the name of privilege any person to withhold evidence which is within his power which may be used in support of a criminal charge." In the case of *Tichborne v. Lushington*, out of which the prosecution of Orton for perjury arose, Bovill, C.J. at the close of the case said: "I believe the law is, and properly is, that if a party consults an attorney and obtains advice for what afterwards turns out to be the commission of a crime or fraud, that party so consulting the attorney has no privilege whatever to close the lips of the attorney for stating the truth. Indeed, if any such privilege should be contended for or existed, it would work most grievous hardship on an attorney who, after he had been consulted upon what subsequently appeared a most manifest crime and fraud, would have his lips closed, and might place himself in the very serious position

of being suspected to be a party to the fraud, and without his having an opportunity of exculpating himself. . . . There is no privilege in the case which I have suggested of a party consulting another, a professional man, as to what may afterwards turn out to be a crime or fraud, and the best mode of accomplishing it." Upon these grounds we think that the question asked of Mr. Goodman in the present case was properly put and answered. We now proceed to consider the cases, some of which have produced a different impression. We may first shortly notice three Chancery cases to which we have been referred. In one of these (*Kelly v. Jackson*, L. Rep. 13 Ir. Eq. 129) it was decided that a solicitor who had suggested a fraud to his client could not claim privilege on the ground that his knowledge of the matter was derived from his client. In the other two (*Mornington v. Mornington*, 2 J. & H. 697, and *Charlton v. Combes*, 32 L. J. 284, Ch.) it was held that where client and solicitor were co-conspirators in a fraud, the solicitor must be charged with the fraud if discovery was required of him, but nothing was said as to the case of fraudulent or criminal communications by a guilty client to an innocent solicitor. We may accordingly pass by these cases without further notice. The cases decided at Nisi Prius, or in the Courts of Common Law, are as follows, taking them in order of time. The first is *Annesley v. Anglesey* (17 St. Tr. 1189), tried in Dublin in 1743. We have already mentioned the principal point in this case as having been quoted with approval by Lord Hatherley in *Gartside v. Outram*. The question was whether Lord Anglesey had caused Annesley, the true heir to the property, to be kidnapped and carried off to America in order that Lord Anglesey might enjoy the family estates. The evidence offered was that Lord Anglesey had employed an attorney to prosecute Annesley for murder in respect of the death of a person whom Annesley had accidentally killed, saying he would "Give 10,000*l.* if he could get him hanged." On this evidence the remarks already quoted, and others to the same effect, were made on a trial at bar. The next case was *Rez v. Dixon* decided in 1765 (3 Burr. 1687). In this case one Peach had produced forged vouchers before a master in Chancery, and Dixon, his attorney, was subpoenaed to produce them to the grand jury before which Peach was indicted. He refused, and an attachment was moved for against him, but the court refused to grant it. It does not appear how the papers came into Dixon's hands. There is certainly nothing to show that Peach gave them to him for any unlawful purpose. He may have deposited them with him after the crime, and for the purposes of his defence. The next case is *Cromack v. Heathcote* (2 B. & B. 4) decided in 1820. In this case the question was whether a deed was fraudulent, and "to prove the fraud the defendant proposed, amongst other evidence, to call Smith, an attorney, to whom the father" (the assignor) "had applied to draw the assignment, and who had refused to draw it, knowing that an execution had been issued against the father." The full Court of Common Pleas, Dallas, C.J. and Burrough and Richardson, JJ., held that this evidence was rightly rejected at the trial. This case closely resembles the one now before us. Indeed, the only distinction is that the objection

taken to the evidence was that the privilege of solicitors extended only to communications made in the progress of a cause. The court accordingly do not seem to have had before them the considerations to which we have addressed ourselves. If the case cannot be supported on this ground we differ from it, as it seems to us to be opposed not only to all principle but to the series of authorities which we have already referred to. It is right to say that *Cromack v. Heathcote* is approved of in *Greenough v. Gaskill* and in other cases, but it is cited only as a general statement of the doctrine of privilege, and the particular point now under consideration is not discussed or mentioned. The point for which it is cited is that it decides that privilege is not confined to communications made in the course of a suit. The next case is *Rez v. Smith* (1 Phillips on Evidence, by Arnold, 118, A.D. 1822). In this case Holroyd, J. refused to compel an attorney to produce a forged promissory note which the prisoner had given to him in order to sue upon it. It had been produced before the magistrates and returned to the attorney at his request, as he said he had a lien on it. We do not agree with this decision. It was said not to be law by Pattison, J. in *Reg. v. Avery* (8 C. & P. 596, A.D. 1838), though some years afterwards he said that "the observations he was reported to have made about it seem too strong:" (*Reg. v. Tuff*, 1 Den. C. C. 324.) The Nisi Prius case of *Doe v. Harris* (5 C. & P. 592), decided in 1833 by Justice, afterwards Baron, Parke, was precisely similar to *Cromack v. Heathcote*, and was decided expressly on the authority of that case. The case of *Knight v. Turquand* (2 M. & W. 101, A.D. 1836) was also mentioned to us. It is enough to say of it that it was not a case of fraud or crime. The next case is *Reg. v. Hayward and others* (2 C. & K. 234, A.D. 1846). In that case Pollock, C.B. admitted a forged will which the prisoners by a trick had got into the possession of the attorney who produced it, hoping that he might act on it, as he did. The judges held that this will was rightly admitted, there having been no professional confidence, "even if that could have made any difference." This case is an authority in favour of the view taken by us. There can in reason be no distinction between getting a will into a solicitor's possession by fraudulently putting it amongst other documents and getting his advice by telling a lie as to the object for which it is asked. The last case to be mentioned is *Reg. v. Tuff* (1 Den. C. C. 325, A.D. 1848, reported also as *Reg. v. Tylney*, 18 L. J. 37, M. C.). In this case the indictment was for forging a will. It had been put into the hands of an attorney in order to be put in force, and the question was whether he could produce it in evidence. The evidence was admitted, and on the prisoner's conviction a case was reserved for the fifteen judges. They recommended a pardon on another point, and gave no opinion as to the admissibility of the evidence. From the observations made during the argument by different learned judges, as reported in the Law Journal, it would seem that there was some difference of opinion on the subject (see *Reg. v. Tylney*, 18 L. J. 378, M. C.). From this examination of the authorities it will be seen that we differ from one decision of the full Court of Common Pleas, and from two decisions at Nisi Prius, but we do so on the



strength of other decisions which appear to us not only to be of greater authority, but also to be more in accordance with legal principles as well as with justice and expediency. We have one other matter to notice. We were greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers as that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept. We were earnestly pressed to lay down some rule as to the manner in which this consequence should be avoided. The only thing which we feel authorised to say upon this matter is, that in each particular case the court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each case, just as they must judge whether a witness deserves to be examined on the supposition that he is hostile, or whether a dying declaration was made in the immediate prospect of death. In this particular case the fact that there had been a partnership (which was proved on the trial of the interpleader issue), the assertion that it had been dissolved, the fact that directly after the verdict a solicitor was consulted, and that the execution creditor was met by a bill of sale which purported to have been made by the defendant to the man who had been and was said to have ceased to be his partner, made it probable that the visit to the solicitor really was intended for the purpose for which, after he had given his evidence, it turned out to have been intended. If the interview had been for an innocent purpose, the evidence given would have done the defendants good instead of harm. Of course the power in question ought to be used with the greatest care not to hamper prisoners in making their defence, and not to enable unscrupulous persons to acquire knowledge to which they have no right, and every precaution should be taken against compelling unnecessary disclosures. *Conviction affirmed.*

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Solicitors for the defendants, *Palmer and Bull.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

Tuesday, Oct. 28, 1884.

(Before BRETT, M.R., COTTON, and LINDLEY, L.JJ.)

THE MERSEY DOCKS AND HARBOUR BOARD v. THE OVERSEERS OF LLANEILIAN. (a)

*Poor rate—Lighthouse—Tower of lighthouse used as telegraph station—Rateability—"Beneficial occupation"—The Mersey Docks Acts.*

*The appellants appealed against a poor rate made by the respondents in accordance with a supplemental valuation of rateable hereditaments in the parish of Llaneilian, wherein the appellants were assessed in respect of a lighthouse, telegraph station, houses, buildings, and land at Point Lynas, at the gross estimated value of 305l., and rateable value of 244l.*

*The appellants were incorporated as a body of public trustees by the Mersey Docks and Harbour Act 1857, and the property, powers, rights, and privileges of the Liverpool Dock Trustees, including the right to levy certain harbour and light dues on vessels entering the port of Liverpool, were vested in the appellants. The tolls were so fixed that, with the other receipts of the appellants applicable to conservancy purposes, they should not be higher than necessary for conservancy expenditure, and therefore no profits were receivable by the appellants from the occupation of any of the property.*

*The lighthouse consisted of a tower and a dwelling-house adjoining. In the tower there was the light-room, which contained the flash-light, with clockwork for regulating the flashes, and also a room used for working a telegraph wire, which was one of the connections of the wire from Birkenhead to Holyhead, maintained by Her Majesty's Postmaster-General for the exclusive use of the appellants under an agreement. The dwelling-house adjoining the tower and the other premises were occupied by the light-keepers as servants of the appellants.*

*The tower of the lighthouse had no occupation value, except as a lighthouse and as a telegraph station.*

*The appellants contended that it was not rateable on the ground that it was not and could not be the subject of any beneficial occupation; and they contended that the premises other than the tower ought to be assessed upon their value to be let from year to year, supposing they were not used for the light or telegraph, but were disconnected therefrom, and applied to any other purposes for which they might be available.*

*The respondents contended that the whole of the premises ought to be assessed upon their existing value to the existing occupiers.*

*Held, that the tower was incapable of profitable occupation either as a lighthouse or as a telegraph station, in consequence of the restrictions as to profits contained in the Mersey Dock Acts, and was therefore not rateable; but that the adjoining premises must be assessed at a valuation which took into consideration the existence of the tower and its use as a lighthouse and telegraph station,*



and not at their value supposing them to be disconnected from and independent of the tower.

*Judgment of Lord Coleridge, C.J. and Mathew, J. (51 L. T. Rep. N. S. 62) varied.*

This was an appeal from a judgment of Lord Coleridge, C.J. and Mathew, J. (reported 51 L. T. Rep. N. S. 62) on a special case.

*Bigham, Q.C. and Carver for the Board.*—We do not argue the point that was taken in the court below upon the 430th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), conceding that it does not apply to the present case. The appellants are expressly restricted by statute from making any profit out of their property used for conservancy purposes, and here the tower, both as a lighthouse and as a telegraph station, is so used. In neither capacity therefore is the tower rateable. There is no such distinction between the two uses of the tower as the Divisional Court has drawn. The adjoining premises must be considered without reference to the tower. [CORRON, L.J.—Supposing a collection of artisans' houses to be built in the immediate neighbourhood of some great factory, are not the values of those houses enhanced by the existence of the factory?] It does not follow that they will be. They cited

*The Commissioners, &c. of New Shoreham v. The Overseers of Lancing*, 22 L. T. Rep. N. S. 434; L. Rep. 5 Q. B. 489;

*The Metropolitan Board of Works v. The Overseers of West Ham*, 23 L. T. Rep. N. S. 480; L. Rep. 6 Q. B. Div. 193;

*Mersey Docks v. Cameron*, 12 L. T. Rep. N. S. 643; 11 H. of L. 443.

*M'Intyre, Q.C. (Marshall with him)* for the overseers.—A tenant might rent the whole of the dock estate, and the lighthouse would increase the value of that estate. The lighthouse therefore is rateable. It does not follow that property is not rateable because you cannot get a hypothetical tenant for it. They referred to

*R. v. Coke*, 5 B. & C. 797.

BRETT, M.R.—I cannot say that the facts are very clearly stated in the case, or that the questions asked are put in very clear terms, but it seems to me that there are two kinds of buildings upon Point Lynas, first, a tower, which is occupied by the appellants, and, secondly, certain houses close to the tower, which are also occupied by the appellants. As to the tower, it is used as a lighthouse, and for the purpose of working a telegraph wire from it, and, as far as I can see, I should say that the truth is, that it is neither used for nor useful for any other purpose. The houses, however, close to it, are used and occupied as dwelling-houses by the servants of the appellants, who are there for the purpose of working the light and the telegraph. These houses are dwelling-houses, and, with the tower, are all the property of the dock board. The use of the tower is certainly regulated by Acts of Parliament, which deals with its use both as a lighthouse and a telegraph station. Those Acts of Parliament have treated it as what is called conservancy apparatus—that is, apparatus for the safety of shipping coming into the port of Liverpool. That conservancy apparatus causes to the dock board large expenditure, and in respect of that expenditure the dock board is certainly entitled to the receipts from its other sources of income, but it seems to me plain that, upon the proper construction of the Acts of Parlia-

ment, the receipts may never legally exceed the expenditure. When, therefore, you come to consider the case of a hypothetical tenant who may be supposed to rent this tower, you must suppose him to rent it subject to the Acts of Parliament, because if he did not do so he would have no power to levy tolls at all. But if he takes it subject to the Acts of Parliament, he must also take it subject to the burden imposed thereby, which, in this case, is that he never can charge more than will be sufficient to pay the expenses. Therefore, if this is so, there never can be any profitable occupation of the tower, it has been struck with sterility by statute, and can have no beneficial value. Therefore, as far as regards the tower, both as a lighthouse and as a telegraph station, it being in both capacities subject to the Acts of Parliament, I think that in neither capacity is it rateable, for in neither capacity is it, or can it be, the subject of any beneficial occupation; and, apart from the purposes for which it is used, the case finds that it is not useful for any other purpose. As to the dwelling-houses, it is clear, to my mind, that they are capable of beneficial occupation, for there is nothing in the Acts of Parliament to prevent the dock board letting them at any time, and a hypothetical tenant would certainly be willing to pay some rent for them. But then the question arises what is the true measure of rateable value in respect of these houses? The suggestion that in order to get at that value the revenues of the dock board are to be taken into account is contrary to every decided case. They must be treated as buildings capable of being let as dwelling-houses, but in a particular position with regard to something else. The neighbourhood must be taken into account—that is plain. A house has a greater letting value as a dwelling-house if it is in the neighbourhood of Grosvenor-square than if it is in the neighbourhood of St. Giles'; and similarly buildings which are capable of being let as workmen's cottages will certainly have a greater letting value if they are in the neighbourhood of some large factory than if they are not. In such a case, then, the existence of the factory might properly be taken into account, because it affects the letting value of the cottages. Coming, then, to the facts of this case, there is here a lighthouse and a telegraph station in existence, and to be used for those purposes in connection with the port of Liverpool. It is obvious that, as long as that state of things lasts, workmen will be wanted to work the light and the telegraph station. Where will these workmen live? It is obvious that they can most conveniently live in the adjoining houses. The hypothetical tenant, therefore, might fairly take into consideration the fact that the dock board would probably want these houses for its work people, and therefore the existence of the tower, used by the dock board as a lighthouse, and a telegraph station is a circumstance which the tenant might properly take into consideration, and in respect of which he might be willing to give a higher rent for these houses as dwelling-houses. To that extent, then, and to that extent only, as it seems to me, may we take into account the existence of the tower. This, I think, is the case put in the third question, and therefore the rateable value will be fixed at 76*l*. Some question arose as to which of the questions did put this

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case, but I think it is clearly the third, for, if not, there is no difference between the third and fourth questions; for the fourth question contemplates the striking of the tower out of the calculation entirely, and estimating the value of these cottages as if the tower did not exist. Therefore, it seems to me that the true answer in this case is that the tower is not to be rated, because it has no occupation value, but that the houses are to be rated at 76*l*.

COTTON, L.J.—In this case there are substantially two questions. The first two questions upon the case are in reality one, because they both relate to the tower in its two different capacities, the one as a lighthouse the other as a telegraph station. In my opinion the telegraph station and lighthouse are upon the same footing. They are both used for conservancy purposes, and the case finds that the tower has no value except as a lighthouse or telegraph station. But being thus used for conservancy purposes, the tower would only be capable of beneficial occupation by reason of the light dues and the use of the telegraph; but these receipts are so restricted by Acts of Parliament that they cannot be fixed so as to produce a beneficial or profitable result to the board. Any hypothetical tenant, therefore, who took these premises must take them subject to these parliamentary fetters, and the result of course would be that he could not possibly obtain any beneficial or profitable result. In my opinion, therefore, the tower cannot be rated in respect of the lighthouse and telegraph, and it is found that it has no other occupation value; therefore our answer must be in favour of the appellants. On the second point, as to the dwelling-house, the difficulty in my mind is to understand what are the alternatives presented, but I think that the fourth alternative means that the lighthouse is to be left out of sight in the calculation altogether, but that, according to the third alternative, if the existence of the tower is to be taken into account, 76*l*. is to be the rateable value. I think the third alternative is the right one. The tower is not to be rated in respect of its use as a lighthouse or telegraph station, but as a fact it is so used, and the fact of its being so used necessitates that there shall be servants there, and the necessity of servants being there to work the tower may be taken into account in considering the value of such houses as those servants would probably occupy. Any person taking these houses would be influenced as to the amount of rent by the fact of the adjoining tower being used for such a purpose, and there would be a greater probability of the houses being occupied at a beneficial rent from the fact that this tower existed and was so used. I think therefore that the tower cannot be disregarded altogether, but must be taken into consideration to this extent, though the board is not to be rated in respect of it. The third alternative seems to put this view, and therefore the rateable value is the amount there fixed, namely 76*l*.

LINDLEY, L.J.—I am of the same opinion, for the same reasons. Mathew, J. seems to have seen his way to distinguish between the case of the tower used as a lighthouse, and the case of the tower used as a telegraph station. I cannot find any ground for any such distinction in the case.

*Judgment varied.*

Solicitors for the appellants, *Venn and Co.* for *A. T. Squarey*, Liverpool.

Solicitors for the respondents, *Ravenscroft and Co.*, for *W. Fanning*, Amlwch.

Nov. 7 and 8, 1884.

(Before BRETT, M.B., COTTON, and LINDLEY, L.JJ.)

TODD v. ROBINSON. (a)

*Public Health Act 1875 (38 & 39 Vict. c. 55), s. 193*  
—*Penal action—Officer of board—"Concerned or interested in" a contract—Shareholder.*

*A clerk to a district local board, who is a shareholder in a gas company which supplies gas in the district, and is paid for such gas by the local board, is an officer "interested in" a contract made with the board, and is liable to penalties under sect. 193 of the Public Health Act 1875 (38 & 39 Vict. c. 55).*

THIS was an appeal from a judgment of Field, J. at the trial.

The action was brought for penalties under sect. 193 of the Public Health Act 1875, and was tried at Newcastle, on the 18th Jan. 1884, before the learned judge without a jury, and judgment was entered for the plaintiff for 50*l*. and costs.

It appeared that the defendant, in July and Aug. 1882, and subsequently, was clerk to the Cowpen District Local Board, and at the same time was a shareholder in the Blyth and Cowpen Gas Company. This company, during the year 1882, supplied gas for the purposes of the Cowpen District Local Board, and was paid by the board at the rate of 46*s*. per lamp for the season. There was no contract under seal, but the terms were embodied in a letter written by the secretary of the gas company to the board, and were accepted by resolution of the board duly entered on the minutes of the board.

Sect. 193 of the Public Health Act 1875 (38 & 39 Vict. c. 55) is as follows:—

Officers or servants appointed or employed under this Act by the local authority shall not in any wise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act. If any such officer or servant is so concerned or interested, or under colour of his office or employment, exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of 50*l*., which may be recovered by any person, with full costs of suit, by action of debt.

The defendant appealed.

*T. W. Chitty* for the defendant.—There was no contract under seal, as required by sect. 174. In law there was no contract with the board at all. The defendant was not "concerned or interested" in the contract. He had nothing but an interest in the company, and that interest was nothing but an interest in the payment of dividends. It would be absurd to suppose that the Legislature intended the severe penalties named in sect. 193 to attach to any person who happened to be a shareholder in a company which, possibly without his knowledge, might make a contract with his board. The action was not brought within one year from the date of the alleged contract, as required by 31 Eliz. c. 5, and is therefore too late.

(a) Reported by A. A. HOPKINS Esq., Barrister-at-Law.

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*Bosanquet, Q.C.* and *J. L. Walton* for the plaintiff.—As to the point of limitation of time, the offence was continuing, the fixed date of the making of the contract must not be taken as the time from which the limitation runs. A contract under seal was not necessary under sect. 174, because this was a contract amounting to less than 50*l.* from day to day. The defendant is clearly interested in the contract. The words were meant to include the case of a shareholder. Where such an interest as the interest of a shareholder has been intended to be excepted out of such a section as this in an Act of Parliament, it has always been done in express terms. See the provision as to members in rule 64 of the schedule to this Act, and further see 5 & 6 Will. 4, c. 76, s. 28; 32 & 33 Vict. c. 55, s. 5. A shareholder is clearly a person having an interest:

*Dimes v. The Grand Junction Canal Company*, 3 H. of L. Cas. 759.

*Chitty* in reply.

BRETT, M.R.—I join with the learned judge who tried this case in his regret at having to come to this decision, but I feel obliged to affirm his judgment. The question is, whether it can be said that the defendant, who is merely a shareholder in the gas company that supplies the district with gas, is a person interested in the contract made with the board whose servant he is. The case in the House of Lords to which we have been referred decides that holding shares in a company is being interested therein; and the whole question now is, whether this Act of Parliament meant to strike at such an interest. We have been referred to another Act, drawn substantially in the same terms, for the omission of the words "directly or indirectly" does not make a substantial difference; and what do we find? We find that the Legislature subsequently, by an amending Act, enacted that the previous Act was not to apply to shareholders for the future. That assumes, as it seems to me, that without an express exemption a shareholder would be interested. If, then, the defendant is "interested in" this contract, he is liable in this action if it has been brought in time. Now, the penalty is, not in respect of making the contract, but in respect of being interested therein; and there is no suggestion that he was not so interested during all the time that the contract subsisted, and that was, in fact, down to the very time of trial of this action. The point as to time, therefore, falls to the ground, and this appeal must be dismissed.

COTTON, L.J.—I am of the same opinion. It is not suggested that the defendant has acted in any way corruptly, but he has transgressed the rule laid down in the statute, and the statute gives the penalty quite independently of any corruption. In my opinion, the defendant was "interested in" the contract. The schedule to the Act helps to show that he was, because participation in profits is there made a form of interest, and the defendant without doubt participated in the profits of the gas company. Holding of shares is, therefore, I think, such an interest as is aimed at by this section, and that interest the defendant had at the time the action was brought, and even later.

LINDLEY, L.J.—I agree. I see no escape from the words of sect. 193, explained as I think it is

by the light thrown upon it by rule 64 in the schedule. I regret that this appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the plaintiff, *Brownlow and Howe*, for *Clark*, Newcastle-on-Tyne.

Solicitors for the defendant, *J. E. and H. Scott*, for *W. S. Daglish*, Newcastle-on-Tyne.

Dec. 9 and 10, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

REG. v. WHITE AND OTHERS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Overseers—Bill in Parliament—Casting burden on rates—Expenses of opposition—Allowance by district auditor.*

*A private Bill, containing clauses which would have imposed a burden on the rates of a parish, was successfully opposed in Parliament by the overseers of the parish. The expenses of opposing the Bill were charged by the overseers in the parish accounts, and allowed by the district auditor. Held (reversing an order to quash such allowance), that, the expenses having been reasonably incurred in opposing a project which would cast a burden on the rates, were properly charged by the overseers, and rightly allowed by the auditor.*

*R. v. The Inhabitants of Essex* (4 T. R. 591) approved.

*Judgment of Watkin Williams and Smith, JJ. (reported 49 L. T. Rep. N. S. 183) overruled.*

IN the session of 1882, a Bill, entitled "The Bristol Port and Dock Commission Bill," was presented to Parliament, by which Bill power was sought to constitute a commission for the purpose of acquiring and working the docks at Bristol, and for the purpose of the Bill to raise, if necessary, moneys out of the poor rates of the city and county of Bristol and certain parishes adjoining, of which the parish of St. George was one. Upon its becoming known what powers the Bill sought to obtain, the overseers of the parish of St. George called a meeting of the vestry of the parish, which meeting passed a resolution that the Bill should be opposed, and authorising the overseers to oppose the Bill in Parliament, and to take steps and incur such expenses in opposing it as they should think necessary. The churchwardens and overseers thereupon proceeded to oppose the Bill, and presented a petition against it; and upon the Bill coming before a committee of the House of Lords, they were heard by counsel in opposition to the Bill, which was ultimately rejected by the Lords' committee. In opposing the Bill, the churchwardens and overseers incurred costs and expenses amounting, as allowed on taxation, to 32*l.* 14*s.* 8*d.*, which sum was paid by them out of moneys in their hands, arising out of the poor rates of the parish of St. George, and was charged by them in their parish accounts.

A rule nisi for a writ of *certiorari* was obtained on behalf of Thomas Dix Sibly, a ratepayer of the parish, to remove into the High Court the auditor's certificate of allowance.

This rule was made absolute with costs against the overseers by Watkin Williams and Smith, JJ. in a judgment (reported 49 L. T. Rep. N. S. 183),

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

where the auditor's certificate and the reasons given by him for the allowance are set out.

A rule to quash the certificate of allowance having been made absolute by Lord Coleridge, C.J. and Stephen, J., the overseers appealed.

Dec. 9.—*A. Charles, Q.C. and Pitt Lewis* for the appellants.

*H. Matthews, Q.C. and A. Glen* for Sibly.

*H. D. Greene and Wigram* for the auditor.

The following authorities were referred to :

- Reg. v. Stewart*, 12 A. & E. 773 ;
- Bright v. North*, 2 Phillips, 216 ;
- Attorney-General v. Mayor, &c., of Brecon*, 40 L. T. Rep. N. S. 52 ; 10 Ch. Div. 204 ;
- R. v. Commissioners of Sewers for the Tower Hamlets*, 1 B. & Ad. 232 ;
- Reg. v. Fouch*, 2 Q. B. 308 ;
- R. v. Gwyer*, 2 A. & E. 216 ;
- R. v. Johnson*, 5 A. & E. 340 ;
- Attorney-General v. Wilkinson*, 28 L. J. 392, Ch. ;
- R. v. The Inhabitants of Essex*, 4 T. E. 591.

Dec. 10.—The following judgments were delivered :—

BRETT, M.R.—In this case a private Bill was proposed for the purpose of making certain docks, and the Bill contained clauses, the effect of which would be to throw a burden on the rates of the parish, of which the appellants are overseers. A meeting of the vestry, called by the overseers, came unanimously to the conclusion that the overseers should oppose these clauses in the Bill, and consequently the overseers in their official capacity petitioned against the clauses, and caused them to be opposed successfully. The expense of this opposition was charged by the overseers in their account, and allowed by the auditor. The Divisional Court overruled the decision of the auditor, and said that the expenses could not legally be thrown on the rates. The result was that the overseers were left personally liable. The question for our decision is, whether the burden of these expenses ought to be thrown upon the rates, and, therefore, whether the expenses can properly be allowed by the auditor. In the argument before us, we were referred to the case of *R. v. The Inhabitants of Essex* (4 T. R. 591, which was not cited in the court below. It was contended for the respondent that the overseers were mere ministerial agents or officers. It was admitted that they were not so in old days, but it was urged that they had become so by a course of legislation, which has never declared that they should be so. I am of opinion that they are not merely ministerial officers. Overseers are bound to levy a rate to meet the expenditure incurred for the relief of the poor ; but there are other expenses thrown upon the rates for which they are bound to provide. The overseers have to take into account all the different things to be provided for out of the rates, and it is their duty to make a rate sufficient to meet all the requirements of the year. It is admitted that there is a margin, as to which the overseers are the judges. Moreover, the rate is, in some respect, prospective. It seems to me, therefore, that to say that the overseers are mere ministerial officers is clearly wrong. It is their duty to levy a rate which, upon the whole, will produce no more than it fairly ought to produce. It is further admitted that it is the duty of the overseers to see that no improper, that is, no illegal, burden is thrown upon the

rates. For instance, if an attempt is made to charge the parish with the maintenance of a pauper who has no settlement there, it becomes the duty of the overseers to resist such an attempt, in order to save the rates from an improper burden. In settlement cases, and in any rating case, if the overseers are of opinion that an improper burden is sought to be imposed upon the parish, they have power to resist the attempt to impose such a burden. The overseers have no remuneration, and a considerable burden is cast upon them. It follows, from the necessity of the case, that, where they rightly protect the parish rates, the moderate expenses of so doing are always allowed to them. This principle was admitted in the court below to extend to settlement and rating cases ; but it was contended for the present respondent that the principle had never gone further than this. However, in *R. v. The Inhabitants of Essex* (4 T. R. 591), which was not referred to in the court below, the judges went further, and held that, in cases analogous to settlement cases, the same rule applied. This principle appears to me to be a just and righteous principle, and one which ought to be applied to the law relating to overseers. It remains to be considered whether the present case comes within this principle. An attempt was here made to throw a burden upon the rates in favour of the promoters of a private Bill in Parliament. I do not think the principle I have referred to would apply to the case of a public Bill, for that is considered as being passed by the Legislature for the purposes of the whole country ; but here the Bill in question would have thrown a considerable burden on the rates of the parish. I am of opinion that, under such circumstances, according to the decision in *R. v. The Inhabitants of Essex* (4 T. R. 591), the overseers were entitled, at the instance of proper persons, to take measures for the protection of the ratepayers. Overseers must, however, be careful, and I do not think that they would be justified in promoting a Bill for the purpose of relieving the rates. The principle I have mentioned is, in my opinion, confined to defence against an attack on the rates. Here, however, the opposition was a pure matter of defence. The auditor came to the conclusion that what was done was reasonable, and I agree with him. It is not alleged that the expenses are immoderate. If they had been, I should have said that, beyond a moderate amount, they ought to be disallowed. Therefore, this being the case of a reasonable defence against a project which would have burdened the rates, I am of opinion that, according to the principle of the decision in *R. v. The Inhabitants of Essex* (4 T. R. 591), the auditor was right in allowing the expenses of the overseers out of the rates. For these reasons I differ from the judgment of the Divisional Court, who were not assisted by having their attention called to the decision to which I have referred.

COTTON L.J. concurred.

LINDLEY, L.J.—I am of the same opinion. I wish to add that I think the principle ought to be confined to cases exactly like the present, or so nearly like that no practical distinction can be drawn. Here it was sought, by a private Bill promoted by individuals for their own profit, to cast a burden upon the rates of the parish. I am

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of opinion that the overseers, being authorised by the vestry, were justified in incurring these expenses.

*Appeal allowed.*

Solicitors for the complainant Sibly, *Merediths, Roberts, and Mills*, agents for Sibly and Dickenson, Bristol.

Solicitors for G. S. White, the district auditor, *Peacock and Goddard*, agents for *Mullings, Ellett, and Co.*, Cirencester.

Solicitors for the Overseers of St. George's, *Warry, Robins, Burgess, and Co.*, agents for *J. W. S. Die*, Bristol.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Wednesday, March 5, 1884.*

(Before DAY and SMITH, JJ.)

THE BRAINTREE LOCAL BOARD OF HEALTH  
v. BOYTON. (a)

*Noxious or offensive trade—Business of fish-frying—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 112.*

*By the 112th section of the Public Health Act 1875 (38 & 39 Vict. c. 55) it is provided that any person who, after the passing of this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade, that is to say, the trade of blood-boiler, or bone-boiler, or fellmonger, or soap-boiler, or tallow-melter, or tripe-boiler, or any other noxious or offensive trade, business, or manufacture, shall be liable to a penalty, &c.*

*A fish-frying business, which is as a fact an offensive business by reason of effluvia arising therefrom and extending to a distance of two or three hundred yards, is not a noxious or offensive business within the meaning of the section, which only applies where a business is necessarily noxious or offensive.*

THIS was a case stated pursuant to the 269th section of the Public Health Act 1875, by the Court of Quarter Sessions for the County of Essex, holden at Chelmsford on the 16th Oct. 1883, at the request of the Local Board of Health for the district of Braintree, in the county of Essex (the urban sanitary authority), who were the appellants, one David Boyton being the respondent.

The case was, so far as material, as follows:

The above-named respondent, David Boyton, has for some years past carried on business at Church-street, in the town of Braintree, as a fish-monger, fruiterer, and sugar-boiler, and from about four years ago, and since the coming into force of the Public Health Act 1875, has carried on the additional business of frying fish for sale by retail.

The respondent commenced, and has since carried on, the said business of fish-frying without the consent of the appellants, either written or otherwise.

Complaint having been made to the appellants of the nuisance occasioned by the said business of the respondent of fish-frying, a summons was served upon the respondent, at the instance of the

appellants, under sect. 112 of the Public Health Act 1875, and the said summons was heard by the justices acting in and for the petty sessional division of South Hickford at Braintree, who convicted the respondent and inflicted a fine upon him of sixpence, the conviction being in the following words: "For that he on the third day of September 1883, at and upon his house and premises, situate in Church-street in Braintree aforesaid, within the district of the local board of health for the district of Braintree, in the county of Essex, being the urban sanitary authority for the said district, did unlawfully carry on a certain noxious and offensive trade and business, to wit, the trade and business of cooking fish for sale, such trade and business having been established since the passing of the Public Health Act 1875, without the consent in writing of the said local board of health as the said urban sanitary authority." The respondent appealed to the Essex Quarter Sessions holden on Oct. 16, 1883, against the said conviction.

It was proved in evidence at the said quarter sessions that the said business of fish-frying was offensive, and that the effluvia arising from the same was experienced in the town of Braintree for a distance of two hundred or three hundred yards from the respondent's premises.

It was proved at the said quarter sessions, and found as a fact by that court, that the trade or business of fish-frying as carried out by the respondent is an offensive trade; but the said court of quarter sessions were of opinion that fish-frying is not a trade which is either specified in the said section or is covered by the general words contained in the said section. And the court accordingly allowed the appeal, and, subject to this case for the opinion of the Queen's Bench Division of the High Court of Justice, ordered the conviction to be quashed.

The question for the said High Court of Justice is, whether the decision of the said court of quarter session, is right; if so, the conviction is to stand quashed. If the said High Court of Justice shall be of opinion that the decision of the said court of quarter sessions was wrong, the said conviction is to stand.

The 112th section of the Public Health Act 1875 (38 & 39 Vict. c. 55) is as follows:

Any person, who after the passing of this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade; that is to say, the trade of blood-boiler, or bone-boiler, or fellmonger, or soap-boiler, or tallow-melter, or tripe-boiler, or any other noxious or offensive trade, business, or manufacture, shall be liable to a penalty not exceeding fifty pounds in respect of the establishment thereof, and any person carrying on a business so established shall be liable to a penalty not exceeding forty shillings for every day on which the offence is continued, whether there has or has not been any conviction in respect of the establishment thereof.

*Finlay, Q.C. and Tindal Atkinson* for the appellants.—The business of fish-frying clearly comes within the words of the section "any noxious or offensive trade, business, or manufacture." In *The Malton Board of Health v. The Malton Manure Company* (40 L. T. Rep. N. S. 755; 4 Ex. Div. 302) it was held that it was not necessary to constitute an offence under the 114th section of this Act, that the effluvia of a trade should be injurious to health, so long as they amounted to a nuisance. In this case the

(a) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

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trade objected to gives rise to effluvia which are found as a fact in the case to be offensive, and are clearly a nuisance. These "offensive trades" sections (ss. 112-115) must be treated as a whole and construed with reference to one another, and the words noxious or offensive must be read separately, and not taken together.

*Wightman Wood* for the respondent.—This business is not a noxious or offensive business within the meaning of the section, since it is not *ejusdem generis* with the other trades specified therein. The justices must be taken to have found this as a fact. [DAY, J.—Can you say that it is not of the same nature and character as the trades mentioned, as, for instance, tripe-boiling?] There is a distinction, this business being the cooking, while tripe-boiling is the creating of an article of food. All the trades mentioned are manufactures. Next, a trade, to come within the section, must be a necessarily offensive trade. In *The Wanstead Local Board of Health v. Hill* (7 L. T. Rep. N. S. 744; 13 C. B. N. S. 479) it was held that brick-making was not a noxious or offensive business, trade, or manufacture within the 64th section of the Public Health Act 1848, and there Erle, C.J. says: "Is brick-making of necessity a business of a noxious or offensive nature analogous to those specified at the beginning of this clause? I am of opinion that it is not. The business of brick-making may be carried on in such a manner as not to be a nuisance to anybody." The section is not aimed at an inoffensive trade carried on in an offensive manner, but at trades which are necessarily offensive. Further, this trade is distinguishable from those set out in the section, because it can only be carried on in the centres of population, the product not being saleable elsewhere. Again, all the other trades are of such a character that their offensiveness would arise from decomposition, in this the nuisance would arise, if at all, from the accidental burning of the oil in which the fish is cooked. There is no finding in the case that the business of fish-frying is offensive, but only that this business is offensive as carried on by the respondent.

*Tindal Atkinson* in reply.

DAY, J.—I am of opinion that the Court of Quarter Sessions was right in this case, and that the conviction must be quashed. I think that they were right on both points. I do not know whether they intended to find as a fact or as a matter of law that this trade or business of fish-frying is not covered by the general words contained in this section. I do not know whether they mean to find that the respondent's trade is not *ejusdem generis* with the trades mentioned by name in the section as a matter of law, or as a matter of fact that it is not a noxious or offensive trade, but in either case I think they are quite right. There is a great difference between a cooking process, which may perhaps be somewhat offensive to persons with delicate noses, and the processes of blood, bone, soap, and tripe-boiling and tallow-melting specified in the section. These trades specified are essentially offensive, by reason of the impossibility of conducting them without producing offensive smells, while the trade in question may be so conducted as to be offensive, but need not necessarily be so. As therefore I see no similarity between this trade

and those specified, and consider it entirely distinct from them, I think we should be wrong in bringing it within the operation of the section. Whether, therefore, I look at it as a question of fact or of law, I think the decision of the Court of Quarter Sessions is quite right. Further, I think that the respondent is right also on the other point. The court has not found that the trade of cooking fish is necessarily offensive. They have taken pains to avoid doing so. In the 5th paragraph of the case they say that it was proved that the "said business" of fish-frying was offensive, and that the effluvia arising from the same were experienced in the town of Baintree for a distance of two hundred or three hundred yards from the respondent's premises. If this meant that the business of cooking fish was necessarily offensive, they would have gone on to say, not that the effluvia were carried two hundred yards from the respondent's premises, but that wherever such a business is carried on the effluvia are necessarily carried two hundred yards. They cannot have meant anything of the sort, for they go on to say, that the business of fish-frying, not generally, but "as carried on by the respondent," is an offensive trade. It may be that it is only offensive because of the way it is carried on, and if so it does not come within the general words of this section. For these reasons I think that the Court of Quarter Sessions was right, and that their decision must be affirmed and this conviction quashed.

SMITH, J.—I am of the same opinion. The question to be decided is, whether it was the intention of the Legislature to include this trade of fish-frying in the general words of this section, and I have arrived at the conclusion that it could not have been their intention to do so. I think that a business, to come within this 112th section, must be a trade, business, or manufacture which is necessarily noxious or offensive; but there is on this point a judgment of the Court of Common Pleas in the case of *The Wanstead Local Board of Health v. Hill* (7 L. T. Rep. N. S. 744; 13 C. B. N. S. 479), which, to my mind, has an important bearing on the present case. That was a case under the 64th section of the Public Health Act 1848 (11 & 12 Vict. c. 63), which is the section of that Act corresponding with the section we are now discussing in the Act of 1875, and I desire to refer to a dictum of Erle, L.C.J. interposed in the report of that case in the argument of Mr. Dowdeswell on page 482: "All the trades," he says, "mentioned specifically deal with substances which are or must necessarily become in themselves offensive;" and Willes, J. also, at the end of his judgment, says: "It appears to me to be very easy to hold that a brickyard is not within any of the definitions in the Act nor within the general words, as general words of that sort are usually construed, because, as was pointed out by my Lord, the substances which are dealt with in the trades which are specified are substances which, without anything being done to them, must be, or by progress of time must necessarily become, a nuisance and annoyance to the neighbourhood." I look, then, at the case to see whether the justices have found this trade to be noxious or offensive, and I find that it was proved that this said business—that is, as explained in a later para-

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graph of the case—this business, as carried on by the respondent, was offensive, and that effluvia arising from the same were experienced at a distance of two hundred yards or more; but it does not say how frequently that was the case, and there is nothing to show us that this offensiveness may not have been caused merely occasionally, as, for instance, by a superfluity of grease being used and getting into the fire; and then later on in the case we find the same thing, that it was proved that the business, as carried on by the respondent, was offensive. It seems to me that these two findings clearly point to the conclusion that this business is offensive, but not necessarily offensive, and therefore I think that the Court of Quarter Sessions was right in its decision, and that this conviction must be quashed.

Solicitor for the appellants, *H. Gibson*, Chelmsford.

Solicitors for the respondents, *Jones and Son*, Colchester.

Nov. 24 and Dec. 1, 1884.

(Before GROVE and HAWKINS, JJ.)

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*Criminal law—Rogue and vagabond—Frequenting highway with intent to commit a felony—5 Geo. 4 c. 83, s. 4—34 & 35 Vict. c. 112, s. 15.*

By 5 Geo. 4, c. 83, s. 4, and 34 & 35 Vict. c. 112, s. 15, every suspected person or reputed thief frequenting any street, or any highway, or any place adjacent to a street or highway, with intent to commit felony, shall be deemed a rogue and vagabond, &c.

A man who frequents a public street having in his mind the intent to commit a felony when and wheresoever opportunity arises, comes within these sections, even though no opportunity arises, and may be committed as a rogue and vagabond, if the justices are satisfied on sufficient evidence, first, that he "frequented" the street according to the ordinary meaning of the word "frequent;" secondly, that he did so with intent to commit felony. The overt act or attempt to carry out the intent is not an essential part of the offence; and it is not necessary that the intent should be to commit a felony in the street frequented.

C., a suspected person and reputed thief, was found in a street at about 1.50 a.m., having in his possession part of a brass pump, which had the appearance of having been wrenched off, and thereupon gave a false name and an untrue account of the article in his possession.

Heid, on case stated, that there was evidence of the intent to commit a felony, but that, there being no evidence of C.'s having been previously in that or any adjacent street on any other occasion with intent to commit a felony or at all, he could not be convicted under the section of "frequencing" the street with intent to commit a felony.

Re Thomas Cross (1 H. & N. 651; 26 L. J. 28, M. C.) discussed.

This was a case stated by the justices of South Shields under 20 & 21 Vict. c. 43.

The case was, so far as material, as follows:

Upon the hearing of a certain complaint preferred against the appellant under the Acts

5 Geo. 4, c. 83, s. 4, and 34 & 35 Vict. c. 112, s. 15, for that he, the appellant, on the 5th day of March 1884, at and in the borough of South Shields, then being a suspected person and reputed thief, unlawfully did frequent a certain street there called Victoria-road for a certain unlawful purpose, to wit, with intent to commit a felony contrary to the statute, we convicted the appellant of the said offence and adjudged him to be committed to Her Majesty's prison at Durham, and there kept to hard labour for the space of one calendar month.

The following facts were proved before us, viz.:

That the appellant was found in Victoria-road, in the borough of South Shields, by two constables at about ten minutes to two o'clock in the morning on the 5th day of March 1884, having in his possession part of a brass pump, the chamber part, or that portion which is usually exposed above the ground for use. It appeared as if it had been torn or wrenched off from a continuation pipe. The appellant was stopped on the suspicion of the constables, and was asked to give an account of how he became possessed of it, and where he was taking it to. The appellant stated that he had got it from a Mr. Johnstone, an engineer, who resided at No. 40, Meldon-terrace, in this town, and that he had just left Johnstone, who was well known to him, at the door of that place, and that he was taking it to a Mr. Hepples, an engineer in the Low-street, to be repaired, and that his name was George Wilson, and that he resided at 52, Adelaide-street. The appellant was not known to the two officers, but the latter, having their suspicions aroused, took the appellant to the police station, and on their way they met other constables to whom the prisoner was known as a convicted thief, and that he was not George Wilson but William Clark. The prisoner was locked up and inquiries made, but no such person as Mr. Johnstone could be found at No. 40, Meldon-terrace, or at any other place. The appellant was then informed of the inquiries made by the police, and of their inability to verify his statement as to the alleged ownership of the pump by Mr. Johnstone, and that no such number existed in Meldon-terrace and no such person lived there, and that an owner for the pump had not been found. It was further discovered, and the appellant was informed of it, that Mr. Hepple had removed some time ago to North Shields, on the other side of the river Tyne, and he was also reminded that he, the prisoner, having been a constable in the South Shields police force, well knew what his duty was, and what it was requisite he should do to satisfy the police, but this he refused to do. The prisoner was then charged by the police, under the statutes named, with being in Victoria-road, in this borough, on the morning in question, with intent to commit a felony. To this charge he pleaded not guilty.

In addition to the facts above stated, it was proved on the hearing before us, on the evidence of two constables, that the prisoner was tried and convicted at the Durham Quarter Sessions on the 25th Feb. 1876, for stealing rope, and by that court sentenced to six months' imprisonment with hard labour, and that since then he had been seen in the company of convicted thieves, and was known to the police as an associate of thieves.

(a) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.



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It was contended before us, on the part of the appellant, that there was no evidence of the appellant being a suspected person or reputed thief; that the appellant did not "frequent" the street called Victoria-road; that the appellant was not there for an unlawful purpose, or with intent to commit a felony; and, lastly, that the circumstances showed (if anything) that a felony had been committed, and that the lesser offence of vagrancy merged in the greater charge of felony, and that the appellant could not therefore be convicted under the statutes above named.

We, however, being of opinion that the facts as proved before us clearly brought the appellant within the sections of the Acts of Parliament named, gave our determination against the appellant in the manner before stated.

The question of law upon which this case is stated for the opinion of the court, therefore, is whether the appellant was rightly convicted under the statutes named on the facts proved before us. If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said complaint is to be dismissed.

The 4th section of 5 Geo. 4, c. 83, is as follows:

4. And be it further enacted that . . . every person having in his or her custody or possession any pick-lock, key, crow, jack, bit, or other implement with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable or out-building, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument with intent to commit any felonious act; every person being found in or upon any dwelling-house, warehouse, coalhouse, stable, or outhouse, or in any inclosed yard, garden, or area for any unlawful purpose; every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony; and every person apprehended as an idle and disorderly person and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended, shall be deemed a rogue and a vagabond within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witnesses or witnesses) to the House of Correction, there to be kept to hard labour for any time not exceeding three calendar months.

The 15th section of the Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112), after reciting so far as material, the above section, provides as follows:

Whereas doubts are entertained as to the construction of the said provision, and as to the nature of the evidence required to prove the intent to commit a felony: Be it enacted, firstly, the said section shall be construed as if instead of the words "highway or place adjacent," there were inserted the words "highway or any place adjacent to a street or highway," and, secondly, that in proving the intent to commit a felony, it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony.

*John Edge* for the appellant. — There is no evidence on which the justices could rightly find

that the appellant was "frequenting" a public thoroughfare within the meaning of the statute. There is a distinction drawn in the section itself between a person "found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area," and a person "frequenting any street, highway, or place adjacent." The appellant was simply found in this street, and there is no evidence of "frequenting." [GROVE, J. — Do you contend that, however clear the intention to commit a felony may be, the conviction cannot be upheld unless the accused has been seen in the street before?] That is so; and, also, that there was no evidence of the intention to commit a felony, the evidence given pointing, if to anything, to the supposition that a felony had been committed. As to the first point, the judgment of Pollock, C.B. in *Re Thomas Cross* (1 H. & N. 651; 26 L. J. 28, M. C.) shows that the word "frequenting" is used in its ordinary sense. "I am of opinion" he says, "that a party attempting to steal in a street which is near to and connected with one that he frequents, renders himself liable to the provisions of the section." It is clear that the court would, in that case, have held the averment, that he was found in a particular street with intent to commit a felony, bad, had it not been also averred that he frequented the adjoining public streets. Here there is no evidence that the appellant frequented any of the streets of the town, construing the word, as the court must, in the ordinary meaning of the term. Secondly, there was no evidence of an intent to commit a felony. The possession of the pump showed if anything that he had committed a felony. [GROVE, J. — The *asportavit* was not completed, and he intended to complete it.] The possession of it was either a part of a felony, and should have been charged as such, or nothing. It is not evidence of an intent to commit a felony.

*Walton* for the respondents. — The possession of a portion wrenched off one pump was evidence from which the justices might well assume he intended to wrench off another. [HAWKINS, J. — It is upon the other point that the court feel a difficulty. What is the evidence of the appellant's "frequenting" the street?] Evidence that he frequented the streets of the town would be sufficient to support the conviction: (*Re Cross, ubi sup.*) [HAWKINS, J. — But there is no evidence that he did frequent the streets of the town.] It is sufficient that he was a reputed thief residing in the town. The justices could well infer from this that he frequented its streets. The cases of *Reg. v. Brown* (17 Q. B. 833; 21 L. J. 113, M. C.) and *Re Elizabeth Jones* (7 Ex. 586; 21 L. J. 116, M. C.) show that the courts are not disposed to lay any stress on the word "frequenting." In the former, Lord Campbell, C.J. says, "All highways are, in my opinion, protected, and any person found in them under the circumstances specified in the Act is liable to be treated as a rogue and vagabond." The other judges in the two cases cited make similar observations, disregarding the distinction which is now attempted to be drawn. Then *Re Cross (ubi sup.)* goes even further, Martin, B. saying, "The Act applies to persons frequenting a 'place of public resort;' and here it is alleged that he is found in Railway-place, being a public thorough-

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fare, and one of the places of resort in the said city. That appears to me to be sufficient." That case is therefore an authority in support of this conviction.

*Edge* in reply. — In *Re Cross* there was an averment that the prisoner frequented the public streets and places of and in the said city, which is absent from and distinguishes the present from that case.

*Cur. adv. vult.*

*Dec. 1.*—GROVE, J.—In this case the appellant, as the facts of the case are, was found—I use the word in a general sense—in Victoria-road, South Shields, at about ten minutes to two o'clock in the morning, on March 5, 1884, having in his possession part of a brass pump—the chamber part, or that portion which is usually exposed above the ground for use. It appeared as if it had been torn or wrenched off from a continuation pipe. He was stopped by the constables, and, in reply to them, gave an account of the article in his possession, which, upon inquiry, was not verified. In addition to this, it was subsequently proved, on the evidence of other constables, that the prisoner had been previously tried and convicted for stealing, and sentenced to six months' imprisonment with hard labour, and further that he had, subsequently to this conviction, been seen in the company of convicted thieves, and was known to the police as an associate of thieves. There was, therefore, more than suspicion against him, since, first of all, he was a convicted thief, and, secondly, the portion of the pump was presumably stolen. The facts, however, did not show that the man had ever been found in the street before. On this evidence the prisoner was convicted, under the statutes 5 Geo. 4, c. 83, s. 4, and 34 & 35 Vict. c. 112, s. 115, for that he, being a suspected person and reputed thief, unlawfully did frequent a certain street in the borough of South Shields, called Victoria-road, for a certain unlawful purpose, to wit, with intent to commit a felony. The appellant, however, considering that he had been wrongly convicted under the statutes in question, obtained a case from the justices, and now contends before us, in the first place, that there is not any sufficient evidence from which the magistrates could rightly conclude that he intended to commit a felony; and, secondly, that, even if they could have rightly come to this conclusion, there is no evidence that he frequented the street in question. As to the first point, I cannot say that the magistrates were wrong in assuming that a man found at that time in the morning, and giving a false account as to who he was and from where he got the article that was found in his possession, might be not unreasonably supposed to be looking about for anything else worth stealing, and I should not be inclined to question the decision of the justices on this ground. But then comes the real difficulty. The words of the original Act of Geo. IV. (5 Geo. 4, c. 83, s. 4) provide that "Every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse, near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, shall be deemed a rogue and vagabond;" and the 15th section of 34 & 35 Vict. c. 112, enacts that, whereas

doubts were entertained as to the construction of that section, it is to be construed as if, instead of the words "highway, or place adjacent," there were inserted the words "any highway or any place adjacent to a street or highway." The whole difficulty, therefore, in this case arises from the question as to what interpretation we are to put on the word "frequenting." I certainly, as far as the present case is concerned, am not surprised that the justices came to the conclusion they did, but I am unable myself to come to the same conclusion, and to decide that the prisoner frequented the street in question or the neighbourhood of the street, there being no evidence that he had ever before been seen there, or in the neighbourhood. To bring him, therefore, within the section, we must apply a different meaning to the words "frequenting" from any which I have ever heard applied to it before. However much we may think the man deserved the conviction, and the consequent imprisonment, we must not extend the Act of Parliament, and give it a different meaning from that found in any dictionary or book of interpretation. I think it would be too dangerous a doctrine to lay down that any man walking about, who can reasonably be supposed to be going to commit a felony, comes within the provisions of this section. To do this would, I think, be to do more than construe the statute—nay, in my opinion, it would be an actual departure from it. Besides, in different parts of the section, two separate forms of words are used. In one place it is said that "every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse" is to be deemed a rogue and vagabond, and in the other that "every suspected person or reputed thief frequenting any street, highway, or place adjacent thereto," is to be so dealt with. Now, it is to be observed that the word "found" is used with respect to dwelling-houses and their precincts, whereas this word "found" is not repeated when we come to the part of the section dealing with streets, highways, and places adjacent thereto, but the word "frequenting" is used instead. There is, therefore, I think, a difference between the two parts of the section made by the Legislature itself. If a person is found in any of the places mentioned in the first part of the section, he must give a reasonable explanation of his presence there, or otherwise may be rightly convicted of an offence against the section; but, when we come to the streets and highways over which the public have the right to walk at all times, the statute, I think, intended by the use of the word "frequenting" that a person was to be found there more than once before could he be brought within the provisions of the section; and this, in my opinion, is the construction to be placed upon the words of the Act. There is an absolute want of all evidence in this case that the appellant had ever been seen in the street in question before, and I do not indeed think that the bare fact of having been seen there once before would bring any man within the section, although it is unnecessary to say so now, as at present I am only adjudicating on this particular case. The statute uses the word "frequent," and no one would say that a man frequents a public-house, for instance, because he has been seen there once; but by the use of that word would mean that he has been sitting there

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frequently, or, as my brother Hawkins said in the course of the argument, no one would say that a man frequents a house to which he goes once to inquire whether the occupier is at home. A convicted thief has just as much right when once he has performed his sentence to walk through the public streets as any other person. There are, therefore, ample reasons for the use of the word "frequenting" in the latter part of the section by the Legislature instead of the word "found;" and I must interpret the words of the statute in their plain and literal meaning, unless, as is not the case here, such an interpretation taken in conjunction with the context would lead to a manifest absurdity. I am, therefore, reluctantly compelled to come to the conclusion that this conviction is wrong, and must be quashed. There were certain cases cited to us in the course of the argument, but I do not think that there is anything in them to affect my decision in the present case, since it appears to me that the learned counsel for the respondents relied more upon the dicta contained in the judgments than on the points really decided in them. In one case (*Re Cross*, 1 H. & N. 651; 26 L. J. 28, M. C.) the question raised was whether a man could be said to frequent a street if he frequented the neighbourhood, and the judges very rightly decided that a person came within the statute who frequented a certain street and was found in an adjacent place with intent to commit a felony, for otherwise a man who frequented a street and was found in an alley down which he had followed some person with intent to rob him would not be within the section. The court, therefore, decided that the commitment in that case was not bad, because it alleged that the prisoner was "found" in a public thoroughfare with intent feloniously to steal; but the court did not say that the word frequent was the same thing as the word "found," which we should have to do if we decided this case differently, for there there was also an averment that the prisoner frequented the public streets of the city, which "frequenting" the court considered to be sufficient to bring the prisoner within the section. I think, therefore, that the Legislature purposely used two different words with different meanings to apply to two different subject-matters; and in this case I see no reasonable evidence that the appellant frequented any street or highway at all. I think, therefore, that I should be straining the statute if I said that he came within it, and for these reasons I am of opinion that this conviction must be quashed.

HAWKINS, J.—I am of opinion that this conviction cannot stand. By 5 Geo. 4, c. 83, s. 4, it is enacted: [Reads it.] Upon the construction of this section grave doubts for a considerable time existed as to whether it justified the commitment of a person frequenting a public street or highway with intent to commit felony, unless such street or highway led to a river, &c., or a place of public resort, or was adjacent thereto. In 1850 Pattison, J. on *habeas corpus* discharged two reputed thieves frequenting a street at the west end of London, with intent, &c., on the ground that the street was not shown to lead to a river, &c., or place of public resort (17 Q. B. 834 n). In a subsequent case (*Reg. v. Brown*, 17 Q. B. 833; 21 L. J. 113, M.C.) in 1852 the Court of Queen's Bench (Pattison, J. dissenting) held

the contrary view, and that the section applied to any street or place adjacent to a street. In the same year in *Re Jones* (7 Ex. 586; 21 L. J. 116, M. C.) the Court of Exchequer dissented from this judgment of the Queen's Bench, and discharged a suspected person charged with frequenting Regent-street with intent to commit a felony on the ground that the commitment did not state that the street frequented by the prisoner was a street leading to a river, &c., or a place of public resort, or a street adjacent to a place of public resort, and this view was adhered to by the Court of Exchequer in *Re George Timson* (L. Rep. 5 Ex. 257) in 1870. To remedy the inconvenience arising from these conflicting interpretations of the law, sect. 15 of 34 & 35 Vict. c. 112 (1871) enacts that sect. 4 of 5 Geo. 4 shall be construed as if instead of the words "highway or place adjacent" there were inserted the words "or any highway or any place adjacent to a street or highway." The effect of this enactment is to render every suspected person or reputed thief frequenting any street or highway, or any place adjacent to a street or highway with intent to commit felony, liable to be dealt with as a rogue and vagabond. Under these two statutes the appellant was convicted by the magistrates of South Shields for that he being a suspected person and reputed thief unlawfully did frequent a certain street there called Victoria-road for a certain unlawful purpose, to wit, with intent to commit a felony, &c.; and we are now asked to say whether upon the evidence that conviction was justified in law. Several objections were raised by the appellants; first, that there was no evidence of his being a suspected person or reputed thief. As to this, one has only to read the statement of fact on the case to see that it is unarguable. Equally unarguable, in my opinion, is the objection that there is no evidence of an intent by the appellant to commit a felony, when the facts proved are taken in conjunction with that part of sect. 15 of 34 & 35 Vict. c. 112, which enacts that "in proving the intent to commit a felony it shall not be necessary to show that the person suspected is guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case or from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony." To the objection that the circumstances show, if anything, that a felony had been committed, and that the lesser offence of vagrancy merged in the greater charge of felony, I have only to observe that the evidence was not such as conclusively to establish that a felony had been committed by the appellant, and certainly the magistrates did not so find; and even if it had been proved that the appellant had committed one felony, it does not follow that he had not an intent to commit another. The objection that there was no evidence to justify the justices in finding that the appellant "frequented" the street called Victoria-road, as alleged, is of a much more serious character, and I am of opinion that it must prevail. The only evidence on this point of the case was that at ten minutes before two o'clock on the morning of the 5th March 1884, the appellant was found by two constables in Victoria-road, South Shields, having then in his possession part of a brass pump, which they had

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every reason to suspect had been stolen by him. There was no evidence of the appellant having been in the street on any other occasion with intent to commit a felony—or indeed at all. Can the appellant then by any reasonable interpretation of the word be said to have been a person “frequenting” the street with the intent, &c.? I think not. In Webster’s Dictionary the verb “frequent” is thus defined: “to visit often; to resort to often, or habitually.” This is also the popular understanding of the word. In this sense I think the Legislature used it, for in the same sect. 4 of 5 Geo. 4, I find a variety of acts which once (that is to say, on one single occasion) committed create offences punishable as acts of vagrancy, e.g., to tell fortunes, to wander abroad and lodge in a barn, &c., having no visible means of subsistence, to wander about and endeavour by exposure of wounds, &c., to gather alms, to run away and leave a wife, &c., chargeable to the parish, to play or bet in the streets with a table, &c., to have possession of a picklock, with intent feloniously to employ it, to be found in or upon any dwelling-house, &c., for any unlawful purpose, all these are punishable as acts of vagrancy, though they be committed on one occasion only, whereas the word “frequenting” was used when the offence of which the appellant was convicted was created. The case of *Re Cross* (1 H. & N. 651; 26 L. J. 28, M. C.) was cited in support of this conviction. In that case the court supported a commitment which alleged that the prisoner, “being a suspected person and reputed thief frequenting the public streets and places of and in the said city (of London), then and there was found in Railway-place, being a public thoroughfare, and one of the places of public resort of and in the said city, with intent feloniously to steal the moneys, goods, and chattels of Sarah Seymour from her person.” According to the report in Hurlstone and Norman’s Reports the only point taken for the prisoner was that it did not appear that the prisoner frequented the spot where the prisoner intended to put his felonious intent into execution—viz., Railway-place, and the court held that this was unnecessary, Martin, B. saying, “a reputed thief frequenting Fleet-street cannot escape by going down Inner Temple-lane to commit a felony,” meaning, as shown by the Law Journal Report, “if a man frequents Fleet-street, and attempts to pick a pocket in Inner Temple-lane, that is within the Act of Parliament.” The case is very unsatisfactorily reported, and the real objection to the commitment does not appear to have been taken, viz., that it did not state that the prisoner frequented the public streets, &c., with intent to commit a felony, but only that the felonious intent existed in Railway-place, where he was only shown to have been once, and it was quite consistent with the averment that he frequented the public streets with an innocent or lawful intent. In discussing and deciding that case it seems, by both counsel and court, to have been assumed, though there was in fact no averment to that effect, that the frequenting the public streets was with the felonious intent charged. On this assumption (but only on this assumption) I entirely agree in the decision, for I am clearly of opinion that a man who frequents a public street, having in his mind the intent to commit a felony when and wheresoever opportunity arises, is

liable to the penalties of the Vagrant Act, even though no opportunity arises, and may be committed as a rogue and vagabond, if the justices are satisfied, on sufficient evidence, first, that he frequented the street; secondly, that he did so with intent to commit felony. The overt act or the attempt to carry out the intent is not an essential part of the offence against the Vagrant Act of Geo. IV., and it was decided in *Reg. v. Brown* (17 Q. B. 833; 21 L. J. 113, M. C.), and *Re Jones* (7 Ex. 586; 21 L. J. 116, M. C.) that it is not necessary that the intent should be to commit a felony “there”—that is, in the street frequented. Read in this light, *Cross’s* case is no authority either against or in favour of the present appellant. I am, then, in the absence of any authority to the contrary, and for the reasons I have endeavoured to express, reluctantly compelled to come to the conclusion that this commitment ought not to stand, because there is no evidence of a “frequenting” any public street with a felonious intent, and that the mere finding upon one occasion of a man in a public street, under circumstances leading to the conclusion that he intended to commit a felony, is not sufficient to satisfy the statute. What amounts to a “frequenting” a street must depend upon the circumstances of each particular case; I only say one visit to it does not, and that is all that is proved by the evidence before us. In order that the error may be avoided in future, I think it right to point out that, apart from any question of evidence, the statement of the offence in the commitment is open to question. It alleges that the appellant frequented the street for an unlawful purpose, to wit, with intent to commit a felony, the intent to commit a felony being only charged under the *videlicet*; without such *videlicet* the commitment would be clearly bad, for, though it is an offence within the Vagrant Act to be found on private premises enumerated in sect. 4 for any unlawful purpose, it is not an offence against that Act to frequent a public street, &c., unless with intent to commit felony, which intent ought to be alleged directly and not as in the commitment before us. This conviction must, for the reasons I have given, be quashed.

*Conviction quashed.*

Solicitors for the appellant, *Gregory, Rowcliffes, and Co.*, for *C. W. Newlands*, South Shields.

Solicitors for the respondents, *Clarke, Rawlins, and Co.*, for *J. M. Moore*, Town Clerk, South Shields.

Dec. 4 and 9, 1884.

(Before Lord COLERIDGE, C.J., GROVE and DENMAN, JJ., POLLOCK and HUDDLESTON, BB.)

REG. v. DUDLEY AND STEPHENS. (a)

*Criminal law—Murder—Extreme necessity of hunger—Justification—Homicide by necessity—Special verdict—Formal addition to special verdict—Certiorari—36 & 37 Vict. c. 66, s. 16.*

*The two prisoners were indicted for wilful murder, and on the trial the jury returned a special verdict, stating the facts, and referred the matter to the court. The facts stated in the special verdict were substantially as follows: The prisoners, able-bodied English seamen, and*

(a) Reported by W. P. EVERHLEY, Esq., Barrister-at-Law.

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the deceased, an English boy between seventeen and eighteen years of age, the crew of an English yacht, were cast away in a storm on the high seas 1600 miles from land, and were compelled to put into an open boat. The food they took with them was all consumed in twelve days, and having been for eight days without food, and for six days without water, the prisoners killed the boy. The boy when killed was lying at the bottom of the boat quite helpless and weak, and unable to make any resistance, and did not assent to his being killed. The prisoners, and another man who was with them, fed upon the body and blood of the boy for four days, when they were picked up by a passing vessel. The verdict went on thus: "That, if the men had not fed upon the body of the boy, they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine; that the boy, being in a much weaker condition, was likely to have died before them; that at the time of the act in question there was no sail in sight nor any reasonable prospect of relief; that, under the circumstances, there appeared to the prisoners every probability that unless they then fed, or very soon fed, upon the boy or one of themselves, they would die of starvation; that there was no appreciable chance of saving life except by killing someone for the others to eat; that, assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men."

On the argument of the special verdict, the following objections (among others) were taken by the prisoners' counsel: "That the formal ending of the special verdict, as entered upon the record, was not found by the jury, but subsequently added, and therefore invalidated the record, rendering the trial abortive; also, that the record ought to have been brought up into the Queen's Bench Division by certiorari, and not by mere order of the court."

Held, that the facts as found afforded no justification for the killing of the boy, and that the prisoners were guilty of wilful murder.

Held, also, that the addition of the formal ending of the special verdict was matter of mere form, and did not invalidate the record.

Held, further, that the record was rightly brought up by order, and not by certiorari, since by the Judicature Act the courts of oyer and terminer and gaol delivery were made part of the High Court of Justice.

THE two prisoners were indicted for the wilful murder of Richard Parker on the 25th July 1884, on the high seas, within the jurisdiction of the Admiralty of England. They were tried at the winter assizes at Exeter on the 6th Nov. 1884, before Huddleston, B., when, at the suggestion of the learned judge, the jury returned a special verdict, setting out the facts, and referred the matter to the court for its decision. The learned judge thereupon adjourned the assizes at Exeter to the Royal Courts of Justice in London until the 25th Nov., and further adjourned them until the 4th Dec.

The court, as above constituted, sat as a Divisional Court of the Queen's Bench Division (sect. 26 of the Judicature Act 1873) to hear the case, and the prisoners were ordered to be

present. The record of the proceedings was brought up by an order of the court, and read.

The record, after setting out the commission and the indictment against the prisoners, concluded with the following special verdict:

The jurors, upon their oath, say and find that, on the 5th July 1884, the prisoners, with one Brooks, all able-bodied English seamen, and the deceased, also an English boy, between seventeen and eighteen years of age, the crew of an English yacht [a registered English vessel (a)], were cast away in a storm on the high seas, 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat [belonging to the said yacht (a)]. That in this boat they had no supply of water and no supply of food, except two 1lb. tins of turnips, and for three days they had nothing else to subsist upon. That on the fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day, when the act now in question was committed. That on the twelfth day the remains of the turtle were entirely consumed, and for the next eight days they had nothing to eat. That they had no fresh water, except such rain as they from time to time caught in their oil-skin capes. That the boat was drifting on the ocean, and it was probably more than a thousand miles away from land. That on the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested that someone should be sacrificed to save the rest, but Brooks dissented, and the boy to whom they were understood to refer was not consulted. That on the 24th July, the day before the act now in question, the prisoner Dudley proposed to Stephens and to Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused to consent, and it was not put to the boy, and in point of fact there was no drawing of lots. That on that day the prisoners spoke of their having families, and suggested that it would be better to kill the boy that their lives should be saved, and the prisoner Dudley proposed that if there was no vessel in sight by the morrow morning the boy should be killed. That next day, the 25th July, no vessel appearing, Dudley told Brooks that he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. The prisoner Stephens agreed to the act, but Brooks dissented from it. That the boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner, Captain Dudley, offered a prayer, asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved. That the prisoner Dudley, with the assent of the prisoner Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there. That the three men fed upon the body and blood of the boy for four days. That, on the fourth day after the act had been committed, the boat was picked up by a passing vessel, and the prisoners were rescued still alive, but in the lowest state of prostration. That they were carried to the port of Falmouth, and committed for trial at Exeter. That, if the men had not fed upon the body of the boy, they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under the circumstances there appeared to the prisoners every probability that, unless they then fed, or very soon fed, upon the boy or one of themselves, they would die of starvation. That there was no appreciable chance of saving life except by killing someone for the others to eat. That, assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men.

But whether upon the whole matter aforesaid by the said jurors in form aforesaid found the killing of the

(a) The words in brackets were by consent struck out during the argument.

said Richard Parker by the said Thomas Dudley and Edwin Stephens done and committed in manner aforesaid be felony and murder or not the said jurors so as aforesaid chosen, tried, and sworn, are ignorant, and pray the advice of the court thereupon. And if upon the whole matter aforesaid by the said jurors in form aforesaid found the court shall be of opinion that the aforesaid killing of the said Richard Parker in manner aforesaid done and committed be felony and murder, then the said jurors on their oath say that the said Thomas Dudley and Edwin Stephens are each guilty of the felony and murder aforesaid in manner and form as in and by the indictment aforesaid above specified is against them alleged. And if upon the whole matter aforesaid by the said jurors in form aforesaid found the court shall be of opinion that the aforesaid killing of the said Richard Parker in manner aforesaid done and committed be not felony and murder, then the jurors aforesaid on their oath aforesaid say that the said Thomas Dudley and Edwin Stephens are not guilty of the felony and murder aforesaid in manner and form as in and by the said indictment above specified is against them alleged. And if upon the whole matter aforesaid by the said jurors in form aforesaid found the court shall be of opinion that the killing of the said Richard Parker in manner aforesaid done and committed be felony and manslaughter, then the said jurors on their said oath say that the said Thomas Dudley and Edwin Stephens are each guilty of the felonious killing and slaying of the said Richard Parker. And if upon the whole matter aforesaid by the said jurors in form aforesaid found the court shall be of opinion that the aforesaid killing of the said Richard Parker be neither felony and murder nor felony and manslaughter, then the said jurors on their oath say that the said Thomas Dudley and Edwin Stephens are not guilty of the premises in the indictment specified and charged upon them.

*Collins, Q.C. (H. Clark and L. E. Pyke with him)*, for the prisoners, took (among others) the following preliminary objections: First, the words in the record, "a registered English vessel," and "belonging to the said yacht," ought to struck out, as they were not in the special verdict as found by the jury. [*Sir H. James (A.G.)*—I admit that these words were not in the verdict as given by the jury, but they were added from the learned judge's notes. I do not think they are material, and will consent to their being omitted.]

The Court, by consent, ordered the words to be struck out.

*Collins, Q.C.*—The next objection is that the formal ending of the special verdict, as entered on the record, was no part of the special verdict found by the jury. The verdict found by the jury ended with the words "the said jurors aforesaid chosen, tried, and sworn are ignorant, and pray the advice of the court thereupon." All the subsequent part has been added since. It is part of the verdict, and there are a number of special verdicts which the jury signed, or counsel for the Crown signed, containing this formal part. There was really no finding by the jury of "guilty" or "not guilty" upon the facts stated in the special verdict. If this ending is not struck out, in reality the judges will find them guilty or not guilty upon the special facts found by the jury. In the case of *Reg. v. Chetwynd* (18 Sta. Tr. 218) the jury signed the special verdict. The jury have not agreed to this finding, and consequently the whole trial is abortive. [*Huddleston, B.*—If you look at Leach's Crown Cases you will see numerous cases, all of which conclude in this way. It is a purely formal ending, which the jury intended. For instance, in *Reg. v. Pedley* (1 Leach's C. C. 242) the verdict ends with the words, "But whether, upon the whole of these

facts, the prisoner is guilty of the offences charged in the indictment, the jury submit to the court." DENMAN, J.—In the case of *Reg. v. Oneby* (2 Ld. Raym. 1485) the special verdict ends in this way.]

*Sir H. James (A.G.)* for the Crown.—The record in *Reg. v. Hazel* (1 Leach's C. C. 368) has been followed exactly in this case. These words are in every special verdict, and the jury having submitted to the court, it is never put to them whether they propose to obey the court in returning their verdict or not. It is the natural intendment from their submission to the court. *Sir Michael Foster*, in his *Crown Law*, 3rd edit., p. 255, says: "In every case where the point turneth upon the question whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing, or alleviating the matter of fact, viz., whether the facts alleged by way of justification, excuse, or alleviation, are true, is the proper and only province of the jury. But whether, upon a supposition of the truth of facts, such homicide be justified, excused, or alleviated, must be submitted to the judgment of the court; for the construction the law putteth upon facts stated and agreed, or found by a jury, is in this, as in all other cases, undoubtedly the proper province of the court." He referred to

*Reg. v. Oneby*, 2 Ld. Raym. 1485;

*Reg. v. Mackalley*, 5 Co. Rep. p. 111.

[*Lord COLERIDGE, C.J.*—To my view it is wholly immaterial, and is mere form. The jury could not, having found the facts, find a verdict contrary to the law. They have found the facts, and the court is to give judgment upon the facts.]

*Sir H. James* then moved that the record be filed.

*Collins, Q.C.* objected that the record ought to have been brought into this court by *certiorari*, and not by an order of the court. [*Lord COLERIDGE, C.J.*—The Courts of Assize are part of the High Court now by sect. 16 of the Judicature Act 1873, and the record has been brought from one part of the court to another.]

*Sir H. James, A.G. (Charles, Q.C., C. Mathews, and Danckwerts with him)* for the Crown.—Upon the merits of the case the killing of the boy Parker, in the manner and under the circumstances stated in the special verdict, was murder. Taking the facts in the special verdict in the light most favourable to the prisoners, it may be taken that, when Parker was killed, the prisoners believed that if they did not feed upon him they would die, and it may be taken that, if they had not done so, they would not have outlived the four days till they were rescued, and that the boy would have died before any relief came. But, on the other hand, at the time the prisoners took the life of the boy there was a chance of his being saved, and they deprived him of that chance. That being so, and separating this case from the question of men acting under legal process or acting in course of warfare, this proposition is a true one: That where a private person, acting upon his own judgment, takes the life of a fellow-creature, that taking away intentionally of a fellow-creature's life can be justified on one ground only, that is, self-defence—*se et sua defendendo*; and it must be self-defence against the acts of the person whose



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life is taken, for the life of a third innocent person must not be taken to save one's own from the act of the aggressor. [HUDDLESTON, B.—A man sees that a great crime is about to be committed by another with a deadly instrument, and he interferes and takes the life of the man with the deadly instrument, surely that would be justifiable?] That case falls within the spirit of the proposition mentioned above. Now, it must be admitted that, if a man be dying of hunger, he must not steal food in order to satisfy that hunger; if he did, he would be guilty of theft. If, then, this boy owned and had in his possession food, and if the prisoners had taken it from him, they would have been guilty of larceny; and if they had killed him, in order to obtain it, they would have been guilty of murder and larceny. Can it be said, then, that a man who cannot steal food, or commit murder to obtain it, can take human life in order to obtain the food of which the body is composed? Yet that must be the other side's contention. The great authorities—Hale, Hawkins, Sir Michael Foster, and East—all concur in the view that no necessity of hunger will justify the killing of a man.

Lord COLERIDGE, C.J.—The proposition that this is not murder is so entirely novel, and the present impression of our minds so clear, that we think we had better hear what Mr. Collins has to say upon the point.

Sir H. James.—It would be convenient now to refer to the case of the seven Englishmen mentioned by Baron Puffendorf in his *Law of Nature and Nations*, book ii., c. 6, sect. 3 (p. 203). [HUDDLESTON, B.—A member of the Bar (Sir Sherston Baker) has found the case referred to at the British Museum, in a medical work of a Dutch writer, Nicolaus Tulpus, and he has given me a copy of it. (a)] That case, as now investi-

(a) The following is the copy as furnished to Huddleston, B., and which, by Sir Sherston Baker's leave, is given here:

General facts as stated by a Dutch writer, Nicolaus Tulpus. He was the author of a Latin work, *Observationum Medicarum*, written at Amsterdam in 1641. He states that the following facts were given him by eye witnesses: Seven Englishmen had prepared themselves in the island of St. Christopher (one of the Caribbean islands) for a cruise in a boat for a period of one night only, but a storm drove them so far out to sea that they could not get back to port before seventeen days. One of them proposed that they should cast lots to settle on whose body they should assuage their ravenous hunger. Lots were cast, and the lot fell on him who had proposed it. None wished to perform the office of butcher, and lots were again cast to provide one. The body was afterwards eaten. At length the boat was cast ashore on the Isle of St. Martin, one of the same group, where the six survivors were treated with kindness by the Dutch and sent home to St. Christopher.

The principal passages in the original are as follows: 'Horribilis illa tragedia quam non ita pridem conspexit India occidentalis in septem Britannis; quibus necessitas famem fecit undecim diurnum. Velut nobis sincere relatum a testibus oculatis qui hæc ipsa ventorum ludibria et humaniter navibus suis excoepere, et officiosè ad suos reducere. Septem Britanni accinxerant se in insula Christophoriana, unus solummodo noctis itineri, ultra quam etiam non extendantur commeatum. At interveniens tempestas abrupit imparatos longius in mare quam ut potuerint reverti ad portum destinatum ante diem septimum decimum. . . . Cujus intraoti erroris, nullum finem promittente spatioso mari, adgebantur tandem (O durum necessitatis telum!) ancipiti sorti committere, cujus carne urgentem famem, et quo

gated, shows that it is no authority at all in support of the prisoner's contention.

A. Collins, Q.C. (H. Clark and L. E. Pyke with him) were heard to argue for the prisoners.

Lord COLERIDGE, C.J.—We need not trouble you, Mr. Attorney-General, to reply, as we are all of opinion that the prisoners must be convicted. What course do you invite us to take as to giving judgment?

Sir H. James (A.G.)—The proper course is for this court, where the case has been heard to its conclusion, to pronounce judgment and pass sentence, and not to send the case back to the assizes for sentence to be passed there. The record is filed in this court, and this court has possession of it. In former days the record was brought by writ of *certiorari* into this court, but the *certiorari* gave no power to this court; therefore the effect was the same as the order of the court bringing up the record is now. In *Res v. Boyce* (4 Burr. 2073) sentence was passed in the King's Bench in a case of a special verdict from the county of Norfolk. So also in the cases of *Res v. Athos* (8 Mod. 136), *B. C.'s case* (in Cro. Car. 175), and *Res v. Cock* (4 M. & S. 71). The Criminal Law Consolidation Act 1861 (24 & 25 Vict. c. 100), s. 2, says that, "upon every conviction for murder the court shall pronounce sentence of death." The convicting court here is this court. The writ of *certiorari* gives no jurisdiction to the court; it is only the mode of bringing the record into court:

2 Hale's Pleas of the Crown, 211;  
*Res v. Bourne*, 7 A. & E. 58.

The court can order the execution to take place where it pleases. [DENMAN, J.—In *Res v. Oneby* (2 Ld. Raym. 1499) the Court of King's Bench decided upon the facts that the prisoner was guilty, and did not pass sentence then, but gave the prisoner four days to move in arrest of judgment, the court saying that, "he was entitled to it by the course of the court."] No other case says that the practice is so. However, it is stated in 2 Hawkins P. C. 8th edit. 624) that, "by the course of the Court of King's Bench upon every conviction in that court of a crime, capital or not, whether by verdict or confession, the party is to have four days to move in arrest

sanguine compescerent inexplabilem sitim. Sed jacta ales (quis eventum hunc non miretur!) destinabit primæ cædi primum hujus laniens auctorem. . . . Quâ oratione ut non parum lenivit horrendi facinoris atrocitatem, sic erexit utique usque eò flaccidos ipsorum animos: ut tandem reperiretur aliquis, sorte tamen priusductus qui petierit animosæ perorantis jugulum, et intulerit vim volentis. Cujus cadaveris expetit quilibet illorum, tam præproperè frustrum, ut vix potuerit tam festinenter dividi. . . . At tandem misertus hujus erroris Deus deduxit ipsorum naviculam ad insulam Martinianam in quâ à præsidio Belgico et humaniter excepti, et benignè ad suos reducti fuere. Sed vix attigerant terram quin accusarentur protinus a prætore homicidii. Sed diluente crimen inevitabili necessitate, dedit ipsis brevi veniam ipsorum iudex.

To understand the account we must notice that Tulpus says this shocking incident occurred *non ita pridem*, "not so long ago." He wrote in 1641. The sailors, on their return from St. Martin (about seven leagues away) were arrested by some executive officer (*a prætore*), probably the constable, and "their own judge" (*ipsorum iudex*), that is, the English judge of the colony, as distinguished from the French judge on the same island, let them go, because "the inevitable necessity had washed away their crime."



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of judgment, if there be so many days remaining of the term." That is only practice, and it is in the discretion of the court to adopt that practice and say whether it is necessary or not.

*Cur. adv. vult.*

*Dec. 9.*—The judgment of the court was delivered by

LORD COLERIDGE, C.J.—The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on the 25th July in the present year. They were tried before my brother Huddleston at Exeter on the 6th Nov., and, under the direction of my learned brother, the jury returned a special verdict, the legal effect of which has been argued before us, and on which we are now to pronounce judgment. The special verdict is as follows: [The learned Judge read the special verdict as set out above.] From these facts, stated with the cold precision of a special verdict, it appears sufficiently that the prisoners were subject to a terrible temptation and to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned brother's notes. But nevertheless this is clear, that the prisoners put to death a weak and unoffending boy, upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with a certainty of depriving him of any possible chance of survival. The verdict finds in terms that, "if the men had not fed upon the body of the boy, they would probably not have survived;" and that "the boy, being in a much weaker condition, was likely to have died before them." They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, them who killed him. Under these circumstances the jury say they are ignorant whether those who killed him were guilty of murder, and have referred it to this court to say what is the legal consequence which follows from the facts which they have found. Certain objections on points of form were taken by Mr. Collins before he came to argue the main point in the case. First, it was contended that the conclusion of the special verdict, as entered on the record, to the effect that the jury found their verdict in accordance with the judgment of the court, was not put to them by my learned brother, and that its forming part of the verdict on the record invalidated the whole verdict. But the answer is twofold: (1) That it is really what the jury meant, and that it is but the clothing in legal phraseology of that which is already contained by necessary implication in their unquestioned finding; and (2) that it is a matter of the purest form, and that it appears from the precedents with which we have been furnished from the Crown office, that this has been the form of special verdicts in Crown cases for upwards of a century at least. Next, it

was objected that the record should have been brought into this court by *certiorari*, and that in this case no writ of *certiorari* has issued. The fact is so; but the objection is groundless. Before the passing of the Judicature Act 1873 (36 & 37 Vict. c. 66), as the courts of oyer and terminer and gaol delivery were not parts of the Court of Queen's Bench, it was necessary that the Queen's Bench should issue its writ to bring before it a record, not of its own, but of another court. But, by the 16th section of 36 & 37 Vict. c. 66, the courts of oyer and terminer and gaol delivery are now made part of the High Court, and their jurisdiction is vested in it. An order of the court has been made to bring the record from one part of the court into this chamber, which is another part of the same court; the record is here in obedience to that order, and we are all of opinion that the objection fails. It was further objected that, according to the decision of the majority of the judges in *The Franconia* (Reg. v. Keyn, 35 L. T. Rep. N. S. 721; 2 Ex. Div. 63), there was no jurisdiction in the court at Exeter to try these prisoners. But (1) in that case the prisoner was a German, who had committed the alleged offence as captain of a German ship; while the prisoners here were English seamen, the crew of an English yacht cast away in a storm on the high seas, and escaping from her in an open boat; (2) the opinion of the minority in *The Franconia* case has been since not only enacted, but declared by Parliament to have always been the law (41 & 42 Vict. c. 73); and (3) the 17 & 18 Vict. c. 104, s. 267, is absolutely fatal to this objection. By that section it is enacted as follows: "All offences against property or person committed in or at any place, either ashore or afloat, out of Her Majesty's dominions by any master seaman or apprentice, who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishment respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England." We are all, therefore, of opinion that this objection likewise must be overruled. There remains to be considered the real question in the case, whether killing, under the circumstances set forth in the verdict, be or be not murder. The contention that it could be anything else was to the minds of us all both new and strange; and we stopped the Attorney-General in his negative argument that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy. All, no doubt, that can be said has been urged before us, and we are now to consider and determine what it amounts to. First, it is said that it follows, from various definitions of murder in books of authority—which definitions imply, if they do not state, the doctrine—that, in order to save your own

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life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever towards you or anyone else. But, if these definitions be looked at, they will not be found to sustain the contention. The earliest in point of date is the passage cited to us from Bracton, who wrote in the reign of Henry III. It was at one time the fashion to discredit Bracton, as Mr. Reeves tells us, because he was supposed to mingle too much of the canonist and civilian with the common lawyer. There is now no such feeling; but the passage upon homicide, on which reliance is placed, is a remarkable example of the kind of writing which may explain it. Sin and crime are spoken of as apparently equally illegal; and the crime of murder, it is expressly declared, may be committed *linguâ vel facto*; so that a man, like Hero, "done to death by slanderous tongues," would, it seems, in the opinion of Bracton, be a person in respect of whom might be grounded a legal indictment for murder. But in the very passage as to necessity, on which reliance has been placed, it is clear that Bracton is speaking of necessity in the ordinary sense, the repelling by violence—violence justified so far as it was necessary for the object—any illegal violence used towards oneself. If, says Bracton (Lib. iii., Art. De Corona, cap. 4, fol. 120), the necessity be "*evitabilis et evadere posset absque occisione, tunc erit reus homicidii*," words which show clearly that he is thinking of physical danger, from which escape may be possible, and that "*inevitabilis necessitas*," of which he speaks as justifying homicide, is a necessity of the same nature. It is, if possible, yet clearer that the doctrine contended for receives no support from the great authority of Lord Hale. It is plain that in his view the necessity which justifies homicide is that only which has always been, and is now, considered a justification. "In all these cases of homicide by necessity," says he, "as in pursuit of a felon, in killing him that assaults to rob, or comes to burn or break a house, or the like, which are in themselves no felony:" (1 Hale P. C. 491.) Again, he says that the necessity which justifies homicide is of two kinds: "(1) That necessity which is of a private nature; (2) That necessity which relates to the public justice and safety. The former is that necessity which obligeth a man to his own defence and safeguard; and this takes in these inquiries: 1. What may be done for the safeguard of a man's own life;" and then follow three other heads not necessary to pursue. Then Lord Hale proceeds: "1. As touching the first of these, viz., homicide in defence of a man's own life, which is usually styled *se defendendo*:" (1 Hale P. C. 478.) It is not possible to use words more clear to show that Lord Hale regarded the private necessity which justified, and alone justified, the taking the life of another for the safeguard of one's own to be what is commonly called self-defence. But if this could be even doubtful upon Lord Hale's words, Lord Hale himself has made it clear, for, in the chapter in which he deals with the exemption created by compulsion or necessity, he thus expresses himself: "If a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of

murder if he commit the fact, for he ought rather to die himself than to kill an innocent; but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant, for, by the violence of the assault and the offence committed upon him by the assailant himself, the law of nature and necessity hath made him his own *protector cum debito moderamine inculpate tutelæ*: (1 Hale P. C. 51.) But, further still. Lord Hale, in the following chapter, deals with the position asserted by the casuists, and sanctioned, as he says, by Grotius and Puffendorf, that in a case of extreme necessity, either of hunger or clothing, "theft is no theft, or at least not punishable as theft, and some even of our own lawyers have asserted the same;" "but," says Lord Hale, "I take it that here in England that rule, at least by the laws of England, is false, and, therefore, if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and *animo furandi* steal another man's goods, it is a felony and a crime by the laws of England punishable with death:" (1 Hale P. C. 54.) If, therefore, Lord Hale is clear, as he is, that extreme necessity of hunger does not justify larceny, what would he have said to the doctrine that it justified murder? It is satisfactory to find that another great authority, second probably only to Lord Hale, speaks with the same unhesitating clearness on this matter. Sir Michael Foster, in the 3rd chapter of his Discourse on Homicide, deals with the subject of Homicide founded in Necessity, and the whole chapter implies, and is insensible unless it does imply, that, in the view of Sir Michael Foster, necessity and self-defence (which in sect. 1 he defines as "opposing force to force even to the death") are convertible terms. There is no hint, no trace of the doctrine now contended for; the whole reasoning of the chapter is entirely inconsistent with it. In East (1 East P. C. 271), the whole chapter on Homicide by Necessity is taken up with an elaborate discussion of the limits within which necessity in Sir Michael Foster's sense (given above) of self-defence is a justification of or excuse for homicide. There is a short section at the end (p. 294), very generally and very doubtfully expressed, in which the only instance discussed is the well-known one of two shipwrecked men on a plank able to sustain only one of them; and the conclusion is left by Sir Edward East entirely undetermined. What is true of Sir Edward East is true also of Mr. Serjeant Hawkins. The whole of his chapter on Justifiable Homicide assumes that the only justifiable homicide of a private nature is in defence against force of a man's person, house, or goods. In the 26th section we find again the case of the two shipwrecked men and the single plank, with this significant expression from a careful writer, "It is said to be justifiable." So, too, Dalton, c. 150, clearly considers necessity and self-defence, in Sir Michael Foster's sense of that expression, to be convertible terms; though he prints without comment Lord Bacon's instance of the two men on one plank as a quotation from Lord Bacon, adding nothing whatever to it of his own; and there is a remarkable passage at p. 339, in which he says that even in the case of a murderous assault upon a man, yet before he may take the life of the man who assaults him, even in self-defence, *cuncta prius tentanda*. The passage in

Staundforde, on which almost the whole of the dicta we have been considering are built, when it comes to be examined, does not warrant the conclusion which has been derived from it. The necessity to justify homicide must be, he says, inevitable, and the example which he gives to illustrate his meaning is the very same which has just been cited from Dalton; showing that the necessity he was speaking of was a physical necessity, and the self-defence a defence against physical violence. Russell merely repeats the language of the old text-books, and adds no new authority nor any fresh considerations. Is there, then, any authority for the proposition which has been presented to us? Decided cases there are none. The case of the seven English sailors referred to by the commentator on Grotius and by Puffendorf has been discovered by a gentleman of the bar, who communicated with my brother Huddleston, to convey the authority, if it conveys so much, of a single judge of the island of St. Kitts, when that island was possessed partly by France and partly by this country, somewhere about the year 1641. It is mentioned in a medical treatise published at Amsterdam, and is altogether, as authority in an English court, as unsatisfactory as possible. The American case cited by my brother Stephen in his Digest from Wharton on Homicide, p. 237, in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but, on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as my brother Stephen says, be an authority satisfactory to a court in this country. The observations of Lord Mansfield in the case of *Reg. v. Stratton and others* (21 St. Tr. 1045), striking and excellent as they are, were delivered in a political trial, where the question was, whether a political necessity had arisen for deposing a Governor of Madras. But they have little application to the case before us, which must be decided on very different considerations. The one real authority of former time is Lord Bacon, who in his Commentary on the maxim, "*Necessitas inducit privilegium quoad jura privata*," lays down the law as follows: "Necessity carrieth a privilege in itself. Necessity is of three sorts: Necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. First, of conservation of life. If a man steal viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side, to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither *se defendendo* nor by misadventure, but justifiable." On this it is to be observed that Lord Bacon's proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundforde, whom he cites for it, and is expressly contradicted by Lord Hale in the passage already cited. And for the proposition as to the plank or boat it is said to be derived from the canonists; at any rate, he cites no authority for it, and it must stand upon his own. Lord Bacon was great even as a lawyer, but it is permissible to much smaller men, relying upon principle and on the authority of others the equals

and even the superiors of Lord Bacon as lawyers, to question the soundness of his dictum. There are many conceivable states of things in which it might possibly be true: but, if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day. There remains the authority of my brother Stephen, who both in his Digest (art. 32) and in his History of the Criminal Law (vol. 2, p. 108) uses language perhaps wide enough to cover this case. The language is somewhat vague in both places, but it does not in either place cover this case of necessity, and we have the best authority for saying that it was not meant to cover it. If it had been necessary we must with true defence have differed from him; but it is satisfactory to know that we have, probably at least, arrived at no conclusion in which, if he had been a member of the court, he would have been unable to agree. Neither are we in conflict with any opinion expressed upon this subject by the learned persons who formed the Commission for preparing the Criminal Code. They say on this subject: "We are not prepared to suggest that necessity should in every case be a justification; we are equally unprepared to suggest that necessity should in no case be a defence. We judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case." It would have been satisfactory to us if these eminent persons could have told us whether the received definitions of legal necessity were in their judgment correct and exhaustive, and, if not, in what way they should be amended; but as it is we have, as they say, "to apply the principles of law to the circumstances of this particular case." Now, except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign or in the defence of their country. Now, it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called necessity. But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and though many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence, and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking, a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the *Birkenhead*—these duties impose

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on men the moral necessity, not of the preservation, but of the sacrifice, of their lives for others, from which in no country—least of all it is to be hoped in England—will men ever shrink, as indeed they have not shrunk. It is not correct, therefore, to say that there is any absolute and unqualified necessity to preserve one's life. "Necesse est ut eam, non ut vivam," is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on Necessity, to which so much reference has been made. It would be a very easy and cheap display of common-place learning to quote from Greek and Latin authors—from Horace, from Juvenal, from Cicero, from Euripides—passage after passage in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics. It is enough in a Christian country to remind ourselves of the Great Example which we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting was chosen. Was it more necessary to kill him than one of the grown men? The answer must be, No.

So spake the Fiend; and with necessity,  
The tyrant's plea, excused his devilish deeds.

It is not suggested that in this particular case the "deeds" were "devilish;" but it is quite plain that such a principle, once admitted, might be made the legal cloak for unbridled passion and atrocious crime. There is no path safe for judges to tread but to ascertain the law to the best of their ability, and to declare it according to their judgment, and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it. It must not be supposed that, in refusing to admit temptation to be an excuse for crime, it is forgotten how terrible the temptation was, how awful the suffering, how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder; that the facts as stated in the verdict are no legal justification of the homicide; and to say that, in our unanimous opinion, they are, upon this special verdict, guilty of murder. (a)

(a) My brother Grove has furnished me with the following suggestion, too late to be embodied in the judgment, but well worth preserving: "If the two accused men were justified in killing Parker, then, if not rescued in time, two of the three survivors would be justified in killing the third; and, of the two who remained, the

Sir Henry James, (A.G.) prayed the sentence of the court.

The LORD CHIEF JUSTICE thereupon passed sentence of death in the usual form. (a)

*Judgment for the Crown.*

Solicitor for the prosecution, *Solicitor to the Treasury.*

Solicitors for the prisoners, *Irvine and Hodges,*

Dec. 9 and 15, 1884.

(Before HAWKINS and SMITH, JJ.)

THE GUARDIANS OF THE HOLBORN UNION (apps.) v. THE GUARDIANS OF THE CHELTSEY UNION (resps.) (b)

*Poor Law—Settlement by residence—Child—Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 34.*

*Sect. 34 of the 39 & 40 Vict. c. 61 enacts that "where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise."*

*Two paupers were legitimate children, and on their mother's death in 1877, being then five and three years of age, were placed by their father in the care of a friend and his wife, who resided in the parish of C., in the respondent union, where they remained until they became chargeable in Oct. 1883. The paupers' father was settled in the parish of A., in the appellant union, by residence there from March 1877 till May 1881; he died in February 1883. The father, from 1877 till his death in 1883, only visited the children three times, for a few hours each time, and the children never visited their father, nor were they ever out of the parish of C. The father paid a stipulated sum for the children's clothing, and agreed to pay a certain sum per week for their maintenance, which latter sum was paid either by the father or by his employer. On appeal from an order of removal to the parish of A.:*

*Held, that upon the above facts there was no intention on the father's part to receive the children back again, and that the pauper children's place of residence was at C.; that, therefore, they had acquired a settlement by residence in the parish of C., under sect. 34, and that the order of removal was wrong.*

*This was a case stated by consent under 12 & 13 Vict., c. 45, s. 11.*

1. On the 20th Oct. 1883 Amy Kelly, aged eleven years, and Wallace Kelly, aged nine years, became chargeable to the respondent union.

2. On the 20th Feb. 1884 an order was made by two justices of the County of Surrey adjudging the said Amy Kelly and Wallace Kelly to be legally settled in that part of the parish of St.

stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving."—C.

(a) The prisoners were afterwards respited and their sentence commuted to one of six months' imprisonment without hard labour.

(b) Reported by W. F. EVERSOLEY, Esq., Barrister-at-Law.

Andrew, Holborn, which is comprised in the appellant union, and the said order was appealed against.

3. The paupers Amy Kelly and Wallace Kelly were the lawful children of Thomas William Kelly and Sarah Ann his wife.

4. The parents of the paupers were both deceased. The mother, Sarah Ann Kelly, died in childbirth in Feb. 1877, and the father, Thomas William Kelly, committed suicide, it is believed, in Feb. 1883.

5. The paupers in the month of Feb. 1877, on the death of their mother, were placed by their father in the care of Samuel and Ann King, who were then residing and still resided at Addlestone, in the parish of Chertsey, in the respondent union, and the paupers still remained in the care of the said Samuel and Ann King.

6. From Feb. 1877 up to Feb. 1883 the father's visits to the children were as follows—the last time on Boxing Day 1880, and twice previously. He came down on each of these occasions by the mid-day train and left on each evening early. The sum agreed upon for the children's maintenance (10s. per week) was remitted through the father's employer who paid absolutely out of his own pocket the said sum of 10s. per week from Feb. 1877 to May 1879. The father then paid half that sum and the father's employer the other half, and the father's half was stopped out of his wages by his employer. In Feb. 1883, after Kelly, the father, disappeared, the employer kept up the 10s. per week out of his own pocket until the children became chargeable, and paid 6s. per week up to the end of March 1884. The sum agreed upon for the children's clothing (9s. per quarter) was paid or remitted to the foster parents regularly by the father from Feb. 1877 until Christmas 1880.

7. The paupers' father resided from March 1877 until the month of May 1881 in the parish of St. Andrew, Holborn, in the appellant union, under such circumstances as to gain a settlement in the said parish of St. Andrew, Holborn, by virtue of the provisions of 39 & 40 Vict. c. 61, s. 34.

8. The appellants contended that the paupers had resided from Feb. 1877, and still continued to reside, in the parish of Chertsey, and thereby had acquired a settlement in their own right in the parish of Chertsey, in the respondent union, as their actual bodily residence for the period and under the circumstances above mentioned came within and satisfied the meaning of the residence prescribed by sect. 34 of the Act 39 & 40 Vict. c. 61.

9. The respondents, on the other hand, contended that the paupers under the above circumstances were constructively resident from Feb. 1877 to the commencement of the year 1883 with their father, the said Thomas William Kelly; that they were, therefore, unable to acquire any settlement in their own right in the respondent union under the Statute 39 & 40 Vict. c. 61, s. 34, or otherwise during such period, and were settled in the appellant union by reason of their said father's residence therein from March 1877 until May 1881, as aforesaid.

10. The question for the opinion of the court was whether the paupers were, at the time of the making of the order of removal, settled in the parish of Chertsey, in the respondent union.

11. If the court should answer that question in

the affirmative the said order was to be quashed with costs, if in the negative the said order was to be confirmed with costs.

39 & 40 Vict. c. 61, s. 34:

Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed without such corroboration as the justices or court think sufficient.

*Charles, Q.C. (Poland with him)* for the appellants.—These children are settled in the parish of Chertsey, in the respondent union, within the plain and obvious meaning of sect. 34 of 39 & 40 Vict. c. 61. They resided for more than three years before Oct. 1883, when they became chargeable, in the parish of Chertsey, with the Kings, and in such a manner as rendered them irremovable. It is true that they were under sixteen years of age, but that does not prevent them from acquiring a settlement for themselves; for instance, an apprentice under sixteen may acquire a settlement for himself. It is said that, the father being settled in the appellant union, the children take his settlement, as they are under sixteen years of age; but the case of *The Wolstanton Union v. Northwich Union* (46 L. T. Rep. N. S. 528), shows that a child under sixteen can acquire a settlement for himself.

*B. Cunningham Glen (Holl, Q.C. with him)* for the respondents.—*The Wolstanton Union v. Northwich Union* does not cover this case, because there it was found as a fact (par. 3 of the case) that the pauper resided in the parish of Maer under such circumstances as to gain a settlement of his own in the parish of Maer under sect. 34; and the decision was that there was nothing in sect. 35 to prevent a child under sixteen from acquiring a settlement under sect. 34, no question of emancipation being raised. In the present case the question for decision is whether these children acquired a settlement under sect. 34. It is admitted that a child under sixteen may acquire a settlement, but the child must be emancipated. These children never became emancipated by any of the recognised methods, as by apprenticeship, or by becoming head of a house. They did not become irremovable during any of the three years as prescribed by the section, because, if they had become chargeable in any year during their father's lifetime, they would have been removed to his union. A child, to become emancipated, must have and exercise a will of its own so as to emancipate itself. These children never exercised any will so as to emancipate themselves, and were in a similar position to children sent to school: (*Reg. v. Abingdon Union*, 22 L. T. Rep. N. S. 603; *L. Rep. 5 Q. B. 406.*) In *Reg. v. Leeds Union* (40 L. T. Rep. N. S. 521; 4 Q. B. Div. 323) the pauper was an illegitimate child. He also cited

*Res v. The Inhabitants of Offchurch*, 3 T. R. 114;

*Res v. The Inhabitants of Wilton-cum-Twambrookes*, 3 T. R. 355;

*Keynsham Union v. Bedminster Union*, 38 L. T. Rep. N. S. 507; 3 Q. B. Div. 344;

*Salford Union v. Manchester*, 48 L. T. Rep. N. S. 119; 10 Q. B. Div. 176;

*Reg. v. St. Olave's Union*, 29 L. T. Rep. N. S. 426;  
L. Rep. 9 Q. B. 38;  
*Reg. v. St. Mary, Islington*, 22 L. T. Rep. N. S. 654;  
L. Rep. 5 Q. B. 445.

*Poland* in reply.—The exercise of the will on the part of the children is not necessary. In *Reg. v. Leeds Union* Cockburn, C.J. said that it was argued "that under sect. 34 there must be an intention on the part of the person residing to choose a residence, but nothing of the kind is expressed in the Act. The expression is simply 'shall have resided.'" In that case the child was illegitimate, but the same reasoning applies as well to a legitimate child. Here the father never had the children back to him again; he had no home for them, and he only came to see them three times. The father had entirely given up the children, and the only place they can be said to have "resided" at was Chertsey. In *Reg. v. St. Olave's Union*, the pauper daughter was nineteen years of age, and the only question was whether she had acquired a status of irremovability, and no question of settlement arose. He also cited

*Ree v. The Inhabitants of Bleasby*, 3 B. & A. 377.

*Cur. adv. vult.*

Dec. 15.—HAWKINS, J. delivered the judgment of the Court.—The question submitted for our opinion is whether the pauper children, Amy and Wallace Kelly, who in Oct. 1883 became chargeable to the union of Chertsey, were on the 20th Feb. 1884, when an order was made adjudging them to be settled in the parish of St. Andrew, Holborn, legally so settled. The paupers' father was admittedly legally settled in the parish of St. Andrew by residence there from March 1877 till May 1881. Where he resided before March 1877, or after May 1881, is not stated. His wife, the mother of the paupers, died in Feb. 1877. He died in Feb. 1883. In Feb. 1877, on the death of their mother, the paupers, being then respectively five and three years of age, were placed by their father in the care of Samuel and Ann King, who lived at Chertsey, in the county of Surrey, and in such care they lived in that parish from that time continuously until the said order was made. It does not appear that the paupers were ever in the parish of St. Andrew, nor is it shown from whence they were sent to the Kings, nor where they had resided before that event. On three occasions only after the children went to Chertsey did their father visit them, and then only for a few hours at a time; but he agreed to pay 10s. a week for their maintenance, and this sum was paid either by the father or his employer till he died, and afterwards by his employer out of his own pocket. From Feb. 1877 to Christmas 1880 the father also paid to the Kings a stipulated sum for the children's clothing. The children never visited their father, nor were they ever out of Chertsey after they commenced to live with the Kings seven years ago. The appellants contended before us that the paupers acquired a settlement in the parish of Chertsey under the provisions of the 39 & 40 Vict. c. 61, s. 34 (passed in 1876), by reason of their residence there under the circumstances above mentioned. The respondents, on the other hand, contended that, though they lived at Chertsey, their legal residence was with their father. The enactment in question, which created an entirely new mode of acquiring a settlement,

viz., by mere residence, runs thus: "Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable, he shall be deemed to be settled therein." The statutes rendering a person irremovable are, first, the 9 & 10 Vict. c. 61, s. 1 (passed in 1846), which enacts that "no person shall be removed nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years next before the application for the warrant;" secondly, the 24 & 25 Vict. c. 55, s. 1 (passed in 1861), substituting three for five years; and, thirdly, the 28 & 29 Vict., c. 79 s. 8 (passed in 1865), substituting one for three years. These statutes, however, conferred no settlement, they simply conferred a status of irremovability. The effect of this modern legislation may, for all practical purposes, be shortly summed up thus: One year's residence in a parish is sufficient to make a person irremovable from it; three years of such residence confers a settlement upon such resident. Reading the plain and simple language of the statutes, one would have supposed that no difficulty could arise in determining where a person resided during any given time; nevertheless the courts have been constantly called upon to determine what is such residence as will satisfy the language of the statutes relating to irremovability, not because of any doubt as to where the paupers have actually lived, but because of endeavours which have been constantly made to have it judicially declared that, though actually living in one parish, they have been "constructively" resident in another. Now, we take the law, for all practical purposes, to stand thus: Mere bodily presence or actual dwelling in a parish, though *prima facie*, is not absolutely sufficient to satisfy the statute; more is required. The residence must be such as to satisfy the tribunal before which the question arises that the place of it was the home and fixed place of abode of the person whose settlement is disputed. If a person having a home of his own of which he is the head, or being a member of his father's family and having his fixed home as of right or by permission at his father's house, quits it for a mere temporary purpose, intending on leaving and during all his absence to return to it so soon as the object of his absence is accomplished and then to live in it as before, such mere temporary physical absence does not operate as a break in his residence at his father's home; though physically absent, his residence continues. A man who goes from his home on a journey or a visit, intending to return to it when his journey or his visit is over, though dwelling away from it for a time, cannot be said to be resident at the place where he is a mere visitor. On the other hand, if a person having a fixed home, whether as the head of it or as being a member of a family, and whether emancipated or not, quits it with the intention not to return, or to return only upon the happening of some particular uncertain event, he cannot be said during his absence to reside in the home he has so quitted. Whether the *animus revertendi* existed is always a question, not of law, but of fact, to be determined by the justices, having regard to the



circumstances of each particular case, though of course it is a question of law whether there is any evidence to justify the justices in their findings, or whether the findings justify the adjudication. We mention this because it is becoming far too common a practice in cases on appeal to leave the judges to draw inferences of fact from other facts which are found; which we think is inconvenient and irregular. In illustration and confirmation of the views we have expressed, we may refer to the case of *Reg. v. The Abingdon Union* (22 L. T. Rep. N. S. 603; L. Rep. 5 Q. B. 409). In that case the pauper, who was blind, resided with his mother and her husband at Littlemore, in the Abingdon Union, from June 1861 until August 1862, when, being then fifteen years old, he was admitted as a pupil at the "School for the Indigent Blind," in which he lived and was maintained till July 1868, when he returned to Littlemore, having no other place to return to, and there he remained with and was maintained by his mother and her husband till he became chargeable. During his stay at the school he had in each of the intervening five years visited for several weeks his mother and her husband. On appeal against an order for his removal to his birth settlement (he being an illegitimate child), the Sessions adjudged him to be irremovable, on the ground that he had been constructively resident in Littlemore for more than a year before the making of the order; and the Court of Queen's Bench held there was evidence to justify that finding—treating the question as being whether during the whole time of the pauper's stay at the school there was an *animus revertendi* in the pauper without any idea of abandoning his old home with his parents. Blackburn, J., in the course of his judgment, said: "The Sessions had to draw inferences in order to decide whether the residence in Littlemore was broken or not during the time the pauper was in the asylum, and they drew the inference that there was an *animus revertendi* in the pauper, and adjudged that the pauper had constructively resided with his mother and her husband. I do not like the phrase 'constructive residence.' When a person is physically absent from his place of residence for a time, if he has an *animus revertendi* his residence continues; and the question in such case is whether he continues to be resident or has ceased to be resident by taking up his permanent residence elsewhere." In *Reg. v. Glossop* (L. Rep. 1 Q. B. 227) the pauper had quitted her parents' roof to go into service. She stayed in such service but a very short time, and then returned to her old home. It was held, nevertheless, that her residence there had been broken, for when she left it there was no definite *animus revertendi*. And in *The Wolstanton Union v. The Northwich Union* (46 L. T. Rep. N. S. 528) the pauper, who was born in 1860, lived with his father, and after his death with his widowed mother, in Wolstanton till 1872, when he was twelve years old, when he left her to go and reside at Maer, in the union of Northwich, and he continued to reside there till 1877. It was held that he had gained a settlement by residence in Maer, and could not be removed to Wolstanton, though it was argued that he could not gain a settlement living apart from his mother's home. See also *The Merthyr Tydvil Union v. The Stepney Union* (50 L. T. Rep. N. S. 822; 53 L. J. 183, M. C.), con-

firmed by the Court of Appeal since this judgment was written. The authorities we have cited were cases in each of which the pauper was of an age and possessed of understanding capable of forming an intention for himself; therefore in them the question discussed was whether an *animus revertendi* existed in the pauper, whose settlement or irremovability was in dispute. To the cases of children of tender age, whose place of abode is subject to the control and will of their parents, different considerations apply. In such cases, where the child is dwelling away from its father, the question seems to us rather to be, what were the intentions of the father with reference to it, than what were the intentions of the child. Of course, a father cannot relieve himself at will of his liability to maintain his child, but he can select its place of abode and determine for himself whether he will maintain and support his child in his own home, or in another home to be provided for it. In the former case, though the father may send his child away for a time—whether it be to school, to visit friends, or for any other purpose—if his intention is that, when that purpose is fulfilled, the child shall return to his home, no other place than that home can be said to be his legal residence for the purpose of gaining a settlement. But, if in sending the child away from his home, the father intended that its absence should be permanent, though he maintained it in all comfort in a new permanent abode, the residence of the child would in every sense be in the new and not in the old home. The case of *Reg. v. The Leeds Union* (40 L. T. Rep. N. S. 521; 4 Q. B. Div. 323) affords a good illustration of this view. There the pauper, an illegitimate female child, was, when about a fortnight old, placed by her mother in the care of John Oakes and his wife, and with them she lived in the parish of Seacroft from Dec. 1871 to Feb. 1878, and it was held that she had acquired a settlement in that parish under the 39 & 40 Vict. c. 61, s. 34. In giving judgment, Cockburn, C.J. said: "It is true that where a child is under the authority and control of its parent, it may, even when placed at a school in a different parish, be said to constructively reside with its parent. Here, however, the child had been entirely given up by its mother; it was not a suspension but a virtual abandonment of the maternal right. Circumstanced as she was, she asked Oakes and his wife to take the child off her hands, and the child resided with them in another parish, without any intention on the part of the mother to resume her rights." And Lopes, J. said: "The case is distinguishable from that of a child placed at a school, for here the mother relinquished the custody of it altogether." In the present case there is no finding as a fact of any intention on the part of the pauper's father to receive them back into his own home; it is not even alleged that he had a home in which he could receive them. The circumstances under which, immediately after their mother's death, he placed them with the Kings in Chertsey, indicate a breaking up of his old home, and the fact that he never invited or had the children to visit him points in the same direction. The payment for their maintenance and clothes affords no evidence of an intention to take them back to live with him, for that was only in fulfilment of his legal obligation. Having carefully considered the



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whole of the facts submitted to us, we are of opinion that there is no evidence to justify any other conclusion than that the paupers' residence with the Kings was in fact their permanent home; that there was no evidence that their father ever intended they should return to live with him; and that consequently they acquired a settlement by residence in Chertsey. This is the conclusion the justices should have come to. The order, therefore, must be quashed with costs.

*Order quashed.*

Solicitor for the appellants, *J. Baworthy.*

Solicitor for the respondents, *W. B. Francis,*  
for *Paine and Brettell, Chertsey.*

*Tuesday, Dec. 16, 1884.*

(Before GROVE, HAWKINS, and SMITH, JJ.)

REG. v. FLAVELL AND ANOTHER. (a)

*Bastardy—7 & 8 Vict. c. 101, s. 70—Voluntary witness—Refusal to answer questions—Power of justices to commit to prison—35 & 36 Vict. c. 65, s. 4.*

*By sect. 70 of the 7 & 8 Vict. c. 101, justices in petty or special sessions may, upon the request of any party to any bastardy proceedings before them, summon any person to appear as a witness in such proceedings; and if any person so summoned neglect or refuse to appear to give evidence at the time and place appointed in such summons . . . it shall be lawful for such justices by warrant . . . to require such person to be brought before them; and if any person coming or brought before any such justices in any such proceedings refuse to give evidence therein, it shall be lawful for such justices to commit any person to any house of correction within their jurisdiction, &c.*

*On the hearing of a bastardy summons, the alleged putative father went into the witness-box and denied the statement of the mother. In cross-examination he declined to answer a question (considered by the justices to be material), and offered to withdraw from the case and consent to an order being made against him. The justices committed him to prison for refusing to answer the question.*

*Held, by Grove and Hawkins, JJ. (dissentiente Smith, J.), that the justices had jurisdiction to commit, for that the words "if any person coming or brought before such justices," in the above section, were not limited to persons who had been summoned to appear and give evidence.*

In this case a rule *nisi* for a *certiorari* had been obtained against two justices of Leamington, calling upon them to show cause why a warrant, under which one Wilkins had been by them ordered to be imprisoned for seven days, should not be brought up to this court to be quashed. Upon the hearing of a bastardy summons, taken out against Wilkins for an order to compel him to contribute towards the support of an illegitimate child, he tendered himself as a witness, and went into the box and denied on oath the statement of the mother that he was the father of the child. In cross-examination he was asked whether or not he had married a person named Pearson, whom he had represented as his wife, and, if so,

when and where the ceremony took place. He declined to answer the question, and thereupon the justices threatened to commit him to prison if he did not answer. He still persisted in his refusal, and offered to withdraw from the case and consent to an affiliation order being made against him. The justices, however, committed Wilkins to prison for seven days, or until such time as he should submit himself to examination and answer the question demanded of him.

A rule *nisi* for a *certiorari* to bring up such order to be quashed was granted, against which

*Dugdale, Q.C. (W. Graham with him)* showed cause.—The authority given to the justices to commit Wilkins to prison is conferred by sect. 70 of 7 & 8 Vict. c. 101. By that section it is provided "that in any proceedings to be had before justices in petty or special sessions, or out of sessions, under the provisions of this Act or of any of the Acts required to be construed as one Act herewith, if any party to such proceedings request that any person be summoned to appear as a witness in such proceedings, it shall be lawful for any justice to summon such person to appear and give evidence upon the matter of such proceedings; and if any person so summoned neglect or refuse to appear to give evidence at the trial and place appointed in such summons, and if proof upon oath be given of personal service of the summons upon such person . . . it shall be lawful for such justice, by warrant under his hand and seal, to require such person to be brought before him, or any justices before whom such proceedings are to be had; and if any person coming or brought before any such justice in any such proceedings refuse to give evidence thereon, it shall be lawful for such justices to commit such person to any house of correction within their jurisdiction, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person shall sooner submit himself to be examined, and in case of such submission the order of any such justice shall be a sufficient warrant for the discharge of such person." The justices had jurisdiction to commit Wilkins, and he was bound to answer the question. The fact that he was a voluntary witness, and was not summoned to give evidence, is immaterial. He was not served with a subpoena, and was not bound to go into the witness-box at all, and the justices had no power to compel him to go there. The words in the section "any person coming before any such justice" are clearly intended to apply to a person who comes forward to give evidence voluntarily, *i.e.*, without having been previously summoned. A reference to sect. 7 of Jervis's Act (11 & 12 Vict. c. 43), would seem to bear this out. There it is provided that a justice may, "if any person is likely to give material evidence . . . and will not voluntarily appear for the purpose of being examined, issue his summons to such person requiring him to appear . . . and if any person so summoned shall neglect or refuse . . . it shall be lawful for the justice to issue a warrant to bring such person . . . and if on the appearance of such person so summoned . . . either in obedience to the said summons or upon being brought before him by virtue of the said warrant, such person shall refuse to be examined, such justice may by warrant commit such person,"

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

&c. The words in that section, "summoned or brought," are clearly confined to the class of involuntary witnesses. The Legislature would seem, therefore, to have intended to extend the power of the justices to commit to those who had volunteered to give evidence. It was most important that the question should have been answered. It was not only material to the issue before the justices, but it materially affected the credibility of the mother. Wilkins denied *in toto* the statement of the mother, who had sworn that he had told her that he had not married this woman in question. The mother had further sworn that, when Wilkins told her this, he promised to marry her (the mother), and in fact under this promise he seduced her. Wilkins positively swore before the justices that he had married the woman Pearson, but, from inquiries which the justices had caused to be made, there was reason to believe that he had married another woman as far back as 1849, who was still living. The question was, therefore, most material as to his credibility, and also as to that of the mother.

*Macmorran* in support of the rule.—The power to commit for refusing to give evidence is, by the 7 & 8 Vict. c. 101, s. 70, confined to those persons who are brought before the court in obedience to a summons or warrant. The words "coming or brought" mean coming or brought in compliance with, or in pursuance of, such summons or warrant. Upon Wilkins electing to withdraw from the case and consenting to an order being made against him, the justices were *functi officio*, except as to the order, which was consented to, being made and enforced. [GROVE, J.—A power to commit for contempt cannot be got rid of by the advocate saying that he gives up the case and consents to a verdict against his client.] The applicant could withdraw her case at any time, then why should not the defendant be at liberty to withdraw his defence, his position being that of defendant in a civil proceeding? He cited *Reg. v. Lightfoot*, 25 L. J. 115, M. C., as to the position of a person summoned before justices as the alleged putative father in bastardy proceedings.

SMITH, J.—The question which we have to consider in this case is whether, under the circumstances, the justices had jurisdiction to commit the defendant to prison for refusing to answer a certain question put to him in cross-examination, after having been ordered to do so. I have the misfortune to differ from my learned brothers Grove and Hawkins. It has been conceded that, apart from sect. 70 of 7 & 8 Vict. c. 101, the justices would have had no power to commit the defendant, and that such power therefore exists only in bastardy proceedings, if at all. It is unnecessary to inquire into the question how far a judge in civil proceedings has power to commit a witness to prison who refuses to answer material questions. I am inclined to think, however, upon reference to Bacon's Abridgment, tit. "Evidence," that the power certainly does exist. This case turns solely upon the construction of sect. 70 of 7 & 8 Vict. c. 101. Can the words "and if any person coming or brought before any such justices in any such proceedings refuse to give evidence thereon" be said to apply to the man Wilkins, who had not been summoned to give evidence? He was in court, but had not been

served with a summons issued by the justices at the request of any party to the proceedings, as provided by sect. 70. He had, no doubt, been served with the ordinary summons issued by the justices under 35 & 36 Vict. c. 65, s. 3, upon the application of the mother, she having tendered proof that he was the father of the child. It was of course necessary that Wilkins should have been served with a summons before the justices could adjudicate in the matter; but he was not bound to appear before the justices, and they could only adjudge him to be the putative father of the child on the evidence of the mother, corroborated in some material particular by other testimony to their satisfaction: (see *Reg. v. Lightfoot*, 25 L. J. 115, M. C.) However, being in court, he elected to go into the witness-box to contradict on oath the statement of the girl, and in his cross-examination he refused to answer a material question. For this refusal he was committed to prison. Does the section then confer upon the justices the power which they assumed? I am of opinion it does not. I think that the words, "any person coming or brought," must be read in connection with the previous part of the section, and are confined to persons who come, or are brought, in obedience to a summons or warrant. I am aware this construction may cause inconvenience, but that cannot be helped. I am of opinion that Wilkins was not a person who had come before the justices, within the contemplation of the Legislature, as expressed in sect. 70, and that the justices had no power to commit him to prison. Upon this ground I think the rule ought to be made absolute.

HAWKINS, J.—I have, during the course of the argument, entertained considerable doubt on the questions raised in the case, and I cannot say that that doubt is entirely removed. However, upon the best consideration I can give to the matter, I am of opinion that the *certiorari* ought not to go, and that this rule should be discharged. It seems to me, upon a true construction of sect. 70 of 7 & 8 Vict., the justices had power to commit, and I will shortly give my reasons. By the Bastardy Laws Amendment Act 1872, the justices shall hear the evidence of the woman at whose instance the summons was obtained, and shall also hear any evidence tendered by, or on behalf of, the person alleged to be the father. It is not disputed that, by that section, the putative father is a competent witness in the proceedings. Referring to sect. 70 of 7 & 8 Vict. c. 101, I find that, if any party to such proceedings (meaning, of course, proceedings in bastardy) request that any person be summoned to appear as a witness, it shall be lawful for the justices to summon such person to appear and give evidence, and if such person neglects or refuses to obey such summons, the justices may issue a warrant and compel the attendance of that person. So far it is clear either party may obtain an order compelling the attendance of persons to give evidence in support of their case. Now, the section goes on thus, "and if any person coming or brought before any such justices in any such proceedings refuse to give evidence thereon, it shall be lawful for such justices to commit such person to any house of detention within their jurisdiction, and there to remain . . . or until such person shall sooner submit himself to be examined," &c. Now, are the words, "if any person coming or brought,"

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which I have read, confined to any person upon whom a summons has been served? Why should they be? What reason can there be for limiting them to that class of persons? It seems to me they include those who come forward voluntarily to give evidence and those who have been summoned as witnesses. It seems to me that a person who comes forward voluntarily to give evidence, and goes into the witness-box and gives evidence, stands exactly in the same position as a person who has been summoned or ordered to appear. I think it would be mischievous to the last extent to hold that the Act only applies to persons who have been brought under compulsion to give evidence. The construction contended for in support of the rule that, after Wilkins—or, rather, his counsel—had withdrawn from the case, and Wilkins had consented to an order being made against him, the justices had no power to commit him to prison for refusing to answer any questions as their jurisdiction had determined, would, if adopted, lead to most serious results, for in any bastardy proceedings, any person, whether party or not, might go into the box and swear just as much or as little as he pleased. He would then be able to withdraw his evidence, and from that moment the justices would be *functi officio*. It is true, no doubt, that the putative father is not bound to give evidence before the justices; but I think the moment he gives evidence, he puts himself within the power of the justices to treat him in the same way for refusing to answer questions as those who have been summoned are subject to. I am therefore of opinion that the justices were right, and that this rule must be discharged.

GROVE, J.—I am also of opinion that the justices were right, though I must at the same time admit that the matter is not altogether free from doubt. It seems to me the words of the section are to be read in their popular, natural, and ordinary sense, and that we should give them a meaning to their full extent and capacity, unless there is reason on their face to believe that they were not intended to bear that construction because of some inconvenience, which could not have been absent from the mind of the framers of the Act, which must arise from the giving them such large sense. I think the words “coming or brought” were clearly intended to include those persons who might happen to be in court and who volunteered to give their evidence, as well as those who were brought there in obedience to the order of the court. Had the words been “and if any person so coming or so brought before any such justice,” it might reasonably be said that the persons over whom the Legislature intended that the justices should have power to commit would be only those who had been previously summoned. On the other hand, if the words had been put in a separate section, it could hardly be doubted, I should think, that they would include voluntary witnesses. The refusal of a voluntary witness is, as it seems to me, to be treated in the same way as a witness who has been summoned. If the voluntary witness is to be held exempt from this part of the section, it would follow that he might withdraw his evidence or give so much evidence as he pleased, and refuse to answer all the questions that might tell against him, and the justices would have no power to compel him to answer. Of course, a person is not obliged to go into the witness-box unless he has been previously sum-

moned; but the magistrates have to get at the truth in the cases before them, and it seems to me the Legislature never intended that they should not have the same power to compel a person to give evidence who has volunteered to go into the witness-box as they have over a person who has been summoned. There is nothing in the words “coming or brought” to limit them to the words used in the previous part of the section. It cannot be said, as it seems to me, that “coming” is to be read as “coming in obedience to a summons.” With regard to the contention that this Act ought to be read by the light of sect. 7 of Jervis's Act, I think the intention of the Legislature was rather to extend the power of the justices to voluntary witnesses, and there seems to be reason for such an intention. The Act under consideration relates to bastardy proceedings, and in such proceedings the alleged putative father is very often a witness in support of his own case. If he does not dispute the case set up by the mother and duly corroborated, an order is made against him. It may be said, therefore, that in bastardy cases, more than in any other, the defendant offers himself as a witness. Upon a grammatical construction of this section, therefore, I am of opinion this rule should be discharged.

*Rule discharged.*

Solicitor for the applicant, *N. C. Barker*, for *Crowther Davies*, Leamington.

Solicitor for the justices, *H. C. Passman*, Leamington.

## Supreme Court of Judicature.

### COURT OF APPEAL.

June 17, 19, 21, and 26, 1884.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)  
BARLOW v. KENSINGTON VESTRY. (a)

*Metropolis Management Amendment Act 1862* (25 & 26 Vict. c. 102), ss. 74, 75—*General line of buildings—New street—Vacant site—House at corner of two streets—Order of magistrate—Reduction into writing—Service.*

*The plaintiff in 1875 became the owner in fee of certain land, covered with buildings, and situated between K-road on the north and C-place on the south.*

*On the 11th Oct. 1875 he obtained the approval of the Metropolitan Board of Works to a new street which would lead across the said land and buildings from north to south, as he intended pulling down his old buildings so that he might erect larger houses on the same site. The street was called “De Vere-gardens.”*

*On the 18th Oct. 1881 the line of buildings in the new street was certified by the superintending architect of the Board of Works. The house, which was the subject of this action, was then being built on a site at the north-east corner of De Vere-gardens, fronting Kensington-road, and projected on its western side up to the pavement in De Vere-gardens. This house was not built on the site of any of the old houses, but on the site of a part of the garden of one of them. The Ken-*

a) Reported by W. C. BISS, Esq., Barrister-at-Law.

sington Vestry obtained an order, under sect. 75 of the Metropolis Management Amendment Act 1862, from a police magistrate, for the demolition of so much of the premises as projected beyond the certified building line. The plaintiff (who had become the mortgagee of the premises) claimed an injunction to restrain the defendants from demolishing any part of the said premises.

*Held* (reversing the decision of *Bacon, V.C.*, 48 L. T. Rep. N. S. 348), that the premises were a building which had been erected beyond the general line of buildings in De Vere-gardens within sect. 75 of the Metropolis Management Amendment Act 1862.

*Lord Auckland v. Westminster District Board of Works* (26 L. T. Rep. N. S. 961; L. Rep. 7 Ch. App. 597) distinguished.

A magistrate made an order under sect. 75 of the Metropolis Management Amendment Act 1862, that a part of a building which projected beyond the general line of buildings should be pulled down within eight weeks. The owner had been summoned, and was present when the order was made, but the order was not drawn up and served on him until the day on which the eight weeks expired.

*Held*, that the Act being silent as to service, the order could be enforced.

THIS was an appeal from a decision of *Bacon, V.C.* (reported 48 L. T. Rep. N. S. 348), granting an injunction restraining the Vestry of St. Mary Abbots, Kensington, from pulling down, under the powers of sect. 75 of the Metropolis Management Amendment Act 1862, a part of a house which they alleged projected beyond the general line of buildings in De Vere-gardens, Kensington.

The facts are sufficiently stated in the report of the case in the court below and in the judgment of the Court of Appeal.

*Webster, Q.C.*, *Millar, Q.C.*, and *Ingle Joyce*, for the appellants, were stopped by the Court.

*Marten, Q.C.*, *Rigby, Q.C.*, and *B. B. Rogers*, for the plaintiff, used the same arguments as in the court below.

*Millar, Q.C.* in reply.

*Cur. adv. vult.*

June 26.—*COTTON, L.J.*—In this case, at the request of *Baggallay, L.J.*, I will give judgment first. It is an appeal from the judgment of *Bacon, V.C.*, by which, at the hearing of the action, he granted an injunction to restrain the defendants, who are the Vestry of St. Mary Abbots, Kensington, from proceeding to pull down a portion of a house of which the plaintiff is the owner; and the defendants have appealed to us from that judgment. The house in question is the corner house on the east side of a street which runs into Kensington-road at right angles, and which street, so far as the roadway is concerned at any rate, is called De Vere-gardens; and the ground on which the vestry was threatening to pull it down was this, that by the proceedings which had been taken under sect. 75 of the Metropolis Management Amendment Act (25 & 26 Vict. c. 102), under an order made by a magistrate, there had been a direction that so much of this house as projected beyond the general line of building in De Vere-gardens should be taken down, and, inasmuch as it had not been taken down, they were proceeding under

the authority of the Act to pull down. I shall presently refer to the particular circumstances under which the order was drawn up, but I will not deal with that question now. I will treat the order which was drawn up as an order put into writing, which the Act requires immediately the decision of the magistrate was given; and I will deal with the objection in that respect after I have dealt with the other part of the case. The plaintiff is the owner or the mortgagee in possession of the house, and the order was not made as against him, but was made under the Act as against the builder, the then lessee, who was at the time building. What I will first consider being the principal question, and the important question, which has been argued before us, is whether this portion of the house is liable to be pulled down under sect. 75 of the Act. Now, for the purpose of considering that, it is necessary to go into the state of the land as it was before the present street and houses were built there. Before the year 1875 (which is as early as we need go) there was no road running at right angles towards Kensington-road, which runs east and west, but there were a number of houses facing the Kensington-road, and at the back there was a road and a riding school. In that state of things the present plaintiff bought a considerable block of land, one end of which abutted on the Kensington-road, for the purpose of a building speculation—for laying it out in new streets, and for letting or selling the land for building. Down the centre of this block of land he proposed to make a new road (I will call it road for the present), and for the purpose only of getting proper authority to make the new road he was bound to lay plans before the Metropolitan Board, which he did. There was some difficulty about the plan which was actually sanctioned, but I think it is quite clear what it was. He first laid a plan before the Metropolitan Board which purported to show something about the buildings which were to be put up, but that was a matter with which the Metropolitan Board had nothing to do, and ultimately he laid before the Metropolitan Board a fresh plan, altering the name of the road which he proposed to make and calling it "De Vere-gardens." By this plan he shows a new road stretching from Canning-place, which was the southern end of the block of land he had bought, right through until it runs into the Kensington-road, and that road from one end to the other was a new road, and he called it De Vere-gardens. Then it is material to observe that there were houses on the northern part of this block which faced the Kensington-road, and among them a public-house called "The House of Call for All Nations," the site of which was, with the exception of what I shall presently mention, on the ground occupied by the roadway of De Vere-gardens; but there was besides the body of the public-house, a passage by its side, part of which apparently was covered with a trellis work, over which a vine that grew by the side of the public-house was trained, and under this vine and on the benches or seats, I suppose, would sit those who went to the "House of Call for All Nations," to take refreshments. That was what you may undoubtedly call a part of the "House of Call for All Nations," but on that passage there was really no building; there was this trellis work, which supported the vine, and a wall I suppose on

the other side, but whether there was or not is to my mind not very material, and the portion of the building which was said to be offending against the 75th section is occupying the site or part of the site of that trellis-covered passage. Now, in order to make the road, it was necessary to take down, amongst others, the public-house called the "House of Call for All Nations," but the roadway does not extend, as I have said, over the site of that trellis-covered passage. The trellis-covered passage abutted partly on a house occupied by a confectioner, and the site of it is now occupied by a portion of the plaintiff's house which is said to be offending against sect. 75. It was suggested to us at first (I think inaccurately) on the result of the evidence that the whole of the land was at once cleared and made vacant land, and was so at the time when the plan was laid before the Metropolitan Board. I think that is inaccurate, but it is to my mind not really material. What was done by the plaintiff was this: From time to time he sold to other persons portions of the land and on these houses were from time to time built, but it is undoubted that when the roadway of De Vere-gardens was made, which must have been before the buildings could have been put up there, the public-house was pulled down, and it necessarily must have been in order to make that roadway. Before the plaintiff's house was commenced there had been a certain amount of building in De Vere-gardens, that is to say, houses had been built on the east side of De Vere-gardens, which came up to the sides of three houses, which appear on the plans, two, there is no doubt, being in De Vere-gardens, and the third being the plaintiff's house which, or a part of which, is in question in this action. At the time, as I understand, when the two houses which are now immediately abutting on the plaintiff's house were not built, the plaintiff, or the builder who then had the land, so began to build as to show there would be a projection westward beyond the westward projection of the house which had been then built in De Vere-gardens. In that state of circumstances application was made under the Act to Mr. Vulliamy, the surveyor, in order to decide what was the general line of buildings (those are the words of the Act) in De Vere-gardens. It is called the building line generally, but it really is the general line of buildings, and he gave his decision, and we have his decision and the plans and the awards before us. It was argued before us that what he laid down did not justify the contention on which the magistrate relied, that the portion of the plaintiff's house, assuming it to be in De Vere-gardens, was beyond the general line of buildings in De Vere-gardens. It is put in two ways: in the first place that Mr. Vulliamy has not said that any part of this is beyond the general line of buildings in De Vere-gardens, and, secondly, that he has not said that this is in De Vere-gardens at all, that in fact he has treated it as not in De Vere-gardens. In my opinion that is not correct. What Mr. Vulliamy did was this, he laid down a red line on the plan, which was before him, which went as far as the northern end of the northernmost of the houses then existing in De Vere-gardens. It there stopped, because there was an intervening space not covered with a house between that and the house of the plaintiff, and he had that line marked on the plan as showing, according to his award,

the general line of buildings in De Vere-gardens on a reference to him to decide on a complaint that the plaintiff's house was beyond the general building line. So that, in my opinion, the general line of buildings is laid down there for everything which is to be included properly in De Vere-gardens; and although it stops where the houses stop, that will show, if it is a house within De Vere-gardens and if it is within the provisions of sect. 75, whether it has or has not offended. Therefore, I must consider that the general line of buildings in De Vere-gardens must be held to have been settled by the architect as running so as to leave a projection of this building of the plaintiff to the westward beyond it. But that, of course, does not settle the question, for there are other serious points to be considered. The first point one has to consider is whether this house is within the provisions of sect. 75. Now, that section, after repealing previous sections, says this: "Be it enacted that no building structure or erection shall, without the consent in writing of the Metropolitan Board of Works be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate." I need not read the rest. The first point is this, To what does that apply? Does it apply to a house which is built on the site of an old house which has been pulled down, and which has occupied a more prominent position; by which I mean a position stretching farther towards the roadway than the other houses? In my opinion, the rule was correctly laid down by Mellish, L.J., and also by James, L.J. (though not exactly in the same words), in the case of *Lord Auckland v. The Westminster District Board of Works* (26 L. T. Rep. N. S. 961; L. Rep. 7 Ch. App. 597), a case which has been much referred to. Mellish, L.J. says, after referring to sect. 74, to which I may have to refer presently: "To make the two sections consistent with each other, I think we must construe the words 'no building structure or erection' in the 75th section to mean no building structure or erection built or erected for the first time." The language is imperfect; "for the first time" requires some explanation. Of course, every new house that is put up must be erected for the first time; but what he means obviously is this: a house which is not built as a restoration of an old house—a building which is not built as a restoration of an old building, but one which is to be considered as built *de novo* as regards the rights of a house. Although James, L.J., with reference to the certificate which was before him, which mentioned vacant land uses the word "vacant," I think he really means the same thing, because he says: "I am of opinion, having regard to the old clauses, in lieu of which this 75th section was enacted, and having regard to the 74th section, which immediately precedes it, and to the whole context of the Act, and the whole spirit of recent legislation with regard to dealing with private persons' property, that the 75th section was only meant to apply to the case of a new building, structure, or erection being built on land which, for the purposes of the Act, would properly have been described by Mr. Vulliamy as vacant ground." Mr. Vulliamy, who in his plan had laid down the building line in that case beyond York-place, had described a site of the old house which the plaintiff had

bought, which was in fact pulled down, but under circumstances which showed an intention to rebuild it, as "vacant land," and therefore, although James, L.J. does use the term "vacant land," in my opinion what he means, just as Mellish, L.J. does, is this, that sect. 75 only applies to a house which may be called, as regards the rights of a house, a new house; and if a man has a house which is pulled down, that house, and everything which is called the house, if he shows an intention to rebuild it, is that which has the right of an ancient house as it stood; and in that respect sect. 75 is consistent with sect. 74. Under sect. 74, where a building which projects beyond the general line of the street (a very different thing to what we have in sect. 75), is pulled down, the authorities can require it to be thrown back, and may either require part of the site, or the site, to be thrown into the street; that is, into the public thoroughfare, or may require the building simply to be put back, but in either case paying compensation. I must observe here—and the Vice-Chancellor seems to have relied upon this, and it was also urged upon us in the argument—that it is not a case of giving up to the public any part of this ground. The defendants do not require that this should be thrown into the public thoroughfare, the question is only this, whether, having regard to the provisions of the statute, this building has offended against the building line. Of course there will be an interference with the rights of the plaintiff if they are entitled to pull it down, but it is not a question whether it is dedicated to the public under sect. 74. Now, can this house be called a new house, or a house built for the first time, within the meaning of those decisions and the true construction of the section? In my opinion it is. To my mind a great part of the fallacy of the argument on the part of the plaintiff depended upon introducing the word "house" into sect. 75 instead of the words "house or building." Of course a house is a building, but every building is not a house, and there may be certain rights belonging to a house which cannot be said to belong to a building as such. But here, in my opinion, what was done at the time when the roadway was made did prevent the plaintiff from alleging, when he wished to build again on the piece of land covered by the seven feet, that he was rebuilding the old house. The old house, the structure of the house, was entirely gone. I refer to the public-house. It is very true that there was this annexe to it, which, if the house called the "House of Call for All Nations" had been conveyed, would have passed by the conveyance. But that is really against the plaintiff here, because the house was gone, and if the house was gone then the rights of the house in respect of that which was a mere annexe to the house would go too; and when the public-house was pulled down, although it is pulled down under such circumstances that the plaintiff must be considered as showing an intention to rebuild, yet in my opinion if he did rebuild, what he showed an intention to do was not to rebuild that house, but to build on the land. It is impossible to rebuild that house. It was pulled down under circumstances and for a purpose which rendered the rebuilding of the house utterly impossible. Therefore, all rights in respect of that house were gone, and it cannot be said that when in building

a part of a house principally occupying another site, he puts part of that building on what would have passed as matter of conveyance as part of the house called the "House of Call for All Nations," that he is rebuilding the "House of Call for All Nations." He is not. He is wishing to take this piece of ground, which is really a vacant piece of ground, to use it in rebuilding the pastrycook's shop; and to say that he is to be entitled to the rights, not of the pastrycook's shop, but of the "House of Call for All Nations," which he utterly destroyed as a house by pulling down, seems to me absurd. In my opinion, therefore, this is not a house rebuilt with the rights of the old house, but a new house built for the first time with all the liabilities which attach to it. It is said, however, that there is something in the judgment in *Lord Auckland v. Westminster District Board of Works* which is against that view, and what I refer to is in Mellish's, L.J. judgment. He says this (L. Rep. 7 Ch. App. 608): "Then the only other question on which there can be any doubt is whether there is any difference between the actual site of the house and the court-yard which was behind the house. In my opinion there is no difference. The front of the house was not towards York-place at all, but the side of the house ran all along York-place, and beyond that there was a continuous wall of some height, which separated the court-yard from York-place. Even assuming that there was a line of street in York-place, I do not think that would be an open space within the meaning of the 75th section. The plaintiff has a house and a wall beyond his house which incloses his court-yard. His court-yard is as much a private place as any other part, it is not in any way dedicated to the use of the public." There Lord Auckland had retained the site of the houses and intended to rebuild upon it; therefore, retaining the house as a house and rebuilding it as a house, he retained all the right of the house in respect not only of the actual site of the old house, but also as regards that which was covered by the court-yard. But here it is just the contrary. The plaintiff has entirely pulled down the old house, and having done that and prevented himself from in any way building up the house or restoring the house, he wants to insist upon the rights of the old house, the "House of Call for All Nations," in respect of this, which was never covered by any building, and which, when the public-house was pulled down, became, in my opinion, a vacant piece of ground, and not a piece of ground in respect of which any right of rebuilding the house which was gone could be claimed on the part of the plaintiff. But then it was said that it was within sect. 74. I have pointed out the difference between the enactments of sect. 74 and sect. 75. In my opinion the plaintiff cannot in any way bring himself within sect. 74. Sect. 74 applies to a case where there is a house or building which projects beyond the line of the other houses regarded as an existing street. That cannot be said here. When this street was first made, it involved necessarily the destruction of the house called "The House of Call for All Nations," which, when pulled down for the purpose of making the road, left the arbour, or vine-covered passage, as regards building, a vacant piece of ground, and one in respect of which there was no building projecting



in any existing street within the meaning of sect. 74. Before I pass from this part of the case, I think one ought just to say that *Lord Auckland's* case (*ubi sup.*), on which principally the Vice-Chancellor decided this case, in my opinion gives no assistance to the plaintiff; possibly in one point, which I shall have to consider, it may be against him. In that case York-place ran at right angles, or nearly so, to another street. There had been a corner house which projected very close up to, and, I think, touched, the side of York-place, and then, after passing a court-yard, there was a recess and a row of houses which stood back some distance from York-place. Of course that was a house projecting beyond other houses towards the roadway of York-place; but it was a house in respect of which the rights of rebuilding were saved. It had been pulled down by the railway company simply for the purpose of making their railway, and then they sold their ground, which of course could only be made profitable by building, that is by re-building the old house which Lord Auckland proposed to build on the old site. Therefore it was not a house built for the first time; it was a re-building of an old house in the eye of the law so as to prevent sect. 75 from applying. The next question we have to consider is this, Is this seven feet projection beyond the general line of buildings fixed by Mr. Vulliamy in *De Vere-gardens*? I have already expressed my opinion, that it is. He lays down what the line is by showing that red line going as far as the houses which were clearly in *De Vere-gardens*, and a projection of that line will cut off the seven feet which are in dispute in the plaintiff's house. But then there is another point, of course, which we have to consider before we can decide this case, which is this: The 75th section enacts "that no building, structure, or erection shall . . . be erected beyond the general line of buildings in any street, place or row of houses in which the same are situate." The contention was that it could not be said that this was a building in *De Vere-gardens*, and here there comes out with considerable force that fallacy which arose from substituting the word "house" for the word "building" which exists in the Act. It was said (and this seems to have prevailed with the Vice-Chancellor) that a house cannot be in two streets, that a house is either in Kensington-road or in *De Vere-gardens*, that this house is in Kensington-road and that therefore it cannot be in *De Vere-gardens*. Now, really, that is a double fallacy. It is a fallacy to substitute the word "house" in the Act of Parliament for the word "building," and it is a fallacy to use language which we make use of for the purpose of describing the place to which we are to go and to which we are to direct our letters. When you say that a house is a house in such and such a square, what you mean is that that is the way in which you describe it. It is No. 1 or No. 2 in a particular square, or it is No. 1 or No. 2 in a certain street. It is perfectly clear that physically some houses are partly in one street and partly in another, but for the matter of description we take one street, one square only; and, as a rule, for the purpose of description, we refer to the house as being in the place in which its principal front is, and not always where its principal entrance is. People who have corner houses in squares,

although the entrance doors are in the side street, like it better to be described as being in the square than as being in the adjoining street. However, that is mere description. It is obvious that a house may be partly in two streets, it may run right through from one street to another, though it may be described by a number in one of those streets. But the real fact is, the word "house" is not used here, and although for the purposes of description this may be called a house in Kensington-road, yet what we have to consider is, whether there is a "building structure or erection" in *De Vere-gardens* beyond the building line. Now, is this or not in *De Vere-gardens*? "Building, structure, or erection" may, of course, apply to part of a house just as much as to the principal front of a house. Is this, therefore, in *De Vere-gardens*? In my opinion it is. *De Vere-gardens* is the name given to the roadway for the first time constructed shortly after 1875. It ran as a new roadway from Canning-place right through into the Kensington-road, and went beyond the site where this erection and building stands. We were told that various architects and various authorities have put a different construction upon the language, and have always allowed corner houses, when the principal front is in another street, to project beyond into the line of building in the street in which their side is. I entirely decline, in construing Acts of Parliament, to be influenced by any opinions expressed by any surveyor or other person. If it is desirable that the law should not be, as I understand the present Act of Parliament to make it, of course Parliament can interfere. If on one side of *De Vere-gardens* there is a row of houses facing all the same way, reaching up to Kensington-road, which I understand to be the case; if, on the other side, the last building is the side of a house whose principal front is in the Kensington-road, can it be said that one side of *De Vere-gardens* ends at the corner on one side and short of the corner on the other? In my opinion this is all *De Vere-gardens* right down to its intersection with and running into the Kensington-road. In my opinion, therefore, there is here a house newly erected subject to the Act, there is a portion of the house, that is, a building, structure, or erection, in *De Vere-gardens* projecting beyond the general line of buildings in *De Vere-gardens*. I ought to mention, in passing, that reliance was placed on different language used in some other parts of the Act of Parliament, which enacts that parts of the building offending may be pulled down, but here it is the offending building. No doubt the language varies. It may be necessary, in order to remove the obstruction, to remove the whole building, and the whole may be projecting. It is very possible that there might be a building projecting. You are to pull down the building, if it is necessary; or you are to pull down part of the building if that will remove the obstruction which does offend by going beyond the general line. But then there was another objection taken which we ought to deal with. The 75th section requires that an order shall be made in writing by a magistrate, directing the removal of the offending building within a reasonable time to be fixed by the magistrate by his order in writing. Here the order being made by the magistrate, not in writing, but the order having been made on the builder being



summoned, on the 24th Jan., eight weeks' time was given, and the order in writing was only drawn up either on the day or the day before the time expired. It was said that was wrong, and therefore that the vestry were acting entirely without authority. But, in my opinion, that objection, which would necessitate going again before the magistrate, cannot prevail. The order recites that the matter was heard on a certain day, and recites what was necessary to enable the order to be made, and then it directs the builder to pull down this offending projection within eight weeks from a day in January. That is drawn up just at the expiration of the time, but it recites that the parties had notice a long time before, and the order fixes this as a reasonable time. The order is put into writing only to enable the compulsory proceedings to be taken if the parties do not choose to obey the directions which have been given by the magistrate. In my opinion, therefore, the objection that this order was not drawn up or served within a proper time cannot prevail. The Act says nothing about service, although, of course, a man ought to have notice of it. Therefore the action of the plaintiff entirely fails, the vestry being entitled, in my opinion, to proceed under the powers which by the Act of Parliament are given in such a case. It would not be reasonable, I think, that the vestry should at once proceed to pull down the offending portion of the building. The plaintiff has been disputing the validity of the order, and at first with success, and of course it is an important question; so I think the better course will be that, although the appeal will be allowed, the order discharging the judgment of the Vice-Chancellor shall not be drawn up for six weeks, so as to give the plaintiff, if he desires to do so, the opportunity of altering the structure of the house and of removing the offending portion.

LINDLEY, L.J.—I am of the same opinion. After the elaborate manner in which the facts have been investigated by Cotton, L.J. my observations will be very few. I start with this, that the power given by sect. 75 of the Metropolitan Local Management Act 1862 is one of those very arbitrary powers which require to be very narrowly watched, and certainly I think every member of the court feels bound to look very carefully at what has been done to see that no house is pulled down unless the demolition is authorised by the Act of Parliament when it is construed accurately and carefully. Now, in order to appreciate this case, it does seem to me to be very important to ascertain exactly the state of things when the old house existed, because for some time there was a little obscurity about that, and until the obscurity was removed there was considerable ground for contending that the case fell, not within sect. 75, but within sect. 74, and that the decision in *Lord Auckland v. Westminster Local Board of Works* (*ubi sup.*) applied to it. When the state of the old property is ascertained, as it is by reference to the maps which are in evidence, it is plain, I think, that there never was upon the site of the offending portion of this building any building whatever. There was a yard, and there was a trellis work and a vine over it, but the offending portion of this building does not replace any building which previously existed. The space which intervened between the confectioner's shop and the public-house, "The House of Call

for All Nations," was not in any way covered by the old building, which, if the old houses had remained, and this street, De Vere-gardens, had been driven through them, could be set back under sect. 74 upon compensation being given. I think Mr. Rigby was right in inviting our attention to that state of things, and if it had appeared that, after driving this street through the old buildings there would have been an old building projecting so that the present house could be considered as built on the site of that projecting house, then I think *Lord Auckland's* case would have applied, and we should have been bound to hold that the case was within sect. 74 and not sect. 75. The facts displace that altogether. This offending portion of the house does not represent any house which if it had stood would have been projecting, or could have been set back under sect. 74. Looking then at sect. 75, we must examine the words with care, and the first thing we must look at is this (it is a question of fact), Is this offending portion of the house a "street, place, or row of houses," known by the name of De Vere-gardens, or is it not? Because if it is not, sect. 75 does not apply. That depends, of course, upon what is meant by the expression "street, place, or row of houses," and, with reference to that, it does not seem to be unimportant to look at the plan which Mr. Elsdon, the builder, laid before the Metropolitan Board of Works, and which the Metropolitan Board of Works sanctioned. Taking that plan, what was there meant by the "street, place, or row of houses" to be called De Vere-gardens is delineated with accuracy. The line of buildings is not delineated. I bear that in mind. The place or street, or whatever it is, to be called De Vere-gardens, and to be sanctioned under that appellation, was the street or place accurately marked out upon this line, which upon that plan denoted the line of area east and west. That was the street which ran right up into Kensington-road. The offending portion of this building is in that street, so understood in that sense of the word. I think there can be no doubt at all about it. The house is not. Cotton, L.J. has explained the ambiguity of that expression. If a house is called No. 5 in some place in Kensington-road that is a mere description for the sake of convenience of reference; but the actual situation of this strip of land, upon which the offending part of this house is, can, I think, only be said to be in De Vere-gardens in the true sense in which the builder used the expression when he got out the plan, and in the true sense of the expression in sect. 75 of the Act of Parliament. Having got so far, then comes this question, Does the house project beyond the line of buildings in that street? Now, the question whether it does or does not must be decided with reference to the general line of buildings, and the general line of buildings must be ascertained by Mr. Vulliamy. It is to be observed that, whilst the Legislature has intrusted to Mr. Vulliamy, the architect of the Metropolitan Board of Works, the power of deciding where the general line of buildings in the street is, it has not entrusted to him the power of deciding in what street a particular offending structure may be. He cannot, for example, certify that this particular offending structure is in De Vere-gardens or in Kensington-road. That is

not left to his decision. That is to be found out as best it can, like any other disputed fact; but, having got the fact that part of the house is in De Vere-gardens, then the question of where the general line of buildings in De Vere-gardens is to be decided by Mr. Vulliamy, and, as far as I can see, he has decided that rightly. Nobody, I believe, can question it, but that is perhaps a moot point which is now under consideration. At all events, the Act of Parliament says he is to decide, and by his certificate he did decide it; and, taking the line of buildings in De Vere-gardens as delineated in the sketch annexed, there can be no question that the second point is made out—that this offending portion projects beyond that building line. That is really decisive in favour of the view taken by the vestry on the facts, and on what I may call the merits of the case. It was put to us very powerfully by the counsel for the plaintiff that this is a very harsh interpretation, and one which requires to be applied with very great care, and it was argued that if this construction was right the owner of the corner house might have been forced to set his house back—nobody knows to what extent—if the person who built the houses in De Vere-gardens chose to build them far back. We must bear in mind, in considering any argument of that kind, the peculiar circumstances of this case. Mr. Elsdon, who bought the property from Mr. Barlow and cleared it for building, mortgaged this particular house back again to Mr. Barlow, and Mr. Barlow was, in effect, in a position to determine, by bargain or otherwise, where the general line of buildings should be, and we may suppose that he looked after his own interest, and he was content to sell those bits of land, which are now covered with houses, upon the assumption that the building line of De Vere-gardens should be where it is. He could have stipulated that it should be nearer the pavement if he liked. What he has done is this: He has pulled down all the houses in Kensington-road, and has sold lots to persons upon the faith of De Vere-gardens running up to Kensington-road and upon the faith that there should not be any break in that line of building (that is plain enough), and having got a piece of land left he thought there was space enough to build three houses upon it, whereas he ought to have been content with two. So much for the merits. There is no hardship in the case. I am satisfied that in what we are doing we are merely holding him to his bargain. But that is apart from the legal question. The legal question is, Where is the offending portion of the house? Is it in De Vere-gardens, and does it project beyond the general line of buildings? My answer to that is, that it is in De Vere-gardens, and it does project. Now I pass to another point which requires attention, though it is a purely technical one—I mean the point that no order in writing was served in proper time. The 75th section requires that the order of the magistrate shall be in writing, and that that order shall limit a reasonable time for the builder to demolish his house, and then it says that, in default of the building being demolished within the time limited by the order, the vestry may demolish the house. The true construction, I think, is this, that the builder is not bound by any order which is not in writing. There must be an order in writing, and he must have a limited time and a reasonable time, and

that reasonable time must be given to him by the order in writing, and therefore it did appear to me at one time to be a very forcible observation that he had not had a reasonable time given him by the order in writing. Let us see how that matter stands. It would not, I apprehend, be competent for the court to differ from the magistrate as to whether a given time was or was not a reasonable time unless it could be shown it was not, under the circumstances, a reasonable time. Now, with regard to the circumstances of this case, it is not right to say that the time limited in the order was not reasonable. On the contrary, I think it was reasonable. The facts are peculiar, and are as follows: In the first place, there is nothing in this Act of Parliament which says anything at all about service of the order. The actual wording of the order may be ascertained by looking into Jervis's Act (11 & 12 Vict. c. 43), and by that Act no service of the order in writing is required. The method in Jervis's Act is this: There is to be a summons in writing, and then, whenever required, the order is to be drawn up in the proper form, and there is no provision in Jervis's Act for serving anything in writing except under sect. 17, where service is required of a mandatory order for the purpose of committing a man to prison, so that when we have pressed upon us the argument that the order has not been served, the answer is, that the Act of Parliament does not require it. What we have in substance is this: Mr. Elsdon was summoned before the magistrate on the 14th Nov.; there were several adjournments, and on the 29th Nov. the case came on, and on the 24th Jan. the order was actually made. It gave the builder eight weeks within which to pull the house down, but the order was not formally put into writing or served until the eight weeks were nearly out. Elsdon says in his examination that he received the summons, that he attended it, that he was present at all the adjournments, and that he was present when the final order was pronounced, and that he knew all about it and made inquiries about it, and we know by his proceedings and by the proceedings of the present plaintiff, who is the mortgagee, that there never was any controversy about it not being a reasonable time. The controversy was on a different question altogether. The controversy was whether the magistrate had jurisdiction to make the order. I think the magistrate was entitled to say, having regard to what has taken place, that eight weeks from the 29th Jan. was a reasonable time. I observe the plaintiff in his pleadings does not controvert that. His objection goes to the substance of the thing—that this offending portion of the house is not in De Vere-gardens, and that the magistrate had no jurisdiction at all. It appears to me that the objection started by Mr. Marten in respect of this order of the magistrate is untenable, and, although I quite agree that we ought to look very carefully at the Act to see that this power of ordering a house to be pulled down is not abused, I have come to the conclusion that the order of the magistrate was right, that he had jurisdiction to do what he did, and that there is no ground whatever for restraining the vestry from acting upon it. I propose, therefore, in order to make it quite clear what the decision of the court is, to declare that so much of the house in the pleadings mentioned as projects

beyond the general line of buildings in De Vere-gardens, as decided by Mr. Vulliamy in his certificate of the 18th Oct. 1881, is situate in De Vere-gardens, and was erected therein beyond such general line of buildings without the consent in writing of the Metropolitan Board of Works, and then discharge the order of the Vice-Chancellor, with costs both here and below. I quite agree that this order should not be drawn up for six weeks.

BAGGALLAY, L.J.—I have had an opportunity of considering the circumstances of this case very fully with my colleagues, and I entirely agree in the views which have been so fully expressed by them; but being myself a ratepayer of Kensington parish, I preferred, and thought it right, that those views should be expressed by them, and that I should simply express my concurrence in them without going into the details.

Solicitors for the plaintiff, *Last and Sons*.

Solicitors for the defendants, *Pontifex, Hewitt, and Pitt*.

Thursday, May 29, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

REG. v. THE WEST BROMWICH SCHOOL BOARD. (a)

*Poor rate—School board—Lands owned or rented by the school board—Elementary Education Act 1870 (33 & 34 Vict. c. 75), ss. 17, 18, 19, 21, 22, and 53—6 & 7 Will. 4, c. 96, s. 1.*

*A school board constituted under the Elementary Education Act 1870 is liable to be rated both in respect of the school buildings built upon lands owned by the school board and in respect of the school buildings built upon lands rented by the school board as tenants, although the board makes no profit out of such schools.*

*Judgment of Lord Coleridge, C.J., Stephen and Mathew, JJ. affirmed.*

THIS was an appeal on the part of the West Bromwich School Board from a judgment of the Queen's Bench Division affirming an order of quarter sessions confirming a poor rate made and assessed upon certain school premises and buildings belonging to the board.

The facts were set out in the form of a special case, and, so far as material, were as follows:—

The appellants are the school board, constituted under the Elementary Education Act 1870 (33 & 34 Vict. c. 75), for the parish of West Bromwich in the county of Stafford.

The respondents are the churchwardens and overseers of the poor of the parish of West Bromwich and the assessment committee of the West Bromwich Union.

The West Bromwich School Board, under the powers of the Elementary Education Act 1870, purchased the site of, and erected, certain elementary schools, and also purchased certain other schools. The total cost of these schools was 24,633*l*.

These sites and schools were conveyed to them, in accordance with the Elementary Education Act 1870, "unto and to the use of the said school board, their successors and assigns for ever, and so that the same land, hereditaments, and premises shall be held upon trust for the purpose of a public elementary school within the meaning

of the Elementary Education Act 1870, and for or towards the provision, in manner thereby authorised, of sufficient public school accommodation for the aforesaid district, and for no other purpose whatever."

The school board also rent certain schools from year to year under various agreements, which agreements were set out in the appendix to the special case.

Neither the school fees, nor the moneys provided by Parliament, nor moneys raised by way of loan (if any), or in any manner whatever received by the school board, have, without contribution from the rates, been sufficient to meet the ordinary and reasonable expenses of the school board, and there has in every year been a deficiency, in respect of which the school board have been compelled to require a rate to be levied, and the deficiency has been made good out of such rate in accordance with the Act.

On the 1st July 1882 a rate and assessment for the relief of the poor of the parish of West Bromwich, and for other purposes chargeable thereon, was made, after the rate of 1*s*. 4*d*. in the pound, on the property of the school board, such rate being made on the basis of the valuation list.

The school board contend that they have no occupation of the schools and premises, nor any beneficial occupation, nor could any tenant, under the same restrictions, have any beneficial occupation of any of the schools and premises. The assessment committee fixed the rateable value of the several schools at the amounts set out in the valuation list.

The school board appealed to the quarter sessions, and the quarter sessions confirmed the assessment, subject to the opinion of the High Court upon the foregoing special case.

The question for the opinion of the court was, whether the appellants were rateable to the relief of the poor in respect of the schools and premises or any of them.

The Divisional Court (Lord Coleridge, C.J., Stephen and Mathew, JJ.) gave judgment confirming the rate.

The school board appealed.

WILLS, Q.C. and ROSE for the appellants.—The school board is not rateable, or rather is rateable at nothing, in respect of these premises. The school board is bound by statute as to how it can use the lands conveyed or leased to it and the buildings thereon, and it cannot make any profit out of its occupation of the premises. The hypothetical tenant, therefore, would be bound by the same statutory restrictions, and therefore the premises are incapable of beneficial occupation. The principles of rating law applicable to such a case as the present were laid down by Blackburn, J., and adopted by the House of Lords, in the case of *The Mersey Docks v. Cameron* (12 L. T. Rep. N. S. 643; 11 H. L. Cas. 443). At page 461 of 11 H. L. Cas., Blackburn, J. says: "In order, therefore, that a valid rate may be imposed, it is essential that the occupation should be of value beyond what is required to maintain the property, for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent or a rent which, after deducting the average annual expense of the maintenance, would leave no overplus, there is nothing to rate." [BRETT, M.R.—Your diffi-

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

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culty in this case seems to be that, if the fees collected were to exceed the expenses, there is nothing in the Act to prevent the school board putting that profit in their pockets.] There is nothing in the Act to show that they may make a profit; the Act makes no provision for profit, and it is plain that a profit is not contemplated or expected. There was no express provision in the Public Health Act of 1848, which forbade local boards to make any profit out of the supply of water, but yet it was decided that they could not, in the case of *The Corporation of Worcester v. Droitwich* (34 L. T. Rep. N. S. 288; 2 Ex. Div. 49). The following cases were also cited:

*Reg. v. Metropolitan Board of Works*, 19 L. T. Rep. N. S. 348; L. Rep. 4 Q. B. 15;  
*The Metropolitan Board of Works v. West Ham*, L. Rep. 6 Q. B. 198;  
*Mayor of Liverpool v. Wavertree*, 2 Ex. Div. 55, n.;  
*Hare v. The Overseers of Putney*, 45 L. T. Rep. N. S. 337; 7 Q. B. Div. 223;  
*The Mayor of Peterborough v. Stamford*, 31 W. R. 948;  
*The Overseers of Chorlton-upon-Medlock v. The Guardians of Chorlton Union*, 47 L. T. Rep. N. S. 96.

*Jelf, Q.C. and Alfred Young*, for the respondents, were not called on.

BRETT, M.R.—The question in this case is, whether a school board is liable to be rated to the poor rate in respect of certain premises which it undoubtedly occupies. Those premises may be divided into two classes: first, premises which belong to the board as owners; secondly, premises occupied by the board as tenants, and the question is whether they are rateable in respect of either or both of these classes of premises. Now, when is it that a person is liable to be rated to the poor rate in respect of property? When he occupies that property, and that property has and is capable of having a beneficial value. What is the test of beneficial value? It is said that the proper test is whether there can be found a hypothetical tenant for the property, who, being a reasonable man in the possession of his ordinary senses, would be willing to take it from year to year and pay anything for it. If this can be done, then the property has a beneficial value. Therefore, the moment one examines the question, one sees that, in deciding a question of this sort, the point to be determined is whether the property in the hands of the occupier is in such a condition that a reasonable hypothetical tenant would be willing to pay a rent for his occupation of the property. This explanation of the principle is not unlike that given by Cave, J. in the case of *The Overseers of Chorlton-upon-Medlock v. The Guardians of Chorlton Union* (*ubi sup.*), where he says: "It must be asked what rent they"—that is, the premises to be rated—"would fetch in the market if the owner wished to let them. If there is a restriction on the use of the tenement, the market value would of course be affected by it; but where there is simply a restriction on the use that a particular tenant may make of it, I think that should be disregarded, except in the case where the assessment is based on the amount of profit made." It appears to me, then, that, if the owner of the property could only let it to a tenant to whom by law no benefit could possibly arise from his occupation, then the property would be of such a nature as to be incapable of beneficial occupation. But if the hypothetical tenant can

possibly obtain a benefit from his occupation, but merely by his own volition does not do so, but yet has the power to do so, then it may be said that the property has a potential beneficial value, though for the moment that value is not apparent. In these remarks I have tried to combine what was said by Cave, J. in the case I have just referred to and what was said by myself in the case of *Hare v. The Overseers of Putney* (*ubi sup.*), and I think that, if the property can have no beneficial value, then it is not rateable, or, to use the phrase which is said to be more correct, "it ought to be rated at nothing." Now, to apply the principles which I have endeavoured to enunciate to the two classes of property in this case, and first to the property which this school board rents and occupies as tenants. Could the landlord or the owner of the land on which these schools are built find a hypothetical tenant who would be willing to give him a rent for the property, a tenant to whom the property in the hands of that tenant would be valuable? Clearly he could. In the hands of the landlord, the property would be immediately let to an ordinary tenant on the ordinary terms, and the landlord would obtain a rent for the property, as in fact he obtains a rent from the school board. It is said that the land is not of any beneficial value to the board. That may be so, but that is not the test. The true test is, whether the owner of the land or premises could find a hypothetical tenant who would give rent for it if he had to let it. The land, therefore, which is rented by the school board is clearly rateable, and the appellants who are the occupiers are the persons to be rated. Now I come to the case of the premises which the school board occupies as owners. With regard to these, it seems to me that, if by reason of statutory enactment the school board could only use these lands in a way that could not possibly produce to them any benefit or value, or could not possibly produce to them any further sum than the mere outgoing expenses, then such premises would have in their hands no beneficial value at all; and further if, in consequence of statutory enactment, the premises could never be let, then there never could be anyone who could become a tenant to the board. If the owner can never make any beneficial value out of the lands, and any hypothetical tenant must take them subject to the same disabilities as the owner, then the land never can have any beneficial value in the hands of anyone. Those were the circumstances of the cases of *The Mayor of Worcester v. Droitwich* (*ubi sup.*) and *The Mayor of Peterborough v. Stamford* (*ubi sup.*). In those cases the lands were acquired under the provisions of a statute and no profit could be made out of the undertaking; and further, the waterworks authority could not let the lands; therefore, the hypothetical tenant must be taken as obliged to take the property subject to the same statutory restrictions as the owner, and therefore no hypothetical tenant would give anything for the property, and therefore the lands were held to have no beneficial value, and to be rateable at nothing. Now to apply these principles to the case we are considering. Supposing the school board in this case had no power to lease their lands, then the question would arise whether the statute forbade them to make any profit out of the management of their schools. It has been said that the whole

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scope of the Elementary Education Act shows that the fees must be reduced if the receipts exceed the expenses. If that be true, then I think it might be said that the school board is forbidden to make any profit; but the Act certainly does not say so in terms, and I think we ought to be very careful how we imply any such provisions. However, it is not necessary to decide the point, because we find that in this case the school board has power to lease its lands. It may be that there are conditions which are conditions precedent to the exercise of that power, but still there are no absolute restrictions placed by the statute upon that power or upon its exercise. If, therefore, they do lease the property, they can obtain a tenant who may use the property in the ordinary way, subject to no statutory restrictions, and who will have a beneficial occupation of the lands, and will be willing to pay the ordinary rent for them. The school board, therefore, can obtain a hypothetical tenant who will pay rent for the lands, and the lands, therefore, are capable of beneficial occupation and have a beneficial value. Therefore, the lands owned by the appellants, as well as the lands leased by them, are rateable, and this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. The question in the case is, whether the lands held by the school board are rateable at more than a nominal value. That depends upon whether the lands are capable of beneficial occupation. I will assume for this purpose that the lands are not capable of beneficial occupation in the hands of the school board. But lands may be capable of beneficial occupation, even although they may not be capable of being beneficially occupied in the hands of the present occupier. We must imagine the case of a hypothetical tenant. If by reason of the language of an Act of Parliament land is struck with sterility in the hands of any and every person, then such land is absolutely sterile, and can have no beneficial value; but it does not follow, because this land is sterile in the hands of the school board, that it must be sterile in the hands of everybody. This is really the principle that has been followed in all the cases, as we see when we examine them critically. In *The Mayor of Liverpool v. Wavertree* (*ubi sup.*) it is obvious that the basis of the judgment was that the land was considered as struck with sterility. In *The Corporation of Worcester v. Droitwich* (*ubi sup.*) the reasoning was based on a similar view, and it is impossible to read the judgment of the present Master of the Rolls in *Hare v. The Overseers of Putney* (*ubi sup.*) without seeing that it proceeded upon the same idea. In the present case part of the premises whose rateability is questioned is rented by the school board. Why is that not rateable? How can that land be said to be sterile when in fact it is let, and is producing rent. I entertain no doubt at all that these premises rented by the school are rateable. Neither do I entertain any doubt that the freehold land belonging to the school board is also rateable. It is bought by them under sects. 20 and 21 of the Elementary Education Act for the purposes of the board, but there is nothing in those sections to show that they may not alienate, exchange, or sell the lands. If they may do this, and I see nothing in the Act to prevent them, then there would be no statutory restriction placed upon the hypothetical tenant, who might take to the lands,

as to his use of them. He would be free to use the lands as he chose, and in his hands they would have a beneficial value. I think, therefore, that all these lands, whether belonging to or occupied by the school board, are within the principle of the rating statute, and that this appeal must be dismissed.

FRY, L.J.—Under the statute 43 Eliz. c. 2 every occupier is to be rated, and by 6 & 7 Will. 4, c. 96, the net annual value of the property occupied is to be taken as the basis of assessment. It seems to me to follow that no lands are to be exempt from liability to rate unless no estimate can be formed of what the rental would be, or unless they could not be let for anything. Land, for instance, over a volcano is so situated that no estimate might be able to be made of its letting value, or it might be incapable of being let at all, and in such a case there would be no rent capable of being assessed, and therefore no rate leviable. But there may be a second class of case, where the land by statute and by law, quite apart from its physical situation, may be incapable of beneficial occupation in the hands of any occupier, and in such a case the land is not liable to the poor rate. For in this case the land is as much sterile by law as if it were physically situated over a volcano. But this is not the case when the result of the law applicable to the particular case is that a benefit may or may not accrue to the occupier out of his occupation at his option. Because a particular occupier at the present moment is prevented from making or does not choose to make any benefit out of his occupation, it does not follow that the lands would be equally barren in the hands of everyone. This is the case of the lands rented by this school board, and these lands, I think, are clearly rateable. Then as to the lands owned by the school board, it is plain that a landowner who may occupy his land himself, or may, if he so choose, let it to another, is not a person who is the holder of lands which can produce nothing. It is true that, in the present case, as long as the school board occupies these lands itself, they can make no profit out of the occupation; yet they may let them, and therefore these lands are also, in my opinion, rateable, because, if they are let by the board, there is nothing whatever to affect their value in the hands of the new tenant, who will take them free from all those restrictions which bind them in the hands of the board. I do not base my judgment on the idea that the school board may make a profit out of their occupation of the lands; I am inclined, as at present advised, to think they may not.

*Appeal dismissed.*

Solicitor for the appellants, *Needham*, for *Caddick*, West Bromwich.

Solicitors for the respondents, *Robinson, Preston*, and *Stow*, for *Bowlands and Co.*, Birmingham.

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BRYSON v. RUSSELL.

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Saturday, Oct. 25, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

BRYSON v. RUSSELL. (a)

*Contagious Diseases (Animals) Act 1878 (41 & 42 Vict. c. 74)—Action against constable for wrongful conversion of cattle—Local venue—Notice of action—1 & 2 Will. 4, c. 41, s. 19—2 & 3 Vict. c. 93, s. 8.*

*Sect. 19 of 1 & 2 Will. 4, c. 41 (an Act by which special constables were appointed) provides that all persons sued for anything done in execution of the provisions of that Act shall be entitled to local venue and one month's notice of action.*

*Sect. 8 of 2 & 3 Vict. c. 93 provides that constables appointed under that Act shall have all the powers, privileges, and duties which any constable has within his constableness by virtue of the common law, or of any statute made or to be made; and every provision of the first recited Act (i.e., 1 & 2 Will. 4, c. 41) shall be deemed to extend to constables appointed under this Act.*

*In an action brought against a constable for detainment and wrongful conversion of the plaintiff's cattle while acting under the powers and provisions of the Contagious Diseases (Animals) Act 1878:*

*Held, that a constable sued in respect of acts done under the Contagious Diseases (Animals) Act 1878 was not entitled to local venue or notice of action.*

*Judgment of Day and Smith, JJ. (ante, p. 362; 51 L. T. Rep. N. S. 90) affirmed.*

THIS was an appeal from a judgment of Day and Smith, JJ.

The action was brought for detainment and wrongful conversion of cattle belonging to the plaintiff.

From the statement of defence it appeared that the defendant was a superintendent of police for the county of Cumberland, and that he had stopped and detained the plaintiff's cattle under the powers given by the Contagious Diseases (Animals) Act 1878, on the ground that such cattle had been removed into the county of Cumberland without a licence, contrary to certain regulations made under that Act by the local authority of the place, and also that the plaintiff had refused to inform the defendant as to the place or district from which the cattle had been removed, or to take the cattle back to that place.

The fourth paragraph of the defence, upon which the present question turned, was as follows:

The defendant further says that the acts complained of were committed by him in the execution and in pursuance of the Acts 1 & 2 Will. 4, c. 41, and 2 & 3 Vict. c. 93, as well as under and in pursuance of the Contagious Diseases (Animals) Act 1878, and this action has not been laid in the county where the said acts were committed, viz., in the said county of Cumberland, and no notice in writing of the said cause or causes of action was given to the defendant one calendar month before the commencement of the said action, pursuant to the said first-mentioned statutes.

The venue in the action was laid in the county of Northumberland, and the question was, whether the defendant was entitled to have the venue laid in Cumberland or to have one calendar month's notice of action, as alleged in paragraph 4 of the statement of defence.

By sect. 19 of 1 & 2 Will. 4, c. 41 (an Act under

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

which special constables were appointed) it is provided:

That all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed . . . and notice in writing of such cause of action shall be given to the defendant one calendar month at least before the commencement of the action.

And by sect. 8 of 2 & 3 Vict. c. 93, it is provided:

That the chief constable and other persons so appointed (i.e., as constables under this Act) . . . shall have all the powers, privileges, and duties throughout the county . . . which any constable duly appointed has within his constableness by virtue of the common law or of any statute made or to be made; and every provision of the first recited Act (i.e., 1 & 2 Will. 4, c. 41) shall be deemed to extend to constables appointed under this Act.

The question of law thus raised by the pleadings was argued before the Divisional Court, and Day and Smith, JJ. made an order to strike out the fourth paragraph of the statement of defence.

The defendant appealed.

*R. O. B. Lane* for the defendant.—Sect. 8 of 2 & 3 Vict. c. 93, enacts that any constable appointed under that Act shall have all the powers, privileges, &c., which any constable has by virtue of the common law or by any statute made or to be made. Therefore, although sect. 19 of 1 & 2 Will. 4, c. 41, seems to limit the right to notice and local venue to a cause of action arising out of acts done in pursuance of that Act, yet the effect of the two statutes taken together is to give a right to notice and local venue in cases arising under the later Act, and under subsequent statutes.

*Ridley*, for the plaintiff, was not called on.

BRETT, M.R.—It seems to me that this is an argument that has often been used before, and has never been allowed to prevail. The question is one of ordinary construction of a statute. The defendant is a constable, and this action has been brought against him in respect of duties which he has performed under the Contagious Diseases (Animals) Act 1878, he himself being a constable appointed under 2 & 3 Vict. c. 93. It is possible that for many things he may do he has the protection afforded him by sect. 19 of 1 & 2 Will. 4, c. 41; but the question is, has he that protection in respect of acts done under the Contagious Diseases (Animals) Act 1878? First, what is that protection? The 19th section of 1 & 2 Will. 4, c. 41 enacts that all actions and prosecutions for anything done in pursuance of this Act shall be subject to local venue and one month's notice of action. Do the words "this Act" apply to anything done under the much later statute, the Contagious Diseases Act? Surely not. What does the word "this" comprehend? All the things done under 1 & 2 Will. 4, c. 41, which a constable might then do under that Act. If we enumerate those things, we only enumerate acts which a constable might then perform, and if we then read this protection into the Contagious Diseases Act, it is plain that it does not touch any acts done by the constable in pursuance of that later statute. The constable, therefore, has only protection in respect of acts which he may do under 1 & 2 Will. 4, c. 41.

BOWEN, L.J.—I am of the same opinion. I think that if we were to accept Mr. Lane's argu-



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ment, we should be doing violence to one of the simplest words of relation in the English language, viz., the word "this." Mr Lane wishes us to expand it so as to read it to mean "that," or, at any rate, something different to "this." The protection which was given to a constable by 1 & 2 Will. 4, c. 41, has been for some reason omitted from the Contagious Diseases Act 1878, and I cannot see any reason or sound argument in favour of our reading into that statute that which is not there.

Fry, L.J.—I am of the same opinion.

*Appeal dismissed.*

Solicitors: for the plaintiff, Bell, Brodrick, and Gray; for the defendant, Morris.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Nov. 7 and 11, 1884.

(Before CHITTY, J.)

HAYWARD v. THE EAST LONDON WATERWORKS COMPANY. (a)

*Company—Waterworks—Injunction—Right to cut off supply—Insufficient rate tendered in advance—Irreparable injury—Proceedings before two justices—Jurisdiction—Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), ss. 43, 53, 68, 74—East London Waterworks Company's Act 1853 (16 & 17 Vict. c. 166), s. 74.*

The defendant company had supplied the plaintiff with water for several years, the rate being assessed and paid on the gross annual value of his property. Two recent tenders, however, of payment in advance by the plaintiff had been refused on the ground that they were insufficient, as they had been assessed on the net annual value, and the defendants now threatened to cut off the supply unless the plaintiff paid the higher rate.

The plaintiff asked the court to grant an injunction restraining them from doing so, and alleged that they ought to have applied to two justices according to the Waterworks Clauses Act 1847, s. 68, if they thought the tenders were insufficient.

The defendants submitted that it was the duty of the plaintiff to take such proceedings before the justices; that this was not a case for an injunction against them, because, in the first place, the High Court had no jurisdiction in the matter, having regard to sects. 43 and 68 of the Waterworks Clauses Act of 1847; and, in the second place, even if it was held that sect. 74 of that Act conferred jurisdiction, the court would not exercise it in the present case, where no irreparable injury would be done to the plaintiff.

Held, that, though the cutting off of water for domestic purposes might cause irreparable damage, and came within the Judicature Act 1873 (36 & 37 Vict. c. 66), s. 25, sub-sect. 8, the court would only grant the injunction prayed for upon the plaintiff giving an undertaking to take immediate proceedings before the justices to have the question as to the right amount of the tender determined; that it was the duty of the plaintiff and not of the defendants to initiate such proceedings; and that the injunction would be continued pend-

*ing the proceedings, if the plaintiff would give that undertaking.*

Cooper v. Whittingham (43 L. T. Rep. N. S. 16; 15 Ch. Div. 501) followed.

The plaintiff was the lessee for ninety-nine years of 150 houses in the Abbey-road, West Ham, let out to weekly tenants, and conceiving that, according to the decision in *Dobbs's case* (49 L. T. Rep. N. S. 541; 9 App. Cas. 49), the annual value of his property was for the purposes of water-rate the net value as for poor-rate, had in Aug. 1884 tendered the water company a sum of about 25*l.* for water-rate, calculated on that footing. The company declined to accept his tender, and threatened to cut off his water.

On the 15th Oct. 1884 the plaintiff obtained from his Lordship an *ex parte* interim injunction against the company upon the terms of paying into court the full sum claimed by the company, without prejudice to any question in the action. He now moved that the interim injunction might be continued.

The questions raised by this motion were, whether, notwithstanding the Waterworks Clauses Act 1847, s. 68 (which provided a statutory tribunal of two justices for the determination of disputes as to the annual value), and sect. 43 (which imposed fixed penalties on the company for refusal to supply), the High Court of Justice had jurisdiction (under the Judicature Act 1873, s. 25, sub-sect. 8) to grant an injunction in the present case; and if it had, whether the present case was one in which it would exercise that jurisdiction.

The Waterworks Clauses Act 1847 enacts as follows:

Sect. 68. The water rates, except as hereinafter and in the special Act mentioned, shall be paid by, and be recoverable from, the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value, the same shall be determined by two justices.

Sect. 43. If the undertakers neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of 10*l.*

Sect. 53. Every owner and occupier of any dwelling-house, or part of a dwelling-house, within the limits of the special Act, shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water rate payable in respect thereof according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes.

Sect. 74. If any person supplied with water by the undertakers, or liable, as herein or in the special Act provided, to pay the water rate, neglect to pay such water rate, at any of the said times of payment thereof, the undertakers may stop the water from flowing into the premises, in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate due from such persons if less than 20*l.*, with the expense of cutting off the water, and costs of recovering the rate, in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act, or if the rate so due amount to 20*l.* or upwards, the undertakers may recover the same, with the expenses of cutting off the water, by action in any court of competent jurisdiction.

The East London Waterworks Act 1853, which incorporated the Waterworks Clauses Act 1847, except the provisions with respect to communi-

(a) Reported by A. COYSEBARNES ESQ., Barrister-at-Law.



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cation pipes to be laid by the undertakers of that Act and sects. 35 and 36, provided in sect. 74:

The company shall, at the request of the owner or occupier of any house, or part of a house, &c., within their limits in which any main or service pipe of the company is or shall be laid, or of any person who, under the Act, may be entitled to demand a supply of water for domestic purposes, furnish to such person by means of communication pipes, &c., to be provided, laid down, and maintained at the cost of such person, a sufficient supply of water for his domestic purposes at a rate per cent. per annum on the annual value of the house not exceeding 5l.

*Romer, Q.C. and Godefroi* for the applicant.—The company has been in the habit of assessing its water rate on the gross annual value of the plaintiff's property. Our contention is that we ought to pay a rate assessed on the net annual value, and not on the gross:

*Dobbs v. Grand Junction Waterworks Company*, 49 L. T. Rep. N. S. 541; 9 App. Cas. 49.

Mr. Hayward has twice tendered payment, assessed on the former footing, and both times in advance; but we do not wish to raise the question now as to what is the proper amount to tender, but only to stop the irreparable injury we should suffer if the company were allowed to cut off the water supply from 150 houses belonging to us; and we are quite content that matters should remain *in statu quo* until the action which is pending shall be decided:

*Sheffield Waterworks Company v. Wilkinson*, 4 C. P. Div. 410 and 422.

It is common ground that the court has, by virtue of sect. 68 of the general Act, no jurisdiction to determine the amount of the assessment. That question is referred by the Act to two justices. The point is that, under sect. 53, there is a statutory obligation or contract on the part of the company to supply the plaintiff with water, when he has done all that the Act requires him to do, and this we submit the plaintiff has done, and consequently the court ought to interfere and protect him by granting the injunction prayed for. The court now clearly has jurisdiction to do so by virtue of the Judicature Act 1875, s. 25, sub-sect. 8. It has been held that where there is a *bona fide* dispute as to the annual value, recourse must be had to the justices under sect. 68 before the company can enforce its statutory remedy under sect. 74 of cutting off the supply and recovering the rate and expenses by action:

*New River Company v. Mather*, 32 L. T. Rep. N. S. 658; L. Rep. 10 C. P. 442, and 452, 454;

*The Hoddesdon Gas and Coke Company Limited v. Haselwood*, 6 C. B. N. S. 239.

*R. S. Wright* for the defendants.—It has been already decided, in a case identical with the present one, that the discontinuance of the water supply by the company is not such an irreparable injury as would entitle the plaintiff to an interlocutory injunction. *Jessel, M.R.* laid down that he had neither power to make what was in effect a mandatory order, nor power to, in the form of an injunction, make an order for specific performance:

*Lowe v. Lambeth Waterworks Company*, per *Jessel, M.R.*, 6th July 1875 (unreported);

*Weale v. West Middlesex Waterworks Company*, 1 Jac. & W. 358 and 374.

The right of the occupier to a supply of water is a new right created by the Act itself and for the enforcement of it sect. 43 of the general Act

provides a new and special remedy, and fixes the amount of damages payable as a penalty to the party aggrieved:

*Atkinson v. The Newcastle and Gateshead Waterworks Company*, 36 L. T. Rep. N. S. 761; 2 Ex. Div. 441.

The Judicature Act 1873, s. 25, sub-sect. 8, which enables the High Court to interfere by injunction in all cases when it is just or convenient, does not extend its jurisdiction to cases occurring before the Judicature Act, when no court could have given any remedy at all:

*The North London Railway Company v. The Great Northern Railway Company*, 43 L. T. Rep. N. S. 695; 11 Q. B. Div. 31.

This court cannot possibly decide whether the plaintiff tendered a sufficient amount or not. Moreover, the balance of convenience is in our favour, and against the court interfering. All the plaintiff has to do is to pay the company's demand, and then recover the money, if he has been overcharged, before the justices. The onus lies on the plaintiff to show that he has tendered a sufficient amount, and not for us to show that the tender was insufficient. It is his duty to initiate proceedings before two justices, who alone can decide the proper amount. Where a company brought an action to recover their rates, the court held that as there was a *bona fide* dispute, the company, to have any *locus standi*, should have first gone before the justices under sect. 68:

*New River Company v. Mather* (*ubi sup.*).

In a case similar to the present one, before *Smith, J.*, 4th July 1884, an interim injunction was refused:

*Whiting v. The East London Waterworks Company* (unreported).

The company is supplying the plaintiff's houses voluntarily, and is entitled to discontinue that supply.

*Romer* in reply.—Before the company can exercise the statutory right of discontinuing their supply of water, it is incumbent on them to ascertain before the justices whether the amount tendered by the plaintiff is insufficient. Otherwise they cannot contend that he has been in default from an insufficient tender. Our position is that we have to pay the demand of the company or to submit having all our houses deprived of their water. If we pay, we have no means of recovering the overcharge. If the justices ultimately decide in our favour and before that decision we have lost our supply of water, we shall not be able to get any compensation. The injury would be an irreparable one, and the court has clearly jurisdiction to grant the injunction under the Judicature Act 1873, s. 25, sub-sect. 8:

*Hedley v. Bates*, 13 Ch. Div. 498;

*Cooper v. Whittingham* (*ubi sup.*).

The case of *Lowe v. Lambeth Waterworks Company* is distinguishable, as there the supply had been discontinued, and the injunction asked for was a mandatory one. The case of *Weale v. West Middlesex Waterworks Company* was decided on the grounds that there was nothing in the Act, which forced the company to supply the plaintiff, or which prevented them from cutting off the water except on default of payment or tender of the rate, and the owner not being bound to take, there was no existing contract which the court

could enforce. Here the plaintiff is a person who has taken the supply, and having done so he is entitled to demand its continuance on payment or tender. My client declines to give any undertaking to take proceedings before the justices, as the duty to do so lies on the defendants.

CHITTY, J., after stating the facts already mentioned, continued:—It appears that a *bond fide* dispute has arisen, and still subsists between the plaintiff and the defendant company, as to the basis on which the rate ought to be calculated. It is admitted on both sides that the effect of the statutes bearing on the question is that the only tribunal by which such a dispute could be settled is that mentioned in sect. 68 of the general Act. Sect. 68 enacts that "if any dispute arise as to such value it shall be determined by two justices," and in the *New River Company v. Mather* (*ubi sup.*) it was held that this statutory tribunal had exclusive jurisdiction on the question of value, and that the action could be maintained by the water company for the rate, when a *bond fide* dispute existed at the commencement of the action, unless the value had been first ascertained by the justices. The plaintiff, before the writ was issued, tendered the company the full amount payable, according to his contention, as to value for the rate up to Christmas, the tender being for the rate in advance. The company refused to accept the amount, and threatened to exercise the power conferred on them by sect. 74, and to stop the water supply. The company threatened to cut off the supply to the plaintiff's houses unless the full amount claimed by them for the rate in advance up to Christmas was forthwith paid. The houses are separate tenements, and the amount claimed by the company in respect of each house is less than 20*l.* The plaintiff has offered to pay, and has paid into court in this action, the full amount claimed by the defendants up to Christmas. Neither the plaintiff nor the defendants have taken any proceedings before the justices to have the dispute as to value determined by them. For some reason which has not been stated to me, neither party is willing to take the initiative. The plaintiff declines to give an undertaking to take any proceedings before the justices, contending that it is the duty of the defendants to take proceedings before putting in force their power to cut off the water. But the plaintiff's counsel has not even stated any ground for this contention beyond citing some passages from the judgment of the Court of Common Pleas in the *New River Company v. Mather*. All that the court decided in that case was that before the company could sue they must get the dispute as to value determined. It did not decide that it was the duty of the company to obtain the settlement of the dispute in all cases. The question here is whether the plaintiff is entitled to an injunction to restrain the defendants from cutting off the water. The writ ask for an injunction without limit of time, but the only injunction that could be granted in the existing circumstances would be up to Christmas. It is argued by the company that the plaintiff's right to the supply of water is a statutory right, and that the only remedies open to the plaintiff are those given by the statutes which confer that right, and that the statutes confer a special remedy, by penalty, payable to the person aggrieved, when the water is cut off. As at

present advised, I should, if it were necessary to decide the question, decline to adopt this argument. I see no reason why the court should refuse to protect a right by injunction merely because it is a statutory right. In *Cooper v. Whittingham* (*ubi sup.*) Jessel, M.R. held that the ancillary remedy by injunction ought to be granted, although the statute had created a new offence and imposed a penalty, and in his judgment he referred to the Judicature Act 1873, s. 25, sub-sect. 8, stating his opinion to be that this enactment might be said to be a general supplement to all Acts of Parliament. Jessel, M.R. gave a wider interpretation to the enactment than has since been adopted by the Court of Appeal. But the Court of Appeal did not in *North London Railway Company v. Great Northern Railway Company* (*ubi sup.*) overrule the decision in *Cooper v. Whittingham*, or lay down any principle inconsistent with that enunciated by Jessel, M.R. Before the passing of the statutes conferring on the Court of Chancery jurisdiction to determine questions of legal right, it was the constant practice of the Chancery Court to intervene by injunction, in proper cases, for the protection of the plaintiff in equity pending the trial of the legal right, and until that right could be determined at law. But the intervention was temporary, and the court required that proceedings should be taken to obtain the decision at law. It seems to me that the principle involved in that practice would apply to the present case. It is argued for the company that the damage to the plaintiff by cutting off the water would not be irreparable. But I am satisfied that that argument by itself could not prevail. The supply of water to the inhabitants of London now depends almost entirely on the water companies, and in the present case there are no less than 150 persons dwelling in the plaintiff's houses. I should have no hesitation in saying that the cutting off the supply of water for domestic purposes would be damage of that grievous nature which would have fallen within the principle of the decisions of the Court of Chancery as to irreparable damage before the passing of the Judicature Acts, and that at all events it would fall within the Judicature Act 1873, sect. 25, sub-sect. 8. The decision of Jessel, M.R. in *Lowe v. Lambeth Waterworks Company*, which is unreported, is distinguishable from the present case. There an attempt was made by means of a mandatory injunction to obtain specific performance of the statutory contract for the supply of water. Necessarily such an application failed. The case is distinguishable on that ground from the one before me, and also, so far as the limited injunction is concerned, which I have referred to as the only one which I should grant, it is distinguishable because that case was decided before the Judicature Act of 1873 was in operation. Still I think no injunction ought to be granted. It would be neither just nor convenient to grant an injunction, except pending proceedings for the settlement of the dispute as to value, or upon an undertaking by the plaintiff to commence the proceedings within a short period. The question whether the company is entitled to cut off the water depends entirely on the question whether the sum tendered is sufficient or not. The defendants are, if they are right in their contention as to value, entitled to have the sum claimed by

Q.B. Div.] GREAT NORTHERN RAILWAY Co. (apps.) v. LANGRIVILLE OVERSEERS (resps.). [Q.B. Div.]

them paid in advance. The plaintiff, having refused to give any undertaking to proceed before the justices, and having failed to show any reason why the company ought to be compelled to take the initiative, I refuse the motion with costs. The company subsequently gave an undertaking not to cut off the supply for a fortnight, it being uncertain whether the plaintiff desired to proceed further or to take proceedings before the magistrate.

Solicitors for the plaintiff, *Hollingsworth, Tyerman, and Co.*

Solicitors for the defendants, *Bircham and Co.*

### QUEEN'S BENCH DIVISION.

Dec. 8 and 15, 1884.

(Before HAWKINS and SMITH, JJ.)

GREAT NORTHERN RAILWAY COMPANY (apps.) v. LANGRIVILLE OVERSEERS (resps.). (a)

*Union Assessment Committee—Meeting to hear objections—Notice to overseers—Duty of overseers to amend valuation list—25 & 26 Vict. c. 103, ss. 18 and 19—27 & 28 Vict. c. 39, s. 1.*

*The Union Assessment Committee of the respondents' parish heard and allowed the appellants' objection to the respondents' valuation list at a meeting, of which the respondents received no notice from the committee in pursuance of the Union Assessment Committee Act 1862, s. 19. The respondents received notice from the committee of their amendment, according to the Union Assessment Committee Amendment Act 1864, s. 1, but refused to alter their then current rate accordingly. Held, upon a rule for mandamus, that the committee's omission to give notice of their meeting was no justification for the respondents' refusal.*

THIS was a rule nisi calling upon the overseers of the parish of Langrville, part of the union of Boston, in Lincolnshire, to show cause why a *mandamus* should not issue commanding them to amend the assessment of the Great Northern Railway Company in the parish according to the amendments directed by the assessment committee of the union.

Upon the assessment of the appellants' premises by the respondents, the appellants gave to the assessment committee of the union and to the respondents due notice in writing of their objection to the valuation list. At a meeting of the assessment committee, of which the respondents received no notice, the committee considered the appellants' objection, and reduced their assessment. When the respondents received directions to amend the valuation list they refused to do so.

This rule was obtained in consequence, on behalf of the appellants.

By the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103), s. 18:

Any overseer or overseers of any parish in any union who shall have reason to think that such parish is aggrieved by the valuation list of any parish within such union, or any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may at any time after the deposit as aforesaid of such list and before the expiration of twenty-eight days after the notice

of the deposit as aforesaid, give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof.

By sect. 19:

The committee shall hold such meetings as they may think necessary for hearing objections to the valuation lists, and shall, twenty-eight days at least before holding every meeting for hearing objections to valuation lists, other than meetings by adjournment, cause notice of such meeting to be given to the overseers of the several parishes to which such lists relate, and such overseers shall on the Sunday next following the receipt of such notice, publish the same in the manner in which notice of a rate allowed by justices is by law required to be given, and the committee may at any such meeting hear and determine such objections.

By the Union Assessment Committee Act Amendment Act 1864 (27 & 28 Vict. c. 39), s. 1:

Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal and the grounds thereof to the assessment committee of such union; provided that after the 1st Aug. next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just, and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly.

Dec. 8.—*W. Graham*, for the respondents, showed cause.—Although the later Act of 1864 extends the powers of the assessment committee, it still requires the objection to be "after notice given at any time in the manner prescribed by the said Act with respect to objections." The said Act is previously referred to in the section as the Union Assessment Committee Act 1862, which provides by sect. 19 that the committee "shall, twenty-eight days at least before holding every meeting for hearing objections to valuation lists, cause notice of such meeting to be given to the overseers of the several parishes to which such lists relate, and such overseers shall, on the Sunday next following the receipt of such notice, publish the same in the manner in which notice of a rate allowed by justices is by law required to be given." As the respondents received no notice of the committee meeting, they are justified in treating the consideration of objections at that meeting as a nullity, and cannot be compelled to make this amendment in the valuation list.

*Dugdale, Q.C.* and *Dodd* supported the rule.—It was open to the respondents, upon receipt of the order to amend the valuation list, to appeal to quarter sessions; and that is the course they ought to have adopted, instead of disobeying the amendment of the assessment committee. The notice of meeting, provided in the 19th section of the Act of 1862, must be given by the committee, and it could not have been intended that a person aggrieved by his assessment should be deprived of his remedy by an omission on the part of the committee. But further, there is nothing in the extended powers to be found in the Act of 1864

(a) Reported by M. W. McKILLAR, Esq., Barrister-at-Law.

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which requires notice of a meeting of the committee to hear objections. The words of the last section provide that notice of objection is to be given to the committee against the list, and afterwards state, with regard to this objection, that it must be "after notice given at any time in the manner prescribed by the said Act with respect to objections." The notice of meeting in manner prescribed is not incorporated in the later Act of 1864, and is no longer necessary. It has been held that another of the requirements prescribed by the Act of 1862 has been abolished by its omission in the Act of 1864:

*Reg. v. Edmonds*, 31 L. T. Rep. N. S. 237; L. Rep. 9 Q. B. 598.

*Cur. adv. vult.*

Dec. 15.—SMITH, J. delivered the judgment of HAWKINS, J. and himself:—This was a rule calling upon the overseers of Langrville to show cause why a *mandamus* should not issue commanding them to alter the rate as it stood in accordance with the amendment of the assessment committee. The point raised on the case is a short one. It is, what is the meaning to be put upon the words "after notice given at any time in the manner prescribed by the Act with respect to objections:" (see sect. 1 of the Union Assessment Committee Act Amendment Act 1864, 27 & 28 Vict. c. 39.) On the part of the overseers it is contended that the notice therein mentioned means not only the notice to be given by any overseer or any person aggrieved by a valuation list to the committee, as is prescribed by sect. 18 of the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103), but also the notice to be given by the committee to the overseers of the meeting they are about to hold to hear objections, as is prescribed by sect. 19 of the said Act. On the other side it is contended that the notice referred to in sect. 1 of the Act of 1864, at the most, only means the notice to be given by the objector of his objection, as is prescribed by sect. 18 of the Act of 1862. The facts are, shortly, as follows: The Great Western Railway Company's line runs through the parish of Langrville. The committee assessed the portion of the company's line which ran through the parish. The company were dissatisfied, and proposed appealing to quarter sessions, but, before doing so, had to comply with the requirements of sect. 1 of the Assessment Committee Act 1864 (27 & 28 Vict. c. 39). The company duly gave notice to the committee of their objection against the valuation list. No notice was given as is prescribed by sect. 19 of the Act of 1862. The committee, having heard the company, determined to amend the list, and, having done so, gave notice of the amendment to the overseers of the parish of Langrville, in order that they might amend the rate as it then stood. This the overseers refused to do, alleging, as is the fact, that they had received no notice of the meeting of the committee, as is prescribed by sect. 19 of the Act of 1862. We are of opinion that there was no necessity to give the notice, and that the section does not apply to the case now in hand. In our judgment the words in sect. 1 of the Act of 1864, "after notice given," apply solely to the notice to be given by the objecting party to the committee. If the contention of the overseers is correct, we must read the words thus, "after notice given," which we

have no warrant for doing, so as to bring in the notice prescribed by sect. 19 of the Act of 1862, as well as the notice prescribed by sect. 18 of the same Act. In the face of the words of the statute, we do not feel ourselves at liberty to inquire as to what was or was not the intention of the Legislature in the year 1864, which we were strenuously invited to do by Mr. Graham. It seems to us that the case of *R. v. Edmonds* (L. Rep. 7 Q. B. 598) goes to show that, at any rate, all the requirements of the Act of 1862 do not apply to a rehearing by the committee of an objection by an objector before he proceeds to quarter sessions, and we are of opinion that the committee are entitled to hear his objection, notwithstanding that the notice prescribed by sect. 19 of the Act of 1862 has not been given. It seems to us also that the words in sect. 1 of the Act of 1864, "after notice given at any time in the manner prescribed by the said Act with respect to objections," refer to sect. 42 of the Act of 1862, having reference to the manner in which the notice is to be served.

*Rule absolute.*

Solicitors for the appellants, *Nelson, Barr, and Nelson*.

Solicitors for the respondents, *Whyte, Collisson, and Co.*, for *H. E. Snaith*, Boston.

Monday, Dec. 15, 1884.

(Before MATHEW and DAY, JJ.)

LANE (app.) v. COLLINS (resp.). (a)

*Adulteration—Skim-milk—Deficiency of butter fat*  
—38 & 39 Vict. c. 63, s. 6.

*In answer to a request for milk, the respondent sold to the appellant skim-milk, which was proved by the analyst to be 60 per cent. butter fat deficient, and not a normal whole milk.*

*Held, upon a case stated, that a magistrate was justified in finding this was no offence within the 6th section of the Sale of Food and Drugs Act 1875.*

THIS was a case stated by one of the metropolitan police magistrates for the opinion of the court under the provisions of 20 & 21 Vict. c. 43, s. 2, as follows:—

1. The appellant is an inspector appointed by the county of Surrey for the Wandsworth district under the Sale of Food and Drugs Act 1875, and the respondent is a milk seller at Merton, in the said district.

2. The appellant laid an information before me under the 6th section of 38 & 39 Vict. c. 63 (the Sale of Food and Drugs Act 1875) against the respondent for that he did on the 12th May 1884, within the said Wandsworth district, sell to the prejudice of the purchaser an article of food, viz., milk, which was not of the nature, substance, and quality of the article demanded by such purchaser.

3. Upon the hearing of the summons, which was granted upon the above information, it was proved that, whilst the respondent was delivering milk in the ordinary course of his business in the Broadway, in the parish of Merton, the appellant stopped him and asked him for a pint of milk. Under the direction of the respondent a boy

(a) Reported by M. W. MCKELLAR, Esq., Barrister-at-Law.

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assisting the respondent served the appellant with a pint of milk, for which the appellant paid to the respondent the sum of twopence.

4. The appellant informed the respondent that he had bought the milk for the purpose of analysis, and gave him a sample. A portion of the milk so purchased by the appellant was analysed by the public analyst for the county of Surrey, who delivered the following certificate:

Surrey.—Sale of Food and Drugs Act 1875.—Analyst's Certificate.

To Arthur Joseph Lane.

I the undersigned public analyst for the county of Surrey do hereby certify that I received on the 12th May 1884 from Arthur Joseph Lane, Inspector of Weights and Measures for District C in the said county of Surrey, a sample of milk, No. C 343, for analysis, which then weighed 6oz., and have analysed the same, and declare the result of my analysis to be as follows:

I am of opinion that the said sample contained the parts as under, or the percentages of foreign ingredients as under: 60 per cent. butter fat deficient. Observations: Not a normal whole milk. No change had taken place in the constitution of the article that would interfere with the analysis. As witness my hand, this 15th day of May in the year of our Lord 1884, at Southwark.

THOS. STEVENSON.

5. On behalf of the appellant, it was considered that the appellant, having asked for milk, the respondent should have supplied him with unskimmed milk; that is to say, milk in its whole normal condition, and from which no butter fat had been abstracted.

I, however, dismissed the summons, on the ground that the respondent had committed no offence within the 6th section of the Sale of Food and Drugs Act 1875, inasmuch as the appellant had asked for "milk" and got "milk," but milk which had been skimmed. I thought that sect. 9 was the section which applied to what the appellant complained of. The question for the opinion of the court is whether, under the circumstances, I was right in dismissing the summons.

Dated the 12th Aug. 1884.

Day argued for the appellant.—This comes within the prohibition of the 6th section of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63). The words are: "No person shall sell, to the prejudice of the purchaser, any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser." The prejudice to the purchaser is indisputable; the article demanded was milk, and it surely cannot be said that this was milk with 60 per cent. butter fat deficient. [MATHEW, J.—You asked for milk, and seem to have expected cream.] This was not even half milk.

The respondent did not appear.

MATHEW, J.—I think the magistrate was right. I cannot say this was an offence within the 6th section of the Act. This article sold to the appellant is not proved to be anything but milk in its nature, substance, or quality. It is inferior milk, but the appellant did not ask for best milk or cream. At all events, I cannot say the magistrate was wrong. I express no opinion as to whether the respondent committed any offence within sect. 9 of the Act.

DAY, J.—I concur. *Judgment for respondent.*

Solicitors for appellant, F. F. Smallpeice, for Smallpeice and Sons, Guildford.

Monday, Dec. 15, 1884.

(Before MATHEW and DAY, JJ.)

LINE AND OTHERS v. WARREN AND OTHERS. (a)

*Municipal election — Four vacancies — Petition against three successful candidates — Subscription to several nomination papers — Objections improperly allowed — 45 & 46 Vict. c. 50.*

At a municipal election, to fill four vacant offices of town councillor, the nominations of four candidates, each with the names of the same ten burgesses, were delivered together to the town clerk. Separate objections were duly made in writing to each of these nominations, on the ground of rule 10 of schedule 3, part 2, of the Municipal Corporations Act 1882, which provides that, when a person subscribes more nomination papers than one, his subscription shall be inoperative in all but the one which is first delivered. Upon the hearing of these objections, that to one of the four candidates was withdrawn by the objector, and the mayor allowed those to the other three. At the election there were five other candidates; the one to whose nomination the objection was withdrawn and the three respondents were returned by a majority of votes. A petition was filed against the three respondents, on the ground that the mayor's allowance of objections to the nominations was improper, but the other successful candidate was no party to the petition.

Held, upon a special case, that this rule 10 does not apply to an election to fill more vacancies than one, but that in all elections the same burgesses may (according to rule 3) subscribe as many nomination papers as there are vacancies to be filled; and that there is nothing in the Act of 1882 to prevent the election of the respondents being set aside, without interfering with that of the other elected candidate, who was not a party to the petition.

THIS was a special case stated for the opinion of the court by order made under sect. 93, sub-sect. 7 of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50). The question whether this petition should be struck off the file was discussed and decided by a majority of a divisional court on the 10th June last (51 L. T. Rep. N. S. 359), the questions now raised being expressly reserved for argument on this special case.

1. The borough of Daventry, in the county of Northampton, is not divided into wards. The election of four councillors to fill four vacancies in the council thereof was appointed to be holden on the 1st Nov. 1883.

2. The petitioners are persons who voted and had a right to vote at the said election.

3. The respondents, Samuel Warren the elder, George Checkley, James Bromwich, Edward Brooks, William White, Thomas Harris, John Merifield, Charles Rodhouse, and John Edward Rodhouse were candidates at the said election, and the respondents and the said Thomas Harris were declared duly elected in manner hereinafter appearing. The number of votes recorded for each candidate is as follows: Thomas Harris, 362; Samuel Warren the elder, 314; George Checkley, 308; James Bromwich, 247; Edward Brooks, 192; William White, 172.

4. The town clerk of the said borough, pursuant

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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to sect. 54 of the Municipal Corporations Act 1882, signed and published in proper time a notice of the election and mode of nomination, of which notice the only material part is paragraph 4, which is as follows :

4. Each candidate must be nominated by a separate nomination paper, but the same burgesses or any of them may subscribe as many nomination papers as there are vacancies to be filled for the borough, but no more.

5. On the 24th Oct. 1883 four nomination papers, nominating respectively John Merifield, Thomas Harris, John Edward Rodhouse, and Charles Rodhouse, and each signed by the same two burgesses as nominating and the same eight burgesses as assisting to the nomination in each case respectively, were duly delivered to the town clerk of the said borough rolled round together in a bundle at twenty-five minutes past two o'clock in the afternoon, being seven days at least before the day of election, and the said town clerk, immediately after the receipt of the said nomination papers, gave notice to the said John Merifield, Thomas Harris, John Edward Rodhouse, and Charles Rodhouse that they had been nominated as candidates for such election as aforesaid.

14. The 3rd rule of part 2 of the third schedule of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) runs as follows :

Each candidate must be nominated by a separate nomination paper, but the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more.

The 6th rule is :

The town clerk shall provide nomination papers, and shall supply any burgess with as many nomination papers as may be required, and shall, at the request of any burgess, fill up a nomination paper.

The 10th rule is :

Where a person subscribes more nomination papers than one, his subscription shall be inoperative in all but the one which is first delivered.

15. The burgesses who signed the said four nomination papers were induced to sign them in the manner they did in consequence of the fourth paragraph of the town clerk's notice, and because of the heading of the said nomination papers having been filled up by one Frederic Billingham in accordance with the said fourth paragraph. No burgess subscribing the said nomination papers subscribed more nomination papers than there were vacancies to be filled, nor more than one nomination paper for any one candidate.

16. On the 25th Oct. 1883 John Sheppard Glover, Esq., the mayor of the said borough, attended at the Moot Hall in the said borough between the hours of two and four o'clock in the afternoon for the purpose of deciding upon the validity of objections to nomination papers. The said Edward Brooks at first objected verbally to the nomination papers of the said John Merifield, Charles Rodhouse, John Edward Rodhouse, and Thomas Harris, but was informed by the town clerk that the objections must be in writing, and half an hour afterwards the said Edward Brooks returned with four objection papers to the said nomination papers written in identical terms, and they were handed in to the mayor. The mayor endeavoured to find out which of the said nomination papers was first delivered, and called John Berry, the burgess who delivered the said nomination papers, and John Wilson Harris, the clerk

in the town clerk's office who received them, but they could give no evidence to enable the mayor to come to a decision as to which of the said nomination papers was first delivered, as they were delivered all together at the same time and rolled round in a bundle. A discussion then took place, and William Willoughby, the partner of the town clerk, who attended the meeting as the candidate's representative of Samuel Warren, sen., one of the respondents, argued in favour of the four objections of the said Edward Brooks, and John William Hayward, who appeared as the candidate's representative of Thomas Harris, claimed that if the mayor should decide that three of the nomination papers were inoperative, the one first delivered would not be so. The said Edward Brooks then had a conversation with the said William Willoughby, and informed the mayor that he withdrew the objection to the nomination paper of the said Thomas Harris. The court was thereupon cleared, and all four objection papers remained upon the table. Shortly afterwards the town clerk called the said William Willoughby into the room with the mayor, and the said John William Hayward objected to the said William Willoughby remaining in the room with the mayor unless he, Hayward, and the candidates were there, and the town clerk replied, "There will be nothing happen to injure you." The said William Willoughby was in the room with the mayor and the town clerk some few minutes, and the others were then called in. The mayor gave no decision as to which of the said nomination papers was first delivered, but allowed the objections of the said Edward Brooks to the nomination papers of John Merifield, Charles Rodhouse, and John Edward Rodhouse, and he returned the objection paper to the nomination of the said Thomas Harris to the said Edward Brooks, and allowing it to be withdrawn, gave no decision thereon.

18. If and so far as it is a question of fact for me, I find that there was no general irregularity at the mayor's meeting.

19. The petitioners petitioned against the return of the three respondents, Samuel Warren the elder, George Checkley, and James Bromwich, praying that it might be determined that the said Samuel Warren the elder, George Checkley, and James Bromwich were not duly elected, and that their said election and return was wholly null and void, but the petitioners did not pray that it might be determined that the said Thomas Harris, the other person declared by the mayor to have been elected councillor, was not duly elected, and that his election and return was null and void. (A copy of the said petition is to be found 51 L. T. Rep. N. S. 360.)

20. The respondents say that the said petition has not been presented in the prescribed manner, and does not contain such statements and matter as are prescribed by the 4th rule of the General Rules made in 1883 for the effectual execution of part 4 of the Municipal Corporations Act 1882, because the said petition does not pray that the election be declared void, but only prays that it may be determined that the respondents, who are three out of four persons elected, were not duly elected, and that their election and return were and are wholly null and void, and because the relief or remedy prayed for cannot be granted without declaring the whole election void, which



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cannot be done in the absence of Thomas Harris, who was elected at the said election, for the said Thomas Harris has not been made a party to these proceedings.

21. The 4th rule of the General Rules mentioned in the last preceding paragraph is as follows:

The petition shall conclude with a prayer, as for instance, that some specified person should be declared duly returned or elected, or that the election should be declared void, or that a return may be enforced (as the case may be), and shall be signed by all the petitioners.

The questions for the consideration of the court are:

1. Whether the election of the respondents in the circumstances mentioned in paragraphs 19 and 20 of this case can be questioned by petition in the absence of the said Thomas Harris, who was elected at the said election, and who has not been made a party to these proceedings.

2. Whether, in the circumstances above mentioned, the respondents were duly elected and returned. And the court may make such further order as to them shall seem meet.

*Yarborough Anderson* (with him *Shearman*) argued for the petitioners.—As to the first question raised by the special case, the sections of the Municipal Corporations Act 1882, which relate to election petitions, must be considered. By sect. 87, sub-sect. 1, "A municipal election may be questioned by an election petition, on the ground, *inter alia*, (c) That the person whose election is questioned was at the time of the election disqualified; or (d) That he was not duly elected by a majority of lawful votes." By sect. 88, sub-sect. 2, "Any person whose election is questioned by the petition, and any returning officer of whose conduct a petition complains, may be made a respondent to the petition." By sect. 91, sub-sect. 3, "Two or more candidates may be made respondents to the same petition, and their cases may be tried at the same time, but for the purposes of this Act the petition shall be deemed to be a separate petition against each respondent." By sect. 93, sub-sect. 4, "At the conclusion of the trial the election court shall determine whether the person whose election is complained of, or any and what other person, was duly elected, or whether the election was void, and shall forthwith certify in writing the determination to the High Court, and the determination so certified shall be final to all intents as to the matters at issue on the petition." By sub-sect. 10 (of the same 93rd section), "On the trial of a petition complaining of an undue election, and claiming the office for some person, the respondent may give evidence to prove that that person was not duly elected, in the same manner as if he had presented a petition against the election of that person." All these provisions in the statute clearly contemplate a challenge of one person's election apart from that of other candidates with him. It appears also from rule 14 of schedule 3, part 2, which is to have effect as if part of the Act (see sect. 7, sub-sect. 4 of the Act), that a petition may be against the return, as well as against the election. As to the second question raised by the special case, although these two rules (Nos. 3 and 10) of schedule 3, part 2, seem at first sight to conflict, it is clear on consideration that rule 10 was never intended to apply to a case in which there were more than one candidate to be elected.

*Coward* for respondents.—The court has power only to declare the election void, and it cannot do that in the absence of one of the elected candidates. There is no power to declare part of an election void, which is the prayer of this petition. The ground of objection to the respondents' election applies equally to that of Harris; and even if the mayor was wrong in allowing the objection to the nomination of three of the candidates, it is not in the power of the court now to set it right:

*Hovess v. Turner*, 35 L. T. Rep. N. S. 58; 1 C. P. Div. 670;

*Budge v. Andrews*, 39 L. T. Rep. N. S. 166; 3 C. P. Div. 510.

Moreover, it is by no means clear that the mayor was wrong; the two rules 3 and 10 of this part of schedule 3 are irreconcilable and repugnant, and under such circumstances, in analogy with sections of an Act of Parliament, the later should be taken to overrule the earlier provision.

The Court stopped the reply on the part of the petitioners.

MATHEW, J.—In this case I am of opinion that our judgment must be for the petitioners. An objection was taken to the nomination paper in the case of three of the candidates at the election in question, founded upon the 10th rule of the second part of the 3rd schedule to the Municipal Corporations Act 1882. The mayor allowed the objection, but I think that his decision was erroneous. The 3rd rule of the schedule provides that the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, and no more. The 10th rule clearly does not apply to the present case, where there were several vacancies, and no burgess had signed more than one nomination paper for any one candidate, or more nomination papers than there were vacancies. In consequence of the disallowance of these nominations the petition was filed and this case stated. The first question raised is, whether the election of the respondents can be questioned by petition in the absence of Thomas Harris, who was elected at the said election, and who has not been made a party to these proceedings. The second question is, whether the respondents were duly elected. The counsel for the respondents practically abandoned his contention on the second question, and admitted that he could not assert that the respondents were duly elected. But he contends that, upon the first question, the respondents are entitled to succeed. The argument is that, inasmuch as the same objection might have been made to Harris's election, the court cannot do anything in the absence of Harris, because it cannot in such a case declare the election void as to three of the persons elected without doing so as to the fourth also. I cannot see any foundation whatever for that contention. It seems to me that the scope of the legislation on the subject is to enable the election of particular persons to be challenged by petition. It is the duty of the court to pronounce on the prayer of such petition, but it can only deal with the case of the person whose election is objected to. Harris's election was not objected to by the petition, and it is clear that he must now be treated as duly elected, because there has been no petition presented against him within the time limited for that



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purpose. The sole duty of the court, therefore, is to see whether the objection taken with regard to the respondents is made good. Assuming that Harris was not duly elected, the court has nothing to do with his election, and has no power to go outside the petition to which he is not a party. The case of *Howes v. Turner* was referred to as supporting the respondents' contention, and as showing that in such a case as the present the court must declare the whole election void; but the case decides no such thing. There all parties concerned were before the court, the petitioners being the unsuccessful candidates, who claimed to have been duly elected, and both the parties returned being made respondents. The argument urged on the court was, that they were bound to declare the petitioners duly elected, and had no power to declare the election void; but the court held otherwise, and that, under the circumstances, they ought to declare the whole election void. That case has no bearing whatever on the present case. The case of *Budge v. Andrews* was also cited, but the decision in that case is equally remote from the present question.

DAY, J.—I concur. *Judgment for petitioners.*

Solicitors for petitioners, *Caister and Shearman*.  
Solicitors for respondents, *Kingsford, Dorman, and Co.*

Tuesday, Feb. 3, 1885.

(Before GROVE, J. and HUDDLESTON, B.)

*Ex parte* CLARK AND OTHERS; *Re* AN APPLICATION UNDER THE CORRUPT AND ILLEGAL PRACTICES ACT MUNICIPAL AND OTHER ELECTIONS ACT 1884, IN RESPECT OF A MUNICIPAL ELECTION IN THE BOROUGH OF HUNTINGDON. (a)

*Municipal election—Illegal practice—Printed placard posted without printer's name on the face of it—Illegal practice arising from inadvertence—No want of good faith—Order of High Court excusing such illegal practice—Municipal Elections Corrupt and Illegal Practices Act 1884 (47 & 48 Vict. c. 70), ss. 14, 20.*

*By* sect. 14 of 47 & 48 Vict. c. 70 it is made an illegal practice to print, publish, or post, or cause to be printed, published, or posted, any bill, placard, or poster, which fails to bear upon its face the name and address of the publisher.

*By* sect. 20, where it is shown to the court that any act or omission which would, by reason of being in contravention of any of the provisions of the Act, be but for the section an illegal practice arose from inadvertence, and not from any want of good faith, the court may on application make an order allowing such act or omission to be an exception from the provisions of the Act, which would otherwise make the same an illegal practice.

Four persons stood as candidates for election at the municipal election in the borough of Huntingdon, held on the 1st Nov. 1884. These persons employed a printer to print their bills and posters. A fortnight before the election Clark, one of the candidates went to the printer, Wm. Goggs, and particularly drew his attention to sect. 14 of the Municipal Elections Act 1884. Goggs in his turn gave instructions to his workmen in accordance with the instructions received by him from Clark.

On the 28th Oct. Goggs printed, published, and posted certain posters on behalf of the four candidates (the applicants) which did not bear his name and address. When the omission was discovered he took steps to rectify it. A prosecution under the Act was commenced against Clark and his colleagues, and Goggs the printer of the posters, but by consent the hearing of the summons before the magistrates was adjourned until an application was made to the court for an order excusing the applicants from the consequences of the omission. The applicants made their application under sect. 20, and filed affidavits to the effect that the issuing of the posters without the printer's name and address being on them was due to inadvertence, and not to the want of good faith:

*Held, that, under the circumstances, the applicants were entitled to an order excusing them from the consequences of the omission under sect. 20.*

THIS was an application under 47 & 48 Vict. c. 70, s. 20, by T. A. Clark and others, candidates at the municipal election for the borough of Huntingdon, and Wm. Goggs, a printer, for an order of the High Court excusing them from the consequences of printing, publishing, and posting, and causing to be printed, published, and posted, certain placards and posters at the said election which did not bear on their face the name and address of Wm. Goggs, the printer, which amounted to an illegal practice under sect. 14 of the said Act. A summons had been taken out against Clark and his colleagues, and Goggs, in respect of such illegal practice, which was by consent adjourned until after an application to the court for an order under sect. 20.

The facts of the case are sufficiently set out in the affidavits of T. A. Clark, and Wm. Goggs.

The affidavit of T. A. Clark:

I, T. A. Clark, of 9, Hartford-road, Huntingdon, in the county of Huntingdon, coal merchant, make oath and say:

1. I was a candidate at the municipal election for the borough of Huntingdon, which was held on the 1st Nov. 1884, but was unsuccessful thereat.

2. On or about the 7th Jan. 1885 I received a summons requiring my attendance before the justices of the peace for the borough of Huntingdon on Thursday, the 15th day of January 1885, to answer a charge against me for having caused to be printed, published, or posted, a certain bill, placard, or poster, having reference to a municipal election, which did not bear on the face thereof the name and address of the printer and publisher thereof, whereby I had incurred penalties under the 14th section of the said Act, and under sect. 7 of the said Act.

3. I attended before the said justices on the said 15th day of January 1885 attended by my counsel.

4. The bill, placard, or poster in respect of which I was charged was one issued by Mr. W. Goggs, a printer, of Huntingdon, on or about the 28th day of October 1884, and was in the following words: "Economy—Efficiency—Order. Vote for Clark, Goodliff, Hawley, and Ridgley, the Liberal candidates."

5. I gave no order for the printing, publishing, or posting of the said handbill except as hereinafter appears, but I was in the shop of Mr. Goggs when the bill-poster Yeardye brought back the bundle of the said bills for correction.

6. About the middle of October 1884, but on what precise day I am unable to state, but believe that it was at least a fortnight before the day of election. I procured a Queen's printers' copy of the above-mentioned Act, and carefully perused the same. My attention was particularly drawn to sect. 14, which made it an offence to print, publish, or post, or cause to be printed, published, or posted, any bill, placard, or poster, having reference to a municipal election, which did not bear

(a) Reported by W. P. EVERSBLEY, Esq., Barrister-at-Law.

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upon the face thereof the name and address of the printer and publisher.

7. Knowing that the said Wm. Goggs would be employed by himself and my colleague in candidature to do any printing which we might require for the purposes of the election, I called upon him with the said Queen's printers' copy of the Act, and in the presence of one of his assistants, named Emmeline Dodge, read over to him word by word, slowly and deliberately, the whole of sect. 14. I distinctly impressed upon him at that time the absolute necessity for his strictly observing the provisions of that section, and under no circumstances to issue any bill, placard, or poster, having reference to the then forthcoming municipal election, which did not bear upon the face of it his name and address, as required by the Act. The said Wm. Goggs solemnly assured me he would take the utmost care that he, and every other person in his establishment, observed my directions.

8. A few days after the interview detailed in the last preceding paragraph, I saw the said Wm. Goggs, and he then told me he had explained to the men in his employ the stringent provisions of the Act in the matter to which I had called his attention, and I might rely upon it that my instructions would now be faithfully carried out and the Act strictly observed.

9. I gave no further or other instructions to the said Wm. Goggs respecting the printing for myself or my colleagues at that election, so far as the same is affected by the said 14th section of the Act.

10. I never directly or indirectly concurred in or authorised the printing, publishing, or posting of any bill, placard, or poster during this election which had not upon the face thereof the name and address of the publisher, and none were so printed, published, or posted during the said election, to the best of my belief, except the one in question which was printed, published, and posted in the form complained without my knowledge or consent. When the said bills or posters were brought to the shop of the said Wm. Goggs, as mentioned in paragraph 4 of this my affidavit, I reminded him of the very strict instructions I had given him on the subject, and he at once explained that the act complained of was an inadvertence on the part of his workmen.

11. Under the circumstances hereinbefore detailed, by the advice of my counsel, application was made to the magistrates on the return day of the summons for the adjournment generally of the summonses against myself and my three colleagues in order that application might be made to the High Court for an order under sect. 20 of the above-mentioned Act, and, after deliberation and after hearing counsel on the other side, the said magistrates granted the application on terms that I paid in respect of my own summons, and my colleagues in respect of their summonses, the costs of the day.

12. I did in the manner hereinbefore stated take the utmost pains to protect myself, as I thought, from the possibility of any violation of sect. 14 of the said Act. I say that the acts or omissions complained of arose, as I am informed, from inadvertence, and, as far as I am concerned, did not arise from any want of good faith on my part, or, to the best of my belief, on the part of anyone. I submit that I have not been guilty of any illegal practice; but, inasmuch as I have been summoned for an alleged illegal practice and if convicted should be liable to be fined 100*l.* and rendered incapable to vote for five years, I now apply on behalf of myself to the said High Court for an order allowing such acts or omissions of printing, publishing, and posting, or causing to be printed, published, or posted, a bill which did not bear on the face thereof the name and address of the printer and publisher, to be exceptions from the provisions of the Municipal Elections and Illegal Practices Act 1884, which would otherwise make the same an illegal practice or illegal practices.

13. I depose to the above facts from my own knowledge.

The affidavit of William Goggs:

I, Wm. Goggs, of No. 116, High-street, in the borough of Huntingdon, in the county of Huntingdon, printer and bookseller, make oath and say:

1. For twenty years past I have been employed to do the printing for the Liberal party on the occasions of both municipal and parliamentary elections.

2. I was so employed to do the requisite printing in

respect of the municipal election for the borough of Huntingdon on the 1st November 1884.

3. Mr. T. A. Clark, of Hartford-road, in Huntingdon aforesaid, was one of the candidates at the said election.

4. About a fortnight before the said election the said T. A. Clark called upon me. He brought with him a Queen's printers' copy of the above-mentioned Act of Parliament, and read to me sect. 14, by which penalties are imposed in respect of the printing, publishing, or posting any bill, placard, or poster, having reference to a municipal election, which did not bear upon the face thereof the name and address of the printer and publisher.

5. The said T. A. Clark cautioned me most strongly against the issuing of any bill, placard, or poster, with reference to the then forthcoming election, which did not strictly comply with the terms of sect. 14 of the said Act. I promised the said T. A. Clark that no bill of any kind should be issued which did not bear my name and address upon it, and it was my intention to carry out all the provisions of the said Act.

6. I subsequently gave instructions to the workmen in my printing establishment in accordance with the caution and instructions I had received from the said T. A. Clark, and a few days afterwards I again saw the said T. A. Clark and told him that I had so done.

7. For a day or two before an election, my printers' office, which is not very extensive, is always under great pressure to get through the printing which is then required.

8. About the 28th day of October I received instructions, but I cannot recollect from whom, to print a poster bill in the following terms: "Economy—Efficiency—Order. Vote for Clark, Goodliff, Hawley, and Ridgley, the Liberal candidates." I was also to procure the same to be posted in the borough. I gave the usual instructions to my workmen, and in due course the handbills were printed, but without my name and address, and when so printed were delivered to one James Yeardye, the bill-poster, for distribution and posting. I did not read or examine the said poster after it came from the printing office and before it was given out to be posted.

9. Within half an hour after they had been so delivered, the said James Yeardye came to my shop, and told me he dare not post the bills, because they did not bear upon the face of them my name and address. I was very much astonished and annoyed, but I thanked Mr. Yeardye for so promptly coming back and giving me this information, and took from him the whole of the posters and handed them to my workmen, with peremptory instructions to correct at once the mistake of which they had inadvertently (as I then and still believe) been guilty, and arranged for the said Mr. Yeardye to call again for them when this had been done.

10. Thinking that Yeardye might perhaps have posted some of these bills, though I understood him to say he had not, I sent round my apprentice, Frederick Dann, during the time the other bills were being corrected, to see if any of them had in fact been so posted. I provided him with the stamp and necessary ink, so that, if he found any so posted, he could impress upon them my name and address. On the return of the said Frederick Dann, after he had visited every posting station in Huntingdon, I was informed by him that he had found four or five of the bills posted, and had in every instance affixed my name and address by the aid of the stamp and ink with which I had provided him. I subsequently redelivered to the said James Yeardye all the posters which he had brought back to me, and in every one of which there now appeared my name and address.

11. The said T. A. Clark gave me no instructions with reference to the printing of this or any other bill, or posters at that election, except his address to the electors, nor did I receive any instructions on this subject from either of the other applicants, Goodliff, Hawley, and Ridgley.

12. The issuing of the said bill or placard, without my name and address being upon the face thereof, was in distinct disregard of the instructions I had received from the said T. A. Clark, and of the instructions which I had repeated to my workmen. It was no doubt an act of carelessness and inadvertence on the part of my workmen, which in the hurry of business I had neglected to notice when the bills were first handed out to the said James Yeardye.

13. There was no desire or intention on my part to violate the provision of the said sect. 14, and it was my duty to have taken care after the instructions I had received from the said T. A. Clark, that no such inadvertence had taken place.

14. I say that the printing, publishing, and posting, or causing to be printed, published, or posted, of the said handbill, without the prescribed name and address, arose from inadvertence on the part of my workmen and myself, and did not arise from any want of good faith on my part, or, to the best of my belief, that of my workmen.

15. On January 7, 1885, I was summoned before the justices of peace for the borough of Huntingdon to appear on January 15, 1885, on the charge by the said summons now shown to me and marked W. G. Appearing on the 15th day of January, the further hearing of the summons was adjourned, under the circumstances stated in the affidavit of T. A. Clark.

16. I now make a similar application to that made by him in his said affidavit on behalf of myself.

By 47 & 48 Vict. c. 70 :

Sect. 14. Every bill, placard, or poster, having reference to a municipal election, shall bear upon the face thereof the name and address of the printer and publisher thereof; and any person printing, publishing, or posting, or causing to be printed, published, or posted, any such bill, placard, or poster as aforesaid, which fails to bear upon the face thereof the name and address of the printer and publisher, shall, if he is a candidate, be guilty of an illegal practice, and if he is not the candidate, shall be liable on summary conviction to a fine not exceeding one hundred pounds.

Sect. 20. Where, on application made, it is shown to the High Court or to a municipal election court by such evidence as seems to the court sufficient—(a) That any act or omission of a candidate at a municipal election for a borough or ward of a borough, or of any agent or other person, would, by reason of being in contravention of any of the provisions of this Act, be but for this section an illegal practice, payment, employment, or hiring; and (b) that such act or omission arose from inadvertence, or from accidental miscalculation, or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith; and (c) that such notice of the application has been given in the said borough as to the court seems fit, and under the circumstances it seems to the court to be just that the said candidate, agent and, person, or any of them, should not be subject to any of the consequences under this Act of the said act or omission, the court may make an order allowing such act or omission to be an exception from the provisions of this Act, which would otherwise make the same an illegal practice, payment, employment, or hiring, and thereupon such candidate, agent, or person shall not be subject to any of the consequences under this Act of the said act or omission.

*Douglas Walker* for the applicants.—I appear here for the four candidates, and the printer of these placards, who have been proceeded against under the Municipal Elections Act 1884, and I have given such notice of our application for the order sought as will no doubt appear sufficient to the court. This application is the result of a summons taken out against my five clients for an illegal practice, the hearing of which was postponed by the justices till this application was heard. The issuing of the placards without the printer's name and address is no doubt an illegal practice under sect. 14 of the Act, but in this case was attributable to inadvertence, and was not the result of corrupt practices. If the court thinks fit to grant an order under sect. 20, we may be excused from the consequences of having acted in contravention of the Act. [*Grove J.*—This section seems to enable the judges to dispense with the penal provisions in the Act; and, looking at the punishment provided for this offence, I do not see the necessity for such dispensing power; it may be a nominal fine.] Not so, for if the

offending party be a candidate, and does not get such an order as we seek, he may (among other consequences) be disfranchised. The candidates may be held liable for the act of the printer, as their agent, even though his act of omission was against their directions. It is enough for me to show that what was omitted to be done arose through inadvertence, and not from any want of good faith. The affidavits show that it was so. [The learned counsel here read various affidavits, including the two set out above.] These documents clearly show that the candidates gave orders to the printer to put his name and address to any bills issued on their behalf, and the printer gave similar orders to his workmen, and that it was due to the inadvertence of the latter that the printer's name and address were omitted.

*Grove J.*—I think enough has been shown in this case to enable us to make the order. I must, however, add that it must not be taken as a precedent that, because there is a mistake or inadvertence in this case, such shall always be so treated in the future. I should be inclined to take a stricter view of these inadvertences when the Act shall become better known.

*Huddleston B.*—We must be satisfied of two things—first, that the infringement of the statute arose from inadvertence, accidental miscalculation, or some other reasonable cause; next, that it did not arise from any want of good faith. I think that here such is the case has been sufficiently made out, and I agree that this application should be allowed.

*Order made as asked for. (a)*

Solicitors for the applicants, *Gedge, Kirby, and Millett*, for *Wright, Williams, and James, Leicester*.

## CROWN CASES RESERVED.

*Saturday, June 28, 1884.*

(Before *Grove, Stephen, Watkin Williams, Mathew, and Hawkins, JJ.*)

REG. v. STEPHENSON. (b)

*Coroner—Interference with—Obstruction of course of justice—Jurisdiction of coroner—Burning body after appointment and before holding of inquest—Misdemeanour.*

*It is an indictable misdemeanour wilfully to prevent the holding of an inquest of which a coroner has given notice, or to destroy a body upon which an inquisition ought to be held.*

*Where, therefore, a coroner bonâ fide believes information given to him to be true, which, if true, would necessitate the holding of an inquest, it is the duty of the coroner to hold an inquest; and it is a misdemeanour to prevent the holding of such inquest, notwithstanding that the information given to the coroner was in fact untrue.*

*A coroner, however, has not an absolute right to hold an inquest in any case he chooses. In order*

(a) That the act or omission of printing, publishing, or posting, or causing to be printed, published, or posted, the bill, placard, or poster referred to in the affidavit of *Wm. Gogga*, sworn on the 24th day of January 1885, be an exception from the provisions of the Municipal Elections (Corrupt and Illegal Practices) Act 1884, which would otherwise make the same an illegal practice.

(b) Reported by *R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.*

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*to justify him in holding an inquest he must have reasonable grounds for believing that the death was caused by unnatural means.*

CASE reserved by Hawkins, J. for consideration of this court, which was stated as follows:—

The defendants were tried before me at the assizes holden at Leeds, on the 15th May last, upon an indictment in substance charging them with having burnt the dead body of an illegitimate infant child (named George Stephenson) to which the defendant Elizabeth Stephenson had recently given birth, with the intent to prevent the holding of an inquest upon it. The defendants were both found guilty; but I deferred passing sentence, and admitted them to bail, until the opinion of the Court of Criminal Appeal could be obtained upon certain questions of law which I reserved at the request of their counsel.

The defendant Elizabeth was on the 17th Dec. 1883, confined of the child in question at the house of a Mrs. Atkinson, at Cayton, near Scarborough, in the North Riding of Yorkshire, with whom it lived until its death on the morning of the 12th Jan. last.

On the 9th Jan. the defendant Elizabeth took it out for the day; it was then quite well; but on the following day it was very poorly and had fits, and it remained ill until its death. The dead body remained in the house of Mrs. Atkinson until the night of the following Monday, when it was surreptitiously taken away by the two defendants, and burnt, to prevent the coroner from holding an inquest upon it.

The defendant Ann is the mother of Elizabeth, and they lived together at Cayton in a cottage opposite Mrs. Atkinson's.

It is fair to the defendants to say that there was no evidence before me to show that the death of the child was due to any misconduct of theirs; but, nevertheless, the police, in the discharge of their duty, communicated to the coroner for the North Riding the fact of the death of the child, and such information respecting it, the honesty and *bona fides* of which he had no reason to doubt, as led him to the conclusion that it was his duty to hold an inquest upon the body. There was no proof that the information given to the coroner was true, but the coroner honestly believed it to be so. And it must be taken as a fact that if the information was true it was the imperative duty of the coroner to hold an inquest.

The coroner accordingly appointed the afternoon of the following day, Tuesday, the 15th Jan., for the holding of such inquest. Of this the defendants had knowledge on the Monday evening. The jury were duly assembled, and the coroner attended pursuant to his appointment. The inquest, however, could not be holden because the body was not forthcoming, it having been on the night of the Monday secretly taken from the house of Mrs. Atkinson and burnt by the two defendants as above stated.

At the close of the case for the prosecution, the learned counsel for the defendants (Mr. Stuart Wortley for Ann, and Mr. Mellor for Elizabeth) objected to the sufficiency of the indictment; that the preliminary averments do not allege that the case was a proper one for an inquest, or that the proposed inquest was one which ought to be held; that the information on which the coroner acted should have been set out; and that it ought to

have been shown that the case was one in which the coroner was bound to hold an inquest.

I reserved these objections for the opinion of this court. A copy of the indictment accompanies this case.

It was then objected that there was no evidence of the truth of the information given to the coroner.

I overruled that objection, and held that, if the information given to the coroner, and honestly believed by him to be true, was such as, assuming its truth, to make it his duty to hold an inquest, he was fully justified in directing the inquest to be holden; and that the jurisdiction of a coroner to hold an inquest does not depend upon the truth of the information forwarded to him, which, if true, would make it his duty to interfere and hold a court of inquiry on view of the body. I gave Mr. Wortley leave, however, to raise the question, if he thought fit, on the argument of this case. It must, however, be taken that, assuming the circumstances brought to the attention of the coroner to be facts, he was abundantly justified in the course he took.

The learned counsel for the defendants further objected that, assuming the coroner to have rightly determined to hold the inquest, and the defendants to have secretly obtained, and burnt, and disposed of the body with the intent to prevent the inquest being held, and so to obstruct the coroner in the execution of his duty, that did not amount to a criminal offence. I held that it did, and, having directed the jury in accordance with these rulings, the jury found both defendants guilty.

I reserved the questions of law above raised for the opinion of this court.

If my rulings are correct, and any one or more counts of the indictment are good, the conviction is to stand. If otherwise, it will be reversed.

(Signed) H. HAWKINS.

*Stuart Wortley* (with him *H. G. Taylor*), for the prisoners, contended that the conviction could not be supported, inasmuch as it did not show any offence at common law, and the offence of burning a dead body was not a statutory offence. [STEPHEN, J.—Here the charge is the burning a dead body in order to prevent an inquest being held upon it.] That has never been held to be an offence. [GROVE, J.—If it is not an offence, it could be done in every case of child murder and in order to conceal the dead body of an illegitimate child, which would clearly be illegal.] In *Reg. v. Price* (15 Cox C. C. 389; 12 Q. B. Div. 247) Stephen, J. laid it down that it is essential to the offence of disposing of a body so that an inquest cannot be held upon it that the inquest which it is proposed to hold is one that ought to be held. Here it is found that the inquest was unnecessary, and therefore it ought not to have been held. [STEPHEN, J.—In that case I did not say that if there were no grounds for holding an inquest it would be legal to prevent it. Here my brother Hawkins held that there were fair grounds for holding an inquest.] These grounds should have been proved then; the fact of the death having been sudden is not a sufficient ground; the death must be shown to have been violent. According to Holt, C.J. in *Anon.* (7 Mod. 15, p. 10): "It is matter indictable to bury a man who dies a violent death before the coroner has sat upon him," and

not who is supposed to have died a violent death. [GROVE, J.—The very object of holding an inquest is to ascertain the cause of death, which object must be frustrated where the body is destroyed before the inquest can be held.] In this case, however, there was no reason for suspicion. [GROVE, J.—No; but if it were legal in such a case as this, would it not be legal where there was reason for suspicion?] Not if the death were violent. [GROVE, J.—Whether the death was violent or not is the very thing the coroner has to inquire into.] In order to justify the holding an inquest, it must appear that there was a reasonable ground for so doing, not merely that the coroner believed there was such ground. [HAWKINS, J.—But the fact cannot be known before the inquiry, and the legality of the inquiry cannot depend upon the result.] The prisoners did not know of the information, and therefore could not know that there were any grounds for holding an inquest. [HAWKINS, J.—It is a common law offence to obstruct a constable in the execution of his duty; and the fact of an arrest having been made illegally does not palliate any interference with the constable who made the arrest. WATKIN WILLIAMS, J.—Suppose that the obstruction consisted merely in the concealing the accused?] That might be a case of obstructing the course of justice, which would be very different from the present, for a coroner's inquest is merely an inquiry. What the prisoners did was not an offence by statute nor at common law, and the conviction should therefore be quashed. In support of the above contention the following authorities were cited, viz.:

2 Hale's Pleas of the Crown, 56, 57;  
 Reg. v. *The Justices of Kent*, 11 East, 229;  
*Jervis on Coroners*, 1880, pp. 23, 29, 31;  
 Reg. v. *Clark*, 1 Salk, 377;  
 Reg. v. *Solgard*, 2 Stra. 1007; 2 Hawk. P. C. bk. 2,  
 c. 9, s. 23;  
 1 Russell on Crimes, 620.

Meek, on behalf of the prosecution, contended that a coroner's inquest formed part of the administration of justice, and to obstruct it was to obstruct the course of justice, which was indictable under 4 Edw. 1, st. 2. The duty of the coroner is, upon information given to him, to hold an inquest if he think fit, which clearly gives him a discretion, but compels him not to disregard the information where he honestly believes the information. Believing the information, he is bound to hold an inquest, and to obstruct him in doing so must clearly be an offence. Even, if the coroner believed the information to be false, it would be his duty to ascertain whether it was false or true, and, if the holding of an inquest was the only means of ascertaining, he would be bound to hold the inquest. Here, however, there was nothing to show that the information was untrue. The prisoners are found to have destroyed the body in order to prevent the inquest being held upon it, which was an obstruction of the course of justice and a misdemeanour at common law. It would have been another matter had the coroner not appointed an inquest; but one having been appointed, it became an offence to prevent its being held in any way.

Stuart Wortley in reply.

GROVE, J.—The two points submitted for our consideration and decision are: Whether it is an

indictable misdemeanour wilfully to prevent the holding of an inquest of which the coroner has given notice, and whether there is sufficient on this case to show that the coroner had the right and power to hold one. No case absolutely in point has been referred to, but there are many cases which show that interfering with, and preventing the performance of, duties imposed upon officers by statute is a misdemeanour at common law. Now, the holding of an inquest is a matter of great public importance, and it is most important that, where a coroner has reasonable grounds for holding an inquest, he should not be prevented from doing so, otherwise the consequences would be most formidable. Child murder especially would be more likely to go unpunished, if by disposing of the bodies by burning the only evidence perhaps of the crime could be destroyed. The very object of a coroner's inquest is to ascertain the cause of death, and it certainly is not the law that the coroner must be certain of the cause of death before he can hold an inquest, which would be the effect of the argument that the prisoners cannot be convicted, although the coroner acted reasonably in determining to hold the inquest, if the inquest should prove to be unnecessary. Under the statute of Edw. 1, the coroner's duty is to act on information, and the inquest is held to test the information. It is said in Bracton 3, c. 5, and Horne's Mirrour, p. 38, that the statute is in affirmance of the common law, and merely directory. Now, the statute says, "The coroner, if he be certified by the king's bailiffs or other honest men of the country, shall go to the place where any be slain, or suddenly dead or wounded," nothing being said about murder. An examination of the body is required by the statute, and the whole wording shows that an inquiry into the cause of death is intended, which would be useless had the coroner to satisfy himself by evidence as to the cause of death previously to holding the inquest. That being so, do not the facts here show that the coroner had a reasonable suspicion that the child came to its death by violent or unnatural means? In my opinion they do. The case states that: "The police, in the discharge of their duty, communicated to the coroner for the North Riding the fact of the death of the child, and such information respecting it, the honesty and *bona fides* of which he had no reason to doubt, as led him to the conclusion that it was his duty to hold an inquest upon the body." I am clearly of opinion that it was the duty of the coroner to hold the inquest, inasmuch as he believed the information to be true; and the case finds as a fact that the body was burnt in order to prevent the carrying out of this duty. In the case in *Mod. Rep. (ubi sup.)* it is said that: "It is matter indictable to bury a man who dies a violent death before the coroner has sat upon him." The expression there is certainly "a violent death;" but that does not, in my opinion, mean a death which must have been proved to have been violent before the inquest, but means a death which appeared to have been violent, or which was discovered to have been violent upon the holding of the inquest. What Lord Holt said, in my opinion, shows that the destruction of a body before the holding of an inquest upon it, with the object of preventing an inquest being held,

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is a misdemeanour. If it is a crime to bury a body, *a fortiori* it is a crime to burn it; for in the one case it may still be possible to exhumate the body in order to examine it, but in the other all trace of the manner in which the death was come to is absolutely destroyed. It is enough here to say that the coroner had a right to hold the inquest, and the prisoners, having secretly and intentionally burnt the body in order to prevent the inquest being held, were rightly convicted of a misdemeanour.

STEPHEN, J.—I am of the same opinion. It is a misdemeanour to destroy a body upon which an inquisition ought to be held to prevent such inquest being held. This law appears to result from many decisions and authorities, all of which are summed up in the report of the Criminal Law Commissioners, between 1841 and 1845. It has not, however, been expressly decided in what cases an inquest should be held; and the second question for us to decide is, whether it is a misdemeanour to interfere in cases where an inquest ought to be held only, or is it also a misdemeanour to interfere in cases where the coroner considers an inquest ought to be held. In deciding this point we are not creating a new offence, but only declaring what the law is with regard to a certain offence. The point came before me in *Reg. v. Price (ubi sup.)*, and I cannot better express my meaning than by reading the view I took of the matter then. In that case I said: "It is a misdemeanour to prevent the holding of an inquest, which ought to be held, by disposing of the body. It is essential to this offence that the inquest which it is proposed to hold is one that ought to be held. The coroner has not an absolute right to hold inquests in every case in which he chooses to do so. It would be intolerable if he had power to intrude without adequate cause upon the privacy of a family in distress, and to interfere in their arrangements for a funeral. Nothing can justify such an interference, except a reasonable suspicion that there may have been something peculiar in the death, and that it may have been due to other causes than common illness. In such cases a coroner not only may, but ought, to hold an inquest, and to prevent him from doing so by disposing of the body in any way—for an inquest must be held on view of the body—is a misdemeanour." I say the same now, and agree with my brother Grove. In my opinion, any other view would result in an absurdity. Were a coroner to insist upon holding an inquest without having reasonable grounds for holding it, I do not say that he would not be liable to an action. But if a person destroys a dead body or removes it in order to prevent an inquest being held, he is guilty of an offence if the inquest intended to be held was one which might lawfully have been held. The destruction of the body is an obstruction of an officer of justice in the performance of his duty, which amounts to a misdemeanour. The simple facts here are that the coroner, upon information which he believed, and which if true made it his duty to hold an inquest, appointed an inquest. The defendants, knowing this, destroyed the body in order to prevent the holding of the inquest, or, in other words, the execution by the coroner of his duty, and were, in my opinion, rightly convicted.

WATKIN WILLIAMS, J.—I agree with my learned

brothers upon the only points which are really reserved in this case, and, but for other points having been discussed, which are, in my opinion, collateral to the point reserved, I should not add anything to what has been said. The first proposition is that, where a coroner has information which he believes, which information if true would justify an inquest, he is bound to hold the inquest; and I am clearly of opinion that where he has such information, and *bonâ fide* believes it to be true, he has jurisdiction to hold an inquest. The second proposition is that to obstruct a coroner in the performance of his duty, under such circumstances, is a misdemeanour, and I have no doubt whatever that it is.

MATHEW, J.—I am of the same opinion. I think, however, that we are not prevented from dealing with all the arguments which have been laid before us. Now, were the statutory duties of the coroner interfered with? It is argued that because the coroner has no jurisdiction unless a crime has been committed or a death has been violent, there has been no such interference. It is clear, however, that the coroner's jurisdiction is not so limited, and that he is bound to hold an inquest if he honestly believes the information given to him, and has reasonable grounds for believing that that information warrants his holding the inquest. Again, it is argued that, even if the coroner is bound to hold the inquest, it is no offence to obstruct his doing so where the defendants were ignorant of the information upon which he was acting, which information was in fact untrue. The effect of that, however, would be to allow others than the coroner to decide whether an inquest should be held or not, and, in my opinion, it would never do to take away the right of the coroner to decide that question, and to free him from the responsibility of his decision.

HAWKINS, J.—At the trial I had not any serious doubt upon the matter, and it was the general importance of the case and its importance to the defendants which induced me to reserve the questions. In my opinion, where a coroner has information, which if true makes it his duty to hold an inquest, and he *bonâ fide* believes in the truth of that information, he is bound to hold the inquest. His jurisdiction does not depend on the truth of the information, but upon his *bonâ fide* belief in its truth, and cannot depend upon the actual result of the inquiry. It is found that the coroner believed information he had to be true, and it was therefore his duty to hold the inquest. The body was destroyed to render it impossible to hold an inquest upon it, and that was in my opinion an obstruction of the coroner in the execution of his duty, and the defendants were guilty of a misdemeanour, and rightly convicted.

*Conviction affirmed.*

Solicitors for the Crown, *Iliffe and Co.*, for *Tasker Hart*, Scarborough.

Solicitors for the defendants, *Watts and Kitching*, Scarborough.



CT. OF APP.]

YATES (plaintiff in error) v. THE QUEEN.

[CT. OF APP.]

## Supreme Court of Judicature.

## COURT OF APPEAL.

Jan. 13, 14, and 16.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

YATES (plaintiff in error) v. THE QUEEN. (a)

ERROR FROM THE QUEEN'S BENCH DIVISION.

*Libel—Criminal prosecution—Criminal information—Fiat of Director of Public Prosecutions—Newspaper Libel and Registration Act 1881 (44 & 45 Vict. c. 60), s. 3.*

*By the Newspaper Libel and Registration Act 1881 (44 & 45 Vict. c. 60), s. 3, "no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions . . . being first had and obtained."*

*Held, that this section does not apply to criminal informations filed by leave of the court, and therefore the plaintiff in error was rightly convicted, on such an information, for a libel published in a newspaper of which he was the proprietor, although the fiat of the Director of Public Prosecutions had not been obtained.*

A RULE *nisi* for a criminal information on behalf of the Earl of Lonsdale against the defendant (now plaintiff in error), the proprietor of the *World* newspaper, for a libellous article published in that paper aspersing the Earl's character, was moved for and obtained without "the written fiat of the Director of Public Prosecutions," as prescribed by sect. 3 of the Newspaper Libel and Registration Act 1881 (44 & 45 Vict. c. 60), (b) having been first obtained; that official having refused an application that was made to him on behalf of the Earl for a fiat, because he was of opinion that he ought not to interfere with the discretion of the court who were about to be applied to for the rule; and when the rule was afterwards argued and made absolute the point was not raised or alluded to.

Subsequently, however, a rule *nisi* to quash the information for invalidity, in having been irregularly and improperly granted in the absence of the necessary previous fiat, was obtained by C. Russell, Q.C., on behalf of the defendants, and against that rule

Sir H. James, Q.C., Attorney-General (with whom were C. Hall, Q.C. and Danckwerts), on behalf of the prosecutor, the Earl of Lonsdale, showed cause, and in support of his arguments, the scope and nature of which sufficiently appear in the several considered judgments of the court, he cited and referred to the following cases and authorities:

*Rez v. Wilkes*, 4 Burr. 2527;

*Wilkes v. The King* (in error), Wilmot, 332;

(a) Reported by HENRY LEIGH and P. B. HUTCHINS, Esqrs., Barristers-at-Law.

(b) That section enacts that "no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained."

*Rez v. Berchet and others*, Show. 101;

*Fountain's case*, 1 Sid. 152;

*Rez v. Phillips*, 3 Burr. 1564, 4 Ib. 2089;

*Heydon's case*, 3 Rep. 7;

*Harding v. Preece*, 47 L. T. Rep. N. S. 100, at p. 105; 51 L. J. 515, Q. B. at p. 523; 9 Q. B. Div. 281, at p. 297 (per Watkin Williams, J.);

*Thatcher and Waller's case*, Sir T. Jones, 53;

*Dr. Foster's case*, 11 Rep. 56 b;

*Smith v. Commissioners of Sewers*, 1 Mod. 44;

*Smith's case*, 1 Vent. 66;

*Rez v. Morely*, 2 Burr. 1040;

*Ex parte The Postmaster-General; Re Bonham*, 40 L. T. Rep. N. S. 16; 10 Ch. Div. 195; 43 L. J. 84, Bank;

*Hawk. P.C. bk. 2, cap. 3, "Court of King's Bench," cap. 26, "Informations";*

*Bac. Abr. "Information," "King's Bench";*

*3 Com. Dig. "The King's Bench," 4 Ib. "Information";*

*4 Blackst. Comm. 308;*

*Tancred on Quo Warranto and Informations, 30;*

*Corner's Crown Office Practice;*

*4 & 5 Will. & M. c. 18;*

*6 & 7 Vict. c. 96 (Lord Campbell's Libel Act);*

*23 & 24 Vict. c. 17 (Vexatious Indictments Act).*

[Lord COLERIDGE, C.J. referred to *Ditcher v. Denison*, 11 Moo. P. C. 324.]

C. Russell, Q.C. (with him were Poland and Gwynne James), for the defendant (the plaintiff in error), supported the rule.—The scope and nature of his arguments sufficiently appear in the judgments of the court. He referred to many of the cases and authorities cited by the Attorney-General in showing cause, and in addition cited the following:

*Reg. v. Steel*, 35 L. T. Rep. N. S. 534; 46 L. J. 1, M. C.; 2 Q. B. Div. 37;

*Reg. v. Slater* (per Denman and Hawkins, JJ.), reported in the *Times* in 1881;

*Reg. v. Percy*, 43 L. J. 45, M. C.;

*Maxwell on Interpretation of Statutes*, 2 Chit. Crim. Law, 841, cap. 22.

[Lord COLERIDGE, C.J. referred to *Reg. v. Fletcher*, in the Court of Appeal, 35 L. T. Rep. N. S. 538; 2 Q. B. Div. 43; 46 L. J. 4, M. C. HAWKINS, J. referred to *Reg. v. Brooks and another*, 2 Den. C. C. R. 217.] *Cur. adv. vult.*

July 3.—The Court having taken time to consider, and being divided in opinion, their several written judgments were now delivered *seriatim* as follows:—

MATHEW, J.—This was a rule to quash an information for libel filed by order of the court against the defendant, who is the proprietor of the newspaper the *World*, on the ground that the written fiat or allowance of the Director of Public Prosecutions had not been obtained. The application raised the question, which turned out to be one not easily answered, whether a criminal information is a prosecution within the meaning of sect. 3 of the Newspaper Libel and Registration Act 1881. The difficulty of ascertaining the meaning of the Legislature upon the point is one of a class with which the courts are but too familiar, and is due to the fact that the language of the enactment is neither wholly popular nor altogether technical, and is therefore not to be interpreted readily either by a layman or a lawyer. The attempt to construe the Act will, it seems to me, be best made by a consideration of the state of the law before the statute passed, and of the provisions by which the existing law was intended to be amended. Prior to the Act of 1881 a newspaper



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proprietor, publisher, editor, or other person responsible for the publication of a newspaper, might be proceeded against criminally for a libel published in the paper—first, by information filed *ex officio* by the Attorney-General, or by the Queen's coroner, by order of the Court of Queen's Bench, under 4 & 5 Will. & M. c. 18; secondly, by a summons or warrant issued by a magistrate; and thirdly, by a bill of indictment presented to a grand jury. With regard to proceedings by way of criminal information at the suit of private prosecutors, it was only when the libel was of a nature, to use the language of Blackstone, "so gross, notorious, and atrocious" as to justify, in the judgment of the court, a departure, in the interest of the public, from the ordinary course of the criminal law, that an information could be had recourse to. A defendant was protected from the vexatious use of this mode of proceeding by the requirement that judicial sanction should be obtained before the information was filed, and also by the provisions of the 4 & 5 Will. & M. c. 18, and 6 & 7 Vict. c. 96 (Lord Campbell's Libel Act), which entitled a successful defendant to the costs of his defence. But with respect to proceedings before a magistrate or the grand jury, the position of a defendant was very different. In any case where an action would lie for a libel without proof of special damage, criminal proceedings might be taken by a private prosecutor, and an application might be made to a magistrate to send a defendant for trial, or, without any notice to a defendant, a bill might be presented to the grand jury. This was a state of the law likely to lead to great abuses, and to expose the class of persons responsible for the publication of newspapers to criminal proceedings of the most vexatious and harassing description, and there was the further grievance that the costs of a successful defence could not be recovered from the prosecutor. It was with this state of things that the Newspaper Libel Act 1881 was intended to deal, and the Act contains several provisions for the protection of newspaper proprietors, the meaning of which is sufficiently clear. Sects. 2, 4, 5, and 6 are meant to protect newspaper proprietors from criminal proceedings in respect of libels not of a serious nature, and these sections clearly relate to ordinary criminal proceedings only, that is, to proceedings before a magistrate or grand jury. Then comes the question upon which our judgment in this case depends—has the 3rd section any wider operation? By sect. 3 it is enacted that "No criminal prosecution shall be commenced against a newspaper proprietor for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland." Does this apply to the offences of the character referred to in the other sections of the Act; or is it applicable to libels of every description, whether grave or trivial, and to proceedings by way of criminal information, as well as to proceedings in the ordinary course of the criminal law? In the first place, it is manifest (and this was conceded in the course of the argument by the defendant's counsel) that the 3rd section does not apply to criminal informations filed by the Attorney-General; for, if it did, the Attorney-General could not proceed in England without the permission of an official who is his subordinate, and

acts under his superintendence under the Act (42 & 43 Vict. c. 22, s. 2), nor in Ireland without a fiat issued by himself. Some proceedings other than those to be instituted by the Attorney-General *ex officio* must, therefore, have been contemplated. Then, does sect. 3 apply to the analogous proceedings of a criminal information filed by order of the court? The object of the Act, as disclosed in sects. 2, 4, 5, and 6, was to prevent vexatious prosecutions. But, as regards proceedings by criminal information filed by the Queen's coroner, was not that object secured by 4 & 5 Will. & M. c. 18? Was the court likely to fail to discover that an application for a criminal information had been made vexatiously; and if the court failed to make the discovery, was the public prosecutor likely to be more successful? Is it probable that Parliament intended to alter the law in respect of the classes of libels usually dealt with by criminal informations? It would be difficult to suggest any grounds on which newspaper proprietors could reasonably ask for the interference of Parliament on their behalf; when, for instance, a libel was deliberately published of an individual so malicious and indefensible that the court would order a criminal information. Again, was it meant that such libellers should have a greater protection than ordinary offenders—for this would be the result of holding that the Act of 1881, as well as the Act of William and Mary, applied to offenders of the former class? But consideration of the probable intention of Parliament cannot avail against the clear language of an enactment, and it was argued for the defendant that sect. 3 was perfectly clear. But is that so? The section says: "No criminal prosecution shall be commenced without the fiat," &c. The learned counsel for the defendant was pressed, during the argument, to say at what stage of the proceedings by way of criminal information a prosecution could be said to have commenced. He admitted, as I understood him, that the fiat of the Public Prosecutor might not be necessary before the application to the court for an order to file the information. But he argued that the proceedings assumed the character of a prosecution within the meaning of the section, and that so the prosecuting "commenced" when a rule *nisi* had been obtained from the court to file the information, and the rule had been served on the defendant. But it seems clear to me that the commencement of the prosecution is the filing of the criminal information. The order of the court under 4 & 5 Will. & Mary is analogous to the fiat under sect. 3 of the Act of 1881. If this be so, and the order of the court must be followed by the fiat of the Public Prosecutor, it must have been intended by the Legislature either that the Public Prosecutor should agree, as of course, with the court and allow the proceedings to be continued, or that he should differ and prohibit them. In the one case the protection of his fiat would be illusory; in the other he would necessarily be called on (upon what material does not appear) to exercise the functions of a court of final appeal from the order of the Queen's Bench. I cannot suppose, in the absence of apt and decisive language for the purpose, that any such result was intended by Parliament. It seems to me so unreasonable that I am bound, if it be possible without violence to the language of the section, to find some other meaning for its provisions. I think

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the proceedings contemplated by sect. 3 did not include a criminal information. What was meant seems to me to have been a prosecution in the ordinary sense of the term, namely, a criminal charge made before a magistrate or grand jury, and not the extraordinary proceeding by way of criminal information. The language of sect. 6 is strongly confirmatory of this view. By that section every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within the meaning of the Act to prevent vexatious indictments. It may not be easy to bring the precise terms of this section into harmony with the rest of the statute, and it is unnecessary to determine whether sect. 3 and sect. 6 are each applicable to the same proceedings, so that the fiat of the Public Prosecutor and the order of a judge would, in some cases, be necessary before a private prosecution could proceed. But offences punishable by criminal information are clearly not within the Vexatious Indictments Act, which contemplates only ordinary criminal proceedings; and it would seem to follow that such offences were not within the meaning or operation of sect. 3. For these reasons I am of opinion that the 3rd section of the Newspaper Libel and Registration Act 1881 does not apply to criminal informations filed by order of the court, and that this rule must be discharged.

HAWKINS, J.—I am of opinion that the 3rd section of the Newspaper Libel and Registration Act 1881 (44 & 45 Vict. c. 60) applies to criminal information for libel at the instance of private prosecutors, and that the written fiat or allowance of the Director of Public Prosecutions is a necessary preliminary to the commencement of such criminal prosecutions, which commencement, I think, is when the rule *nisi* for the criminal information is applied for. See *Clarke v. Postan* (6 C. & P. 423, per Bosanquet, J.), where the mere making of a criminal charge before a magistrate, who instantly discharged it, was held sufficient foundation for an action for malicious prosecution. If it were otherwise, the most scandalous and false affidavits might be used on the application for a rule *nisi* with impunity against any civil action. It seems to me impossible to say that a criminal information under which (if found guilty) a person may be imprisoned and fined as a criminal is not a "criminal prosecution" within the ordinary and popular sense of those words. It is contended, however, by the prosecutor in the present case that, in the section referred to, we ought to construe them as excluding all criminal informations, and as applicable only to other criminal proceedings, namely, by indictment, or before a court of summary jurisdiction; and it was argued before us that, having regard to the existing state of the law at the time of the passing of the Act, the intention of the Legislature that they should be so construed is apparent and obvious. As regards informations *ex officio* filed by the Attorney-General by virtue of his office on his own responsibility, in exercise of the prerogative of the Crown, it cannot be doubted that they are excluded from the operation of the section; for the general rule is well established that the rights of the Crown shall not be barred or restrained by any statute unless it be specially named, which is not the case in the section now under consideration. Informations at the instance of private persons stand, however, upon a totally different

footing. With regard to them, although exhibited in the name of the Queen, they are not in any sense State prosecutions, any more than are ordinary indictments, which also are preferred in the name of the Queen. Formerly criminal informations for misdemeanours were exhibited by the Clerk of the Crown without check or restraint, at the mere will of any individual. This privilege came to be so abused by malicious and contentious persons that the Legislature thought fit to put a limit upon it, and accordingly, by statute 4 & 5 Will. & M. c. 18, s. 1, it was enacted that the Clerk of the Crown should not, without "express order" to be given by the Court of King's Bench in open court, exhibit, receive, or file any such information. From thenceforward a restriction was placed upon the exhibition of criminal informations for trivial matters, or for purposes of malice or extortion; but there was still nothing to prevent the presentment to a grand jury of a bill of indictment for any offence at the mere will of any person who thought fit to present it. In course of time, however, it was found that this power too was grievously abused for unworthy purposes. Bills of indictment were often presented, and easily procured to be returned as true bills, upon the most unsatisfactory evidence, subject to no test of cross-examination, and were used as instruments of oppression and extortion. To remedy, to some extent, this evil, the Vexatious Indictments Act (22 & 23 Vict. c. 17) was passed, which, by sect. 1, provides that no bill of indictment for certain misdemeanours therein mentioned (not including libels) shall be presented to or found by any grand jury, unless (1) the prosecutor has been bound over to prosecute or give evidence against the person accused; or (2) unless the accused has been committed for trial or bound by recognisance to appear to answer to an indictment to be preferred against him for such offence; or (3) unless such indictment for such offence be preferred by the direction or with the consent in writing of a judge of one of the Superior Courts or of the Attorney or Solicitor-General. The 2nd section of the Act entitles the person who prefers a charge to insist upon being bound over to prosecute in the event of a magistrate refusing to commit or hold the accused to bail; so that any malicious person could in one way or other insist upon his right to present a bill of indictment. The state of the law then, when the Newspaper Libel Act 1881 was passed, stood thus: A criminal prosecution for the offence of libel could only be instituted by criminal information or by indictment, no other form of criminal proceedings for libel being known to the law. No criminal information could be filed without the express order of the Court of Queen's Bench, but a bill of indictment might be preferred at the mere will of anyone who thought fit to present it. It is unnecessary to enter minutely into the history of the Newspaper Libel Act 1881, or to endeavour to point out all the reasons which brought about its enactment, but it is beyond all question that one great object of the Legislature was to afford to newspaper proprietors more protection than they then enjoyed against hostile proceedings for trivial libels. Its preamble recites that it is expedient to amend the law affecting civil actions and criminal prosecutions for newspaper libel. By sect. 3 it is enacted that no criminal prosecution shall be commenced

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against any proprietor, &c., of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions. The 5th section for the first time gives a court of summary jurisdiction, in the course of an investigation with a view to an indictment, power (with the assent of the accused) to deal summarily with trivial libels; and the 6th section extends the Vexatious Indictments Act to the offence of libel. Now, the first question I have asked myself is this: if it was intended by the Legislature to include within the 3rd section all the forms of criminal procedure known to the law for the offence of libel, what more apt, simple, and unequivocal language could it have used to express that intention than the words, "no criminal prosecution shall be commenced without the fiat of the Public Prosecutor?" And if, on the other hand, the Legislature had intended to exclude criminal informations from the operation of the section, what more inapt or misleading language could it have selected to express that intention? To neither of these questions have I been able to suggest to myself an answer. Why, then, am I, sitting here judicially, to come to the conclusion that the Legislature has deliberately said what it did not mean, and left unsaid, or rather said the contrary to, that which it intended to express? It has been suggested that the Legislature must be taken to have passed the Act under discussion with full cognisance of the statute of William and Mary, which gave effectual protection against vexatious and frivolous criminal informations, and must be taken to have intended sect. 3 to apply to indictments only. If it were so, how strange it is that, with the knowledge that there were only two forms of criminal procedure applicable to libel, namely, information and indictment, the words "no indictment" were not substituted for the comprehensive and unambiguous words, "no criminal prosecution." It was argued, moreover, that by including criminal informations within the 3rd section, we should be construing the Act in such a manner as to give the Public Prosecutor a controlling power over Her Majesty's Court of Queen's Bench, and to interfere with the prerogative and jurisdiction of that court. I think that no such consequences would result from such a construction of the section. The result of our so interpreting the Act would, indeed, be to vest in the Public Prosecutor (who, in addition to his legal attainments, ought to be a man of experience, knowledge of the world, common sense, and discretion), the power and the duty to say, having regard to all the surrounding circumstances of each particular case (into all which circumstances he ought to make inquiry), whether it is expedient that a newspaper proprietor should, under all those circumstances, be criminally prosecuted at all, and to grant or refuse his fiat accordingly, even though he may be satisfied that, in strictness of law, a libel has been published. I can imagine many cases in which that power might be most usefully exercised, cases in which inestimable mischief and injustice might be done by the first step in the prosecution, whether by application to the Queen's Bench for leave to file a criminal information, or by proceedings before a magistrate with a view to an indictment. But though the Public Prosecutor has the power to grant or refuse his fiat, he has no power, if he grants it, to direct in what form

the prosecution shall be conducted. The Court of Queen's Bench, on the other hand, has not, and never had, the power to put a veto upon a prosecution; but it had, and has, the power, under the statute of William and Mary, to refuse to allow it to be instituted in the form of a criminal information; and it does constantly so refuse in cases which, though justifying the application of the criminal law, can be equally well dealt with by a grand jury upon a bill of indictment. The distinction between the power of the Public Prosecutor and that of the Queen's Bench is obvious; and I see no reason why these two powers should not exist harmoniously together—the Public Prosecutor determining in the first instance whether a criminal prosecution is expedient, and should be allowed; the Queen's Bench determining whether to permit the use of a criminal information or to leave the prosecutor to his other remedy by indictment. These jurisdictions could never clash, for the jurisdiction of the Public Prosecutor must necessarily have ceased before that of the Queen's Bench came into existence. But the reason urged for excluding informations from the operation of the section would also apply to an indictment preferred by order of a judge or the Attorney or Solicitor-General under the Vexatious Indictments Act. It might just as well be argued that the Legislature never intended to give the Public Prosecutor power, practically, to supersede the order of a judge or the fiat of the law officers of the Crown; and yet that some indictments are within the operation of the section is clear, or it would have no operation at all. It is impossible to suppose the Legislature to have intended that no restraint should be put upon a vindictive unreasonable prosecutor who insisted upon being bound over to prosecute, notwithstanding the refusal of the magistrate to commit, or of a judge to allow an indictment to be preferred before the grand jury. To extend the exception to indictments by order of a judge, or the Attorney or Solicitor-General, as well as to criminal informations, would practically limit the 3rd section to proceedings before a magistrate preliminary to an indictment. If such was the intention of the Legislature, how easy it would have been to express it in so many words. I cannot think the Legislature intended the language used in the 3rd section to be construed in any other than its popular sense, and so as to comprehend every criminal prosecution—that is, it intended what it said. Probably, when the Act of 1881 was passed, the jurisdiction of the Queen's Bench to refuse a criminal information, and of a judge or the Attorney or Solicitor-General to order an indictment, was altogether lost sight of, and possibly, had it not been so, the 3rd section might have been differently framed; but this is mere speculation. We are not here to say what the Legislature would have done if the suggested inconveniences had been present to its mind, but what it has done. Even if we were satisfied that the section is defective by reason of an oversight, we have no right to remedy the defect by engrafting an exception upon clear and explicit language; that would be to legislate, which we have not the power to do, and not to construe the language as we find it. (See *Warbuton v. Loveland*, 2 Dow. & Cl. 489; *Miller v. Salomons*, 7 Ex. 475; 21 L. J. 161, Ex., per Pollock, C.B.; *Lee v. Bude, &c., Railway Company*, 24

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L. T. Rep. N. S. 827; 40 L. J. 285, C. P.; L. Rep. 6 C. P. 576, per Willes, J.; *Reg. v. Cleworth*, 9 L. T. Rep. N. S. 682; 4 B. & S. 927, per Blackburn, J.) It is not our duty to amend defective legislation, but simply to administer the law as it stands. For the reasons I have stated I am of opinion that this information ought to be quashed; but, as the majority of the court take a different view, the rule must of course be discharged. In the course of the discussion I have entertained some doubt, whether the omission to obtain the fiat of the Public Prosecutor was a mere irregularity in procedure, capable of being waived by omitting to take the objection at the proper time, namely, in showing cause against the rule *nisi*; or whether the objection goes to the original jurisdiction of the court. Our refusal to quash the information or motion will not prevent the defendant from raising the whole question in such a shape as he may be advised, either by plea to the jurisdiction, or by assigning error in fact, if the judgment on the information should be given against him. (See *Rees v. Marsh*, 6 A. & E. 236; *Reg. v. Heane*, 4 B. & S. 947; 9 L. T. Rep. N. S. 719.)

FIELD, J.—This is an application by the defendant, the proprietor of a newspaper, to quash, for defect of jurisdiction, a criminal information for libel exhibited against him by the Queen's coroner by order of this court. The defect alleged is the absence of the fiat of the Director of Public Prosecutions in England, the necessity for which, as a condition precedent, is said to arise under the 3rd section of the 44 & 45 Vict. c. 60, which enacts that no "criminal prosecution" for such libel shall be commenced against any proprietor of a newspaper without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first obtained. The short question, therefore, is whether an information so filed at the instance of a private individual is a "criminal prosecution" within the meaning of that section. That those words are sufficiently large in their widest sense to include such a proceeding, no one, I think, doubts; but it does not of necessity follow that the words are so used in that sense. Indeed, it is clear that it does not, for in their largest and widest sense would be included an information filed *ex officio* by Her Majesty's Attorney-General, whether of England or Ireland, and it is certain that such a proceeding is not a "criminal prosecution" within the meaning of the 3rd section. What, then, is the limitation to be put on these general words? Is everything but *ex officio* information included, or is there to be imposed any further limitation? The question is not altogether easy to answer, in consequence of the use by the Legislature of the general and, what may almost be called, popular language, instead of precise words, the well-known import and effect of which when used leave no room for doubt as to their meaning. To enable this question to be answered, the first step is to see what, at the time of the passing of the Act, were the several modes by which an individual could commence and prosecute any criminal proceedings in such a case, and what were the mischiefs attending such proceedings which the Legislature wished to prevent. The ordinary remedy of a private prosecutor for this, as for any other offence punishable by the

criminal law, was, of course, by bill of indictment presented to and found by a grand jury, and such a bill it was competent for any individual to prefer, without any preliminary inquiry, order, fiat, or allowance. The finding of such bill might therefore be, and often was, the first step in or commencement of a prosecution; for although it was a usual and generally a fair and proper course for a prosecutor, before preferring his bill, to summon the proposed defendant before a magistrate and so institute an inquiry into the alleged offence, the result of which might be the committal, or binding over, or discharge of the defendant, such a step was not a necessary preliminary to the sending up of the bill, and it was constantly found that, although the magistrate dismissed the application, a vindictive or vexatious prosecutor still preferred his bill, and that many vexatiously did so without going before a magistrate at all. Moreover, the very institution of the preliminary investigation was made use of by irresponsible prosecutors as an instrument of vexation and revenge, and however trivial the libel, or whatever the circumstances under which it had appeared in the newspaper, whether its publication amounted to an offence within the meaning of Lord Campbell's Act or not, the newspaper proprietor was often subjected to expensive and harassing proceedings, the expense of which, even when he was successful, fell upon himself. By the side of this ordinary remedy, with these attendant evils, and others which are remedied by the 4th and 5th sections of the Act we have to construe, there stood the remedy by criminal information. This exceptional remedy had originally probably been part of the general privilege of the Attorney-General to file information in the Court of Queen's Bench at his will, by virtue of his office, but in course of time so much of the privilege as consisted in filing such an information at the suit of a private individual had become by usage vested in another officer of the Crown, the Queen's coroner, who was also an officer of this court. This remedy had, however, also come to be accompanied, in course of time, by some, at least, of the same evils as attended an ordinary prosecution for libel, but the latter were, in the case of this proceeding, removed by express legislation as far back as 4 & 5 Will. & M. c. 18. By the 1st section of that Act the Queen's coroner was prohibited from filing any such information without the express order of this court, and from issuing any process of this court under it, without the prosecutor coming under recognisances effectually to prosecute the information and abide by the order of the court, to whom power was given to award costs against him in certain events. Since that statute, therefore, no prosecutor can proceed by way of criminal information without obtaining the "express order" of this court, and which he can only obtain upon rule *nisi* made absolute after no cause shown, in which proceeding he is obliged by the practice of the court to bring before it the terms of the libel of which he complains, so that its nature and character may be seen: he is further obliged to deny upon oath that there is any truth in or foundation for the libel, and if he fail his recognisances are estreated, unless he pay such costs as the court may award. This mode of proceeding was, therefore, placed by the Legislature absolutely under the control of this court, which,

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in its discretion, granted or refused this order, and only granted it with just care or deliberation, and never in aid of any unworthy or vindictive prosecutor, or trivial or vexatious prosecution. A more complete protection to the subject against groundless, harassing, and vexatious proceedings it is hardly possible to conceive. Now, whatever uncertainty may exist as to the precise limit to be put upon the language of sect. 3 of the Newspaper Libel and Registration Act 1881, it is quite clear that the necessity for the fiat does extend to summary proceedings for newspaper libel before magistrates; and as to them there is no uncertainty as to the period at which the prosecution in such a case commences; the result is, that no information or complaint for such a libel can be made without the fiat of the Director in England, or the Attorney-General in Ireland, who will of course take care not to authorise any other than legitimate proceedings. The words "criminal prosecution" have therefore at least one important application. But, besides dealing with this proceeding by sect. 3, it is also clear that the preferring of a bill of indictment is dealt with by the Act, but not, as it seems to me, because it is directly included in the words "criminal prosecution" in sect. 3, but by the extension in sect. 6 to the offence of "newspaper libel of the provisions of the Vexatious Indictments Act (22 & 23 Vict. c. 17). By that Act, as it is well known, certain specified offences (prosecution by private persons for which had become in practice vexatious and harassing) were placed under certain restrictions, for (although dealing very guardedly with the common law right of the subject to prefer a bill before a grand jury) it imposes alternative conditions, one of which is a necessary preliminary to its exercise. These conditions are—first, an information before a magistrate, who may either commit, or bind over, or discharge the defendant; or, secondly, the direction of or the consent in writing of a judge or the Attorney or Solicitor-General. In the first alternative, if the magistrate commits or holds to bail, the case of course goes to trial in the ordinary way, and the prosecutor enters into the ordinary recognisances to prosecute and abide by the order of the court; but the committal or holding to bail is not an essential preliminary to an indictment, for a bill may also be preferred even if the magistrate discharges the defendant, the only condition in that event being, by sect. 2, the recognisance of the prosecutor. If, therefore, the prosecutor do not obtain the direction or consent of a judge or law officer, no indictment can be preferred without the prosecutor rendering himself liable for costs, nor without the fiat of the Director being obtained for the preliminary proceedings; so that by this construction a complete protection seems to be effected against vexatious or trifling prosecutions. But the Vexatious Indictment Act provides another mode in which a bill may still be preferred without any preliminary magisterial proceedings, and that is the direction or consent in writing of a judge or law officer; and it seems to me that, in reference to this latter mode of proceeding, it could not have been intended that the fiat of the Director was also necessary. I am unable to see any reason why that additional safeguard should be required, or that expense and trouble should be imposed

upon a prosecutor. Is it to be supposed that if a judge or law officer, with all the circumstances before him, in the exercise of his discretion "directed" a prosecution, the order was to be of no avail without the allowance of the Director of Public Prosecutions; or if the prosecutor, disclosing all necessary facts to the judge, obtained his consent in writing, that must be subject to a previous preliminary investigation or subsequent allowance or fiat? I cannot think so; of course, if the words of the Act plainly said it, such would be the result; but, to my mind, the words actually used in sect. 3 are satisfied by the application of them to summary proceedings, and do not extend to an indictment commenced merely by itself. The question now remains (not free from doubt, as evidenced by the views expressed by some of my learned brethren on the argument, but which, after careful consideration, I am compelled to answer in the negative), whether a criminal information at the suit of a prosecutor is included in the provisions of sect. 3? Now, as I have before said, it is admitted that an information *ex officio* by the Attorney-General is not a criminal prosecution within it. That it is not so is evidenced by the fact that the Attorney-General for Ireland is constituted the alternative jurisdiction for that country. But that is not the reason for the exclusion, the real ground being (as tacitly admitted by Mr. Russell) that it could not have been intended by the Legislature that the discretion of a high public officer like the Attorney-General should be submitted to the discretion of the Director of Public Prosecutions, although also a high public officer, for the exercise of the very same functions. But that ground of exclusion seems to me to apply with at least equal if not greater force to the supposition that the discretion of this court, the highest criminal court in the realm, is subordinated to that of another tribunal; and before I could arrive at that result I should require a much clearer indication of the will of the Legislature than I find in sect. 3. In the first place, if the words are to be applied to a criminal information, the period when a prosecution is "commenced" is somewhat uncertain. Is such a prosecution commenced when the order *nisi* is obtained, or when the information is filed? If the filing of the information is the commencement, then the order of this court that it shall be filed is in effect rescinded by the refusal of the Director to give his sanction, and Mr. Russell fairly admitted that this consequence would be so unreasonable that he could not contend for it. But he said that such was not the case, and that the prosecution commenced at some earlier period, and (so far as I was able to collect, he fixed that earlier period at the application for and making of the order *nisi*. But if that be so, the consequences appear to me to be as unreasonable as in the other view. Is the subject in a case in which in the discretion of this court, if brought before it, he would be entitled to have what he asks for, to be prevented from making any application for it? Is the Director of Public Prosecutions to be asked to give leave to apply for the leave of this court? Is he to exercise a discretion preliminary to the exercise of a second discretion by another and higher tribunal acting with all parties before it and with the same identical functions? and, if so, with what object? The action of this court, in granting or

refusing an order to file a criminal information, guards against all the mischiefs attending either upon summary proceedings or indictment; and the only one which Mr. Russell was able, when pressed, to point out as the object of the Legislature, if the fiat is necessary in criminal information, was the *ex parte* application for the rule. But that application is either successful or not; if successful, it is one which ought not to have been prevented; if unsuccessful, the defendant is in no way vexed or harassed by any order. Again, I say that all these consequences seem to me to be so unreasonable that, unless the Legislature has plainly said they are to come into existence, I cannot think that it contemplated them; and, in my judgment, the words used in the 3rd section are not sufficiently indicative of any such intention. The terms used in that section are general; admittedly they must receive some limitation, and I think that the necessary limitation to be imposed excludes criminal informations and indictments where preferred by the direction or with the consent in writing of a judge or law officer. I think, therefore, that the rule must be discharged.

DENMAN, J.—The question in this case turns upon the true meaning of sect. 3 of 44 & 45 Vict. c. 60. The words of that section are as follows: "No criminal prosecution shall be commenced against the proprietor of any newspaper for any libel published therein without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained." The facts of the present case are, that a rule has been made absolute, by which it is ordered that a criminal information be filed against the defendant Yates, who is the proprietor of a newspaper, for an alleged libel appearing in his paper; that a criminal information has been accordingly filed by the master of the Crown Office; and that no written fiat or allowance of the Director of Public Prosecutions has been obtained. At first sight this state of facts would seem to bring the case within the section referred to, and to show that the information, having been issued in violation of the enactment, ought to be quashed, for there can be no doubt that, according to ordinary understanding among lawyers, and to the words of the most approved text-books, a criminal information filed by the master of the Crown Office is a well-known kind of criminal prosecution, so that the words of the statute, construed according to a well-known use of them among lawyers, will include the case. There might be some doubt as to the particular stage of the proceedings at which the prosecution was "commenced;" but this would be immaterial to the decision of the present case, for there could be no doubt, if the section includes a criminal information under the words "criminal prosecution," that the prosecution would have been "commenced" at the latest when the information was actually filed. But, notwithstanding the apparent ease and simplicity of the above solution of the case, I have, upon consideration of the whole statute, 44 & 45 Vict. c. 60, and the Acts therein referred to, and having regard to the state of the law relating to criminal informations existing at the time when that statute was passed, come to the conclusion that sect. 3 does not apply to criminal informations at all; and that the words "criminal

prosecution for any libel" must be construed as confined to proceedings by indictment or before a magistrate with a view to obtaining either the power of indicting or a summary conviction as provided by the Act. My reasons for thinking that this is the true meaning of the 3rd section are as follows: In 1881, when the 44 & 45 Vict. c. 60 was passed, there was in existence, and still is, unrepealed, the statute 4 & 5 Will. & M. c. 18. That is an Act with which all lawyers are familiar, and which it is impossible to suppose to have escaped the attention of the Legislature. Its object was to prevent the abuses which had arisen, owing to the too great ease with which the master of the Crown Office had exhibited criminal informations on the relation of private prosecutors. The main provision of that Act, the whole of which is still in force, and which has been constantly acted upon ever since, is that the master of the Crown Office "shall not, without express order to be given by the Court of King's Bench in open court, exhibit or file any information for misdemeanour." Upon this provision a not inconsiderable and a very well-known portion of the jurisdiction, practice, and business of the King's Bench has for nearly two centuries been founded, and in no class of misdemeanour has it been more called upon to act than in cases of libel, and in no cases of libel more frequently than in applications against proprietors, &c., of newspapers. Nothing can be more improbable than that the Legislature, with such a jurisdiction, and the statutable requirements in connection with it still in constant operation, should have intended to enact that, either before or after applying to the court for the "express order" mentioned in that well-known statute, a party complaining of a libel in a newspaper should be required to obtain the fiat or allowance of any individual. But it is not sufficient merely to show that it is improbable. The true question is, has the Legislature so enacted? I am of opinion that it has not. I think that the words of sect. 3 do not, when read with the rest of the Act, show an intention to include, or necessarily or in fact include, criminal informations. They are, no doubt, large enough to include them; but in the construction of statutes, though where clear and unambiguous words are used—where the language is precise and capable of but one construction—it is not the province of the court to scan the wisdom or policy of the enactment, but to give effect to the plain meaning of words—yet, where general words are used, capable of including or excluding a particular case, it is, I apprehend, clearly the duty of the court to call to its aid the other provisions of the statute itself, and of other statutes referred to in it, and, assisted by these, and having regard to the state of the law existing at the time of the enactment, to form its judgment as to the real intention of the Legislature, and the true meaning of the language used in the passages in which it is used. Sometimes what Lord Cottenham called "flexible expressions" are used (see *Salkeld v. Johnson*, 1 Mac. & G. 284; 18 L. J. 497, Ch.); and in such cases, when the question arises whether a particular case falls within the enactment or not, such assistance is of the utmost importance. Akin to this observation is the maxim that all words, if they be general and not express and



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precise, are to be restricted to the fitness of the matter: (Bac. Max. 10.) It is also a true canon of construction of statutes that the Legislature does not intend any alteration in the law beyond what it declares, either in express terms or by necessary implication. There is, moreover, a presumption against any such intention, not only to oust, but to restrict the jurisdiction of the Superior Court, except where such intention is clearly shown. Now, admitting fully that a criminal information in ordinary parlance, and even in ordinary legal parlance, is a kind of criminal prosecution, I am of opinion that, applying the principles above referred to, it is not a "criminal prosecution" within the meaning of those words as used in sect. 3 of 44 & 45 Vict. c. 60. The Act begins by reciting that it is expedient to amend the law affecting civil actions and criminal prosecutions for "newspaper libels." It is said that a criminal information is a kind of criminal prosecution, and therefore it is included in the preamble of the Act, and that, if the Act had not intended to include it, it would have used the word "indictments" only. This would be a strong argument if the Act referred to no other proceedings except indictments, and (possibly) criminal informations; but it does refer expressly in the following clauses 4 and 5 to proceedings before magistrates, which are in their nature the commencement of criminal prosecutions, and which in one case may end in an actual conviction for libel (sect. 5). It seems to me that there is more reason for saying that those are what the preamble refers to, than that the general words "criminal prosecutions" include that peculiar kind of criminal prosecution (fenced about as it already is by 4 & 5 Will. & M. c. 18) known to everybody as a proceeding by way of criminal information. There is, indeed, one provision in the Act which I think would apply to criminal informations—namely, that in sect. 15, which provides that copies of registers shall be conclusive or *prima facie* evidence, as the case may be, "in all proceedings civil or criminal." This alone would satisfy the words of the preamble. But it is never safe to rely too much upon the words of the preamble, either as extending or limiting the enacting parts of the statute. Now, turning to the words of sect. 3, "no criminal prosecution shall be commenced," can it be supposed that these prohibitory words are intended to prohibit a person from doing (or, to speak more correctly, from having done for him by the master of the Crown Office) that which he has power to do, or have done, until he has obtained a rule absolute for an "express order" of the Court of King's Bench that the master of the Crown Office shall file the information subject to well-known and elaborate provisions by statute as to recognisances and other matters? Or, if the mere motion for the rule, or any intermediate stage of the proceedings, before the filing, be looked upon as the "commencement" of the prosecution, can it be supposed that the Legislature intended that the Director of Public Prosecutions should have the power of vetoing an application to a court invested by a well-known statute with full power and discretion to decide whether an information shall or shall not be filed by its own officer? Either of these suppositions seems to be wholly inadmissible. But, pursuing further the words of

sect. 3, no criminal prosecution is to be commenced in the cases mentioned "without the written fiat or allowance of the Director, &c." This seems to me to be very inaccurate language as applied to the case of a criminal information, and equally so whether the commencement of the prosecution be the filing of the information or any anterior proceeding. In the former case the statute gives the Director no power to "fiat" or "allow." He cannot say, "Let it be done," or effectively allow it, independently of the court. For, whatever he may write, the Court of Queen's Bench is not bound to order an information to be filed. On the other hand, if the motion, or any subsequent steps short of the filing, is the commencement of the prosecution, the words "fiat" or "allowance" are equally out of place. Passing on to the succeeding sections of the Act, sects. 4 and 5 contain provisions relating to proceedings in courts of summary jurisdiction where criminal charges are made against proprietors of newspapers for libel; and they both contemplate a proceeding which may end in an indictment or summary conviction, as the case may be, and are wholly inapplicable to a proceeding by criminal information. Sect. 5 contains a provision enabling the court of summary jurisdiction in certain cases, with consent of the parties charged with libel, to deal summarily with the case, and applies the provisions of sect. 27 of 42 & 43 Vict. c. 49, relative to indictable offences dealt with summarily. This provision is not applicable to the case of a criminal information. Then by sect. 6 it is enacted, "That every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within and subject to the provisions of 22 & 23 Vict. c. 17, intituled 'An Act to prevent vexatious indictments for certain misdemeanours,'" which provisions are again wholly inapplicable to criminal informations. The words of sect. 6 are difficult to construe; but I can put no construction upon them which is at all consistent with any view except that the libels dealt with by the Act are only libels to which the Vexatious Indictments Acts are applicable; that is to say, libels for which proceedings are taken in such manner that the Vexatious Indictments Acts can apply; that is, libels which are prosecuted by indictment or summary conviction; not libels for which proceedings are to be by application to the Queen's Bench for, or by the actual filing of, a criminal information. I have now dealt with all the provisions of 44 & 45 Vict. c. 60 which have any bearing upon the question raised before us, and I cannot resist the conclusion that sect. 3 of the Act was never intended to apply to criminal informations; that the words "criminal prosecution" do not mean to include "criminal information" or proceedings to obtain criminal information, but that they are confined to the kinds of prosecutions contemplated by sects. 4, 5, and 6 of the Act and the Acts therein referred to, viz., indictments and proceedings before magistrates, with the view of indicting or obtaining a summary conviction in the case provided for by sect. 5 of the Act. For these reasons I am of opinion that the rule in this case ought to be discharged.

Lord COLERIDGE, C.J.—In this case a criminal information has been filed against Mr. Yates for libel, and the question for our consideration is whether, previously to that application being



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made, the leave or sanction of the Director of Public Prosecutions should have been obtained. I observe that the Act under which the question arises is one passed in favour of newspaper proprietors. It enlarges the well-established rule which protects *bona fide* reports of matters of public interest, and is intended to make prosecutions more efficient. The earlier Act (Lord Campbell's Act) very much enlarged the ordinary protection which a person accused of libel has, and this Act was carried to enlarge that protection still further in the case of newspapers. At the time of the passing of the Act one of the most ordinary modes of proceeding against newspapers for libel was by means of a criminal information. In the books the commonest cases of criminal information will be found to be against newspapers, and to suppose that the Act enlarging the protection previously afforded to newspapers was not intended to include one of the commonest modes of prosecution imposes, in my opinion, the onus on those who say it does not of showing that they are right. If the words are clear, and if the matter with which they deal is such as may reasonably be seen to have been under the notice of the Legislature at the time, we have no business to look about for a way of evading their plain effect. It is otherwise only when the ordinary sense of the words used would lead to a grave absurdity. Take the case of the Attorney-General in England or Ireland under sect. 3 of this Act. He, as representing the Crown, files *ex officio* an information. It is clear that that cannot be intended to be included in the words "criminal prosecution;" it is clear, because in Ireland the Attorney-General is the same person as he whose fiat is required, and in England the Director of Public Prosecutions is the subordinate of the Attorney-General. I agree, therefore, that the conclusion applying sect. 3 to *ex officio* informations would be absurd, and so I have no difficulty in deciding that such a prosecution is not within sect. 3, because it cannot have been intended to be within it. If reasons of the same cogency could be adduced as to other criminal informations, I should agree with the majority of the court; but I confess that I have a great objection to construe plain words to exclude what they do or to include what they do not say. It is the duty of the court to construe the words as they are, without adding to or taking from them. When I was young an Act was passed to take away the equitable jurisdiction of the Court of Exchequer, and yet there were found plenty of arguments to show that it had nevertheless not done so in revenue cases, and the court itself so decided. Afterwards an Act was passed to enlarge the jurisdiction of the Mayor's Court; yet the greatest jurist of my time persuaded himself and the Court of Common Pleas that the Act had no such effect. Later the Court of Appeal overruled this decision, and declared that the Act meant what it said. Another Act of Parliament said that costs should follow the event, nevertheless it was ingeniously argued and decided that it was meant that they should not, and that was so held till finally corrected in the House of Lords. These are instances of the tendency there is to disregard plain language in Acts of Parliament, and to substitute some wholly inconsistent opinion for it, and against this tendency courts ought to be on their guard. For my part, I always give way

with the greatest possible reluctance when I am obliged to say that the Legislature has not enacted what it seems to have done, and I do not think that this is a case where I am at all so obliged. The Act here says: "No criminal prosecution shall be commenced . . . without the written fiat," &c. I have shown that at the time of the Act passing criminal information was a very common way of beginning prosecutions against newspapers. Those who passed the Act must have been aware of it, and it is incredible that a House full of lawyers should have intended to exclude that common mode of prosecuting newspapers and yet have used the words I have just read. I think, therefore, that "criminal prosecution" must include criminal information. Now, what is the chief argument against so construing the plain words? It is, that proceedings by criminal information require the "express order" of the Queen's Bench in open court to be given to filing the information, and that to say that the Director of Public Prosecutions must give his leave restrains the exercise of the jurisdiction of the Queen's Bench. If I could see that this was so, I might think the conclusion to be drawn from the fact of such restraint very difficult to escape from in construing the section. If the Act limited the discretion of the court by interposing the fiat of the Director of Criminal Prosecutions it would be a serious matter. But I venture to think that no such conclusion is necessary at all; to say that the necessity of going through certain conditions precedent to the coming to the court or judge or a grand jury amounts to a fettering of the tribunal is, in my opinion, a misuse of language. The condition has to be fulfilled by a person desiring to proceed before the exercise of the discretion in question is asked for. One of my learned brothers has fairly enough held that, in his view, an application to a judge is also outside the section. The proceedings of the Queen's Bench are regulated by the statute 4 & 5 Will. & M. c. 18. That Act shows, by the preamble, that the proceedings by criminal information, through the Queen's coroner, had previously been treated as a purely private matter. The master of the Crown Office granted leave to file informations as of course on the private application of individuals. The statute restrained the Queen's coroner from acting, possibly improperly, on private information, and necessitated application to the court, whose discretion was thenceforward to be exercised as to granting or refusing leave to file; so, now, I see no more reason why this well-known private mode of redressing wrongs should not be subjected to the preliminary condition imposed by this statute. There is no more interference with prerogative or jurisdiction of the court than there was by the Act of William and Mary. On the other hand, there is abundant reason and good sense in imposing the condition. The Director of Public Prosecutions has means of investigating and inquiring into matters which the court has not; for it must be remembered that at first the application to the court is *ex parte*—one side only is heard. It has been too much insisted on that when the court makes the rule absolute the condition requiring the fiat is a fettering of its discretion, whereas when it discharges the rule—thereby saying that its discretion ought not to have

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been appealed to—its discretion must obviously be wholly free. I do not therefore think that it is at all derogatory to the honour of the court that this preliminary should be required. I think, further, that the difficulty as to the "commencement of the prosecution" is not great. A criminal prosecution is "commenced" within the meaning of this Act of Parliament when the first step is taken in a long series of legal proceedings which end in the conviction of the accused. It is therefore the coming to the court to ask leave to proceed that is the "commencement," and the Director of Public Prosecutions must be asked for his fiat before any application is made to the court at all. I come, without hesitation, to the conclusion that this rule should be made absolute.

*Rule discharged.*

The defendant was afterwards convicted, and sentenced to four months' imprisonment, but was released on bail pending the decision of the Court of Appeal on a writ of error, which raised the same question as that decided against the defendant by the majority of the court in the above judgments.

Jan. 13 and 14, 1885.—The case was argued in the Court of Appeal, before Brett, M.R. and Cotton and Lindley, L.JJ., by Charles Russell, Q.C. and *Boz* (Poland with them) for the defendant (plaintiff in error), and by Sir H. James (A.G.) and Danckwerts for the prosecution.

The arguments are sufficiently noticed in the judgments. The following authorities were referred to:

*Reg. v. Drury*, 18 L. J. 189, M.C.;  
*Clarke v. Postan*, 6 C. & P. 423;  
*Reg. v. Steel*, 35 L. T. Rep. N. S. 534; 2 Q. B. Div. 37;  
*Reg. v. Fletcher*, 35 L. T. Rep. N. S. 138; 2 Q. B. Div. 43;  
*Stradling v. Morgan*, Plowd. 199;  
*Eyton v. Studd*, Plowd. 459;  
*Heydon's case*, 3 Coke, 7;  
*Wigan v. Fowler*, 1 Stark. 459;  
*Harding v. Preece*, 47 L. T. Rep. N. S. 100; 9 Q. B. Div. 281;  
*King v. Cole*, 6 T. R. 640;  
*R. v. Almon*, 6 T. R. 642, note;  
*R. v. Robinson* (cited in *King v. Cole*), 6 T. R. 642;  
*Ditcher v. Denison*, 11 Moo. P. C. C. 324;  
*Attorney-General v. Brown*, Forrest, 110;  
*Reg. v. Labouchere*, 50 L. T. Rep. N. S. 177; 12 Q. B. Div. 320;  
*The case of Thatcher and Waller*, Sir T. Jones, 53;  
*Smith v. Commissioners of Sewers*, 1 Mod. 44;  
*R. v. Morsley*, 2 Burr. 1041;  
*Dr. Foster's case*, 11 Coke, 56;  
*Corner's Crown Practice*, 168;  
*Hawk. P. C. book 2*, cap. 26, s. 4;  
*4 Blackstone's Commentaries* (by Coleridge), 301-310;  
*Odgers on Libel*, 380;  
*Bacon's Abr. "Court of King's Bench"* (A);  
*1 Chitty's Criminal Law*, 843;  
*Manning's Exchequer Practice*, 220.

*Cur. adv. vult.*

Jan. 16.—The following judgments were delivered:—

BRETT, M.R.—In this case a criminal information for a newspaper libel was exhibited at the instance of a private prosecutor against the defendant, who was tried and found guilty. The case now comes before us upon a writ of error, and we have no jurisdiction, inasmuch as this is a criminal case, except upon such a writ. In order to deal with the question of the alleged error on the record, we must look at the information itself. The

objection of the plaintiff in error comes to this, that the leave of the Director of Public Prosecutions was a condition precedent to the jurisdiction of the court, and not merely a regulation which might or might not be waived, or which would be an error in the course of the proceeding if the case were allowed to go on without its being proved. He must go to the extent of saying that this is a condition precedent to the jurisdiction of the court, that it is necessary to aver jurisdiction, and that such an averment is wanting. The first thing to be determined is, whether under the statute in question it is a condition in any sense that the fiat of the Director of Public Prosecutions should be obtained, i.e., whether sect. 3 of the Newspaper Libel and Registration Act 1881 applies to criminal informations for newspaper libels at the suit of private prosecutors. If it does so apply, then at some time or other it would seem that the fiat must be obtained. If it does not apply, then there is no objection which can successfully be urged to this information. It was strongly urged on behalf of the plaintiff in error that sect. 3 does apply to criminal informations for newspaper libels at the suit of private prosecutors. The first point taken was, that sect. 2 clearly so applies, and if so, that the first recital in the preamble of the Act must also apply, and then that the phrase "criminal prosecutions" also applies to such informations, in which case the same interpretation must be given to the same phrase in sect. 3. That sect. 2 does apply to such criminal informations. I do not doubt in the least, but I do not think that it follows that the phrase "criminal prosecutions" in the preamble applies to criminal informations. The only argument which can be urged to the contrary is to say that sect. 2 cannot go beyond the preamble. The phrase in sect. 2 is not "criminal prosecution," but "proceeding," which is a far larger term. I have no doubt that a proceeding for libel by means of information is a "criminal proceeding." But it does not follow that the preamble is to be as large as sect. 2, for it is well known that a positive enactment can go beyond a preamble. Whatever may be the meaning of the preamble, it is clear that sect. 6 goes beyond the preamble, for it extends to all libels, whereas the preamble refers only to newspaper libels. Therefore it may be that sect. 2 also goes beyond the preamble, and therefore the application of sect. 2, which uses a different term from that in the preamble, does not assist us in ascertaining the meaning of the phrase "criminal prosecution" in the preamble. I agree that, whatever is the meaning of the phrase in the preamble, it is contrary to every canon of construction to say that when the same phrase occurs in the section a different construction can be given to it. The question is reduced to the same thing, namely, what does it mean in one or both sections? The next argument was, that in Acts of Parliament *in pari materia* informations and indictments have always been dealt with together, and that the Act now in question would be the first in which they were separated. Several Acts of Parliament have been cited to us, one of which is 32 Geo. 3, c. 60. But there distinct phraseology is used to distinguish indictment from information. The Act speaks of "the trial of an indictment or informa-

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tion." Then the next statute, 60 Geo. 3 & 1 Geo. 4, c. 8, does not contain either of the phrases, and therefore does not assist us. Then in 3 & 4 Vict. c. 9 the phraseology used is "civil or criminal proceeding." The term "criminal prosecution" is not used. Therefore the term "criminal proceeding" has the same larger interpretation as in sect. 2 of the Act of 1881, but does not lead us to the meaning of "criminal prosecution" in sect. 3. Lord Campbell's Act (6 & 7 Vict. c. 96) speaks of "any indictment or information;" so there, when both classes are to be brought into one enactment, distinctive phrases are used which describe both. It seems to me, therefore, that on looking at Acts of Parliament *in pari materia* it cannot be seen that the phrase "criminal prosecution" has been applied to prosecutions by way of indictment or information; on the contrary, they show that when Parliament desires to deal with both indictments and informations, either words are used which must combine both, or distinctive phraseology is used. It was said that the term "criminal prosecution" is the ordinary expression used in legal proceedings by lawyers as comprising both prosecution by indictment and by information. In the first place, those very Acts of Parliament which have been cited show that this is not so, for that phrase is never so used. Secondly, so far from saying that this is the ordinary mode in which lawyers speak of prosecutions by way of information, in my opinion that is precisely the phrase which lawyers would not use, and in speaking of a prosecution for libel they would mean a prosecution in the ordinary way by indictment by a bill found by a grand jury, or a prosecution before a magistrate; and in a case of criminal information for libel lawyers would not say that the defendant had been prosecuted, but that he had been tried on an information at the suit either of a private prosecutor or of the Attorney-General. Therefore to say that the term "criminal prosecution" is a phrase which is used by all lawyers as one comprising both prosecutions by indictment and by information is a proposition which cannot be maintained. But that is a general phrase which, according to the ordinary English language and legal scientific language, may comprise several different modes of prosecution, viz., prosecution by way of bill of indictment found by a grand jury, prosecution before a magistrate, or prosecution by way of criminal information. Therefore there is a general term which may comprise several modes of dealing with the matter. When under such circumstances the question is raised whether a case which the general term may comprise is not within it, the true canon of construction is, that if it can be shown that the case is not within the mischief of the enactment, and that to include it will lead to an absurd state of things with regard to the administration of the law, then the court ought to hold that the general phrase does not comprise that particular case, because to include it would produce an absurdity. Then we must consider whether the case of a criminal information for newspaper libel is within the mischief of the statute, and also whether, if such informations are within sect. 3, the result must not be an absurdity in the administration of the law. In the first place, it seems to me impossible to say that if the term "criminal prosecution" in sect.

3 includes prosecutions by way of information, it does not include both criminal informations at the suit of private persons and those filed *ex officio* by the Attorney-General. The question is, whether either or both these cases are within the mischief of the statute, and whether the application of the section will not produce an absurdity in one or the other. What was the mischief at which the statute was directed? Newspaper proprietors must not publish libels for any motive of their own, but are only protected when under certain circumstances they publish libels, not for their own purpose, but in order to give information to which the public is said to be entitled. It is obvious that a newspaper proprietor might be harassed by criminal proceedings, and might, when publishing information, casually publish that which would be a libel against an individual, and then, though the newspaper proprietor might not in truth have been guilty of any practical or moral offence, a person might have gone before a grand jury without having applied to the newspaper proprietor or told him that he was going to do so. If the grand jury threw out the bill I cannot say that the newspaper proprietor would have been damaged at all, but the bill might have been found, and been turned into an indictment for libel, without his having had any means of knowing of it, and then he would necessarily have been put to considerable expense, trouble, and anxiety. A grand jury do not listen to any defence, but only find that there is a *prima facie* case, so that, if the alleged libel is put in, and shows that it is a libel, a true bill is found. In the same way, if a prosecutor went before a magistrate, the magistrate would not hear any defence before he issued a summons. Therefore the mischief against which the statute was directed was this, that for a really unimportant matter a newspaper proprietor might be put to trouble and expense, because a prosecutor might commence proceedings against him without giving him any opportunity for explanation. That mischief is applicable both to the case of prosecution by indictment and of prosecution before a magistrate. Does that mischief apply in the case of a prosecution to be commenced by information either at the suit of a private prosecutor or of the Attorney-General *ex officio*? Upon applying to the Queen's Bench Division for a criminal information for libel the prosecutor brings before the court the libel, and his affidavit that he is wholly innocent of the charge against him. Upon that a rule *nisi* is granted, and the newspaper proprietor has an opportunity of showing cause before he is tried by a jury. Therefore in such a case the prosecutor is not empowered to go on to the bitter end without interference from any authority; but from the very first step he is brought before the court, and the defendant is also before the court, and has the protection of the consideration of the court. In the case of an *ex officio* information, there is the protection of the responsibility of the Attorney-General, the highest officer at the bar, who by the call of his office is bound, in considering anything in regard to criminal prosecutions, to conscientiously exercise all his knowledge in order to say whether there is a sufficient case for prosecution. Therefore with regard to informations at the suit of private persons, or of the Attorney-General, the mischief aimed at by this statute does not exist. But it is

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necessary to go further, and to consider whether, if such informations are included within the enactment, an absurdity will be produced in respect of either of them, for I think that if the section applies to one it applies to both. It seems to me that an absurdity would be produced in both cases. This point will depend upon when a criminal prosecution by way of information can be said to commence, because the fiat is only required at the moment before the prosecution commences. Upon that point the statute 4 & 5 Will. & M. c. 18, is most important. I cannot doubt that before that statute the commencement of a prosecution by way of criminal information was the exhibiting of the information to the officer to be filed. Is there anything in that statute to alter this, and to make something else the commencement of the prosecution? That statute deals with proceedings before the information, and requires the order of the Court of Queen's Bench to file the information. Can it be said that to ask the court for leave to begin a prosecution is to begin the prosecution? In some cases the leave of a judge is required before an action can be brought. Can anyone say that if an action begins by writ, and it is necessary to go before a judge for leave to issue the writ, the action commences before the writ is issued? The proposition is, that to ask leave to do a thing is to do the thing. It is only necessary to state the proposition to show the fallacy. Therefore, after the statute, that which was done in the Queen's Bench was preliminary to the commencement of the prosecution, and a prosecution by way of information commences at the time when the information is received by the proper officer and is filed. It was said that the analogy to the case of a summons granted by a magistrate was so close as to oblige us to say that, if that proposition as to the commencement of the prosecution is affirmed, the laying an information before a magistrate in order to obtain a summons is not the commencement of the prosecution. I do not hesitate to say that, in my opinion, the information laid before the magistrate, for the purpose of asking whether he will issue a summons or a warrant, is not the commencement of the prosecution, because a magistrate may refuse to issue a summons or warrant, in which case it could not be said that a prosecution had commenced. A prosecution once commenced can only be ended by the definite conclusion of it. In any case the analogy is not good, because an information before a magistrate would not under such circumstances be to ask leave to proceed. It seems to me that the commencement of a criminal information is the filing or exhibiting of the information. If so, the fiat of the Director of Public Prosecutions need not be asked for or obtained until the moment before that commencement. If so, the application to the court, or to the Attorney-General, in order to see whether the information shall be exhibited, may take place before the application to the Director of Public Prosecutions. Therefore, it follows that the court may, upon the affidavits of both sides, make a rule absolute for a criminal information, and then the Director of Public Prosecutions may refuse his fiat. If that proposition is true, he would practically overrule a decision of the court upon solemn argument, and if the application has been to the Attorney-General the decision

of the Attorney-General would be practically overruled by the decision of an officer who by the statute creating the office is made in every way subordinate to him. Therefore, in either way, the result is an indecent absurdity in the administration of the law. Even if the commencement of a criminal information were the first application to the court, then it might be said that before an application could be made to the court, the fiat of the Director of Public Prosecutions would be necessary. Applying that to an *ex officio* information by the Attorney-General, the Executive on the advice of the law officers might come to the conclusion that for the public peace an information should be filed, and yet the Attorney-General would be obliged to go before the Director of Public Prosecutions, and ask whether he agreed with the opinion given to the Government by the law officers of the Crown. I repeat that by such an application of the enactment the matter is reduced to an indecent absurdity in the administration of the law. Therefore, with regard to the case of *ex officio* informations, I think it is impossible to conceive that the Legislature could have so intended or enacted. If I am right in saying that, if the phrase "criminal prosecution" applies to prosecutions by way of information at all, it must apply both to those at the suit of private persons and to those filed *ex officio* by the Attorney-General, and if I have shown that if it cannot apply to the latter class, then it follows that it cannot apply to the former. As to informations at the suit of private persons, there is also the fact they are not within the mischief of the law at all. It does not follow that the term "criminal prosecution" in sect. 3 can have no application. No doubt it applies to prosecutions by way of bill of indictment and to proceedings before magistrates. Then it was argued that we are about to strike out of sect. 3 prosecutions by way of criminal information because we say that to include them will produce absurdity in the administration of the law; but that by reason of sect. 6 applying the Vexatious Indictments Act to every offence under the Act of 1881 the same absurdity will occur in the prosecutions by bill of indictment, and therefore, if we give way to the absurdity in the case of sect. 3, we shall be obliged to do the same in the case of indictment, and nothing will remain to which sect. 3 can apply. But the Vexatious Indictments Act obviously applies only to indictments. As to the same absurdity being produced, it must first be noticed that sect. 6 goes beyond the preamble of the Act, and deals with libels other than newspaper libels. How the words "and every offence under this Act" got into the statute I cannot say, but I think by inadvertence. The words apply to newspaper libels, for that is an offence within the Act, but the section cannot apply to a criminal information, for that is never begun by bill of indictment. Therefore, the effect of the application of the Vexatious Indictments Act is that no bill of indictment for newspaper libel is to be presented and found by any grand jury "unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be preferred against

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him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the Superior Courts of law at Westminster, or of Her Majesty's Attorney-General or Solicitor-General for England:" (22 & 23 Vict. c. 17, s. 1.) With regard to several of these matters, they do not arise until the prosecution has commenced. Thus the person accused cannot be detained in custody unless a prosecution has commenced before a magistrate or a bill of indictment has been found. So the person accused cannot be bound by recognisance until after the indictment has been preferred. Now, in order to construe sect. 6 as incorporating the Vexatious Indictments Act with regard to a bill of indictment for a newspaper libel within sect. 3, it must be said either that sect. 3 gives an alternative protection to that mentioned in the Vexatious Indictments Act, so that, if the proposed prosecutor obtains the fiat or complies with that Act, he may go on to prosecute; or, secondly, that he cannot commence the prosecution without both the fiat of the Director of Public Prosecution, and the consent in writing of one of the judges or the Attorney-General. The same reasons which seem to justify one in saying that the Legislature could not have intended to cause the jurisdiction of the Director of Public Prosecutions to clash with the authority of the Attorney-General show that it could not have been meant that the leave of the judge could be overruled by the Director of Public Prosecutions, or that the fiat must be obtained before asking leave of the judge. That is an indecency which could not have been intended. Therefore, both sections must be read reasonably, and it must be held that, at all events, the fiat is not required when the judge or the Attorney-General gives leave to prosecute by bill of indictment. We do not, as alleged, allow the absurdity in the case of indictment by bill. Therefore I act upon the ordinary canon of construction, that, where in a statute there is a general phrase which, though it may comprise several specific things, yet, if it is applied to one or more of them, will act upon that which is not within the mischief, and will thereby produce an absurdity, which it is impossible to suppose that the Legislature intended, then the general phrase is to be left to act upon that which is within the mischief, and not upon that which is not within it. For these reasons I come to the conclusion that the term "criminal prosecution" in sect. 3 does not apply to a criminal information, either at the suit of a private prosecutor or of the Attorney-General *ex officio*. I wish to add that, even if it did apply, I doubt whether it would go to the extent of being a condition precedent to the jurisdiction of the court. I think it would rather be a protection to the newspaper proprietor, in this way, that the fiat would have to be proved as a necessary part of the procedure, unless the defendant waived the objection. I have considerable doubt, but I am inclined to think that it is a personal protection to the defendant, which he might waive, in which case it is a matter of proof in the procedure, and does not go to the jurisdiction of the court. Therefore, if sect. 3 did apply, I should have doubted whether the want of an allegation of the existence of the fiat in the information would have been a matter which

showed that the court had no jurisdiction. The objection would have been only to the procedure, and would not have been upon the record, and therefore we could not have taken any notice, whether it had been proved or not. Having come to the conclusion that it would be wrong to hold that criminal prosecutions by way of information are within sect. 3, I am of opinion that the judgment of the Queen's Bench Division must be affirmed.

COTTON, L.J.—On the last point mentioned by the Master of the Rolls I do not add anything. It was not argued before us, but I think it should be mentioned so that it may not be said that the matter was overlooked by the Court of Appeal. The question to be decided is as to the true construction of sect. 3 of the Newspaper Libel and Registration Act 1881. I have no doubt that the general words "criminal prosecution" in that section are sufficient to include certain particular things, namely, prosecutions by way of information and proceedings before magistrates, but they are not appropriate to criminal informations in the sense of being specially appropriate, and I should say that they were words not generally used with regard to that mode of proceeding for an offence. It is said that, if we find words in a statute, we ought to apply them even if they lead to absurdity, leaving those who have made the enactment to correct the mischief. No doubt, where the Legislature has used words which will be deprived of application unless they are construed in a sense leading to absurdity, it is not for any court to correct that which has been done by Parliament. But it is different where the language used is not specific but generic, and applies to various things. If the result of applying the general term to a specific thing will produce manifest absurdity, incongruity, or inconvenience, then it is the duty of the court so to construe the general term as not to apply it to that which it may include, if the provisions are not in the opinion of the court such that the conclusion must be that the Legislature intended the general words to have that application. That is a rule of construction which has often been applied, and it is unnecessary to refer to authority to show that there are many general terms in Acts of Parliament which have been so construed because they included that which either was not within the mischief of the statute, or which if included would lead to absurdity. Now we have to consider this: The words "criminal prosecution" do generally include that class of prosecution which is begun by criminal information. Are they to be unrestricted? All the judges before whom the rule to take the information off the file was argued held that *ex officio* informations could not be included in them. If it is admitted that the words do not apply to all cases of criminal information, and that there is an exception from the generality of the words, it only comes to a question whether the reasons for excluding criminal informations at the suit of private prosecutors are sufficient to require us to say that these general words do not apply to that particular kind of prosecution. In the first place, I think that a criminal information even at the suit of a private prosecutor is not within the mischief intended to be guarded against by this section. The object of the section was to prevent newspaper proprietors being harassed by vexatious

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prosecutions for libel. There must be certain steps taken, and the judgment of the court is obtained before there can be any criminal information exhibited against a newspaper proprietor. Can it be said therefore that the mischief can possibly arise until the information is exhibited or filed? It is impossible to say that it can, when a matter has been before the court, and not only the private prosecutor, but also the person against whom the information was asked for has been heard, and when we know that the court is most careful in not allowing an information to be exhibited unless it is satisfied not only that the matter is not vexatious but that it is of public importance, having regard to the charge and the person against whom it is made. Having regard to the care taken by the court in dealing with the affidavits, in my opinion there cannot be any such mischief as was intended to be remedied, even if the proceedings do not commence until after the rule *nisi*. Is there any absurdity, incongruity, or inconvenience in allowing the general words to be applied to criminal informations? As to criminal informations by the Attorney-General *ex officio*, I will not add to what was said by the Master of the Rolls. But as regards the particular class of information now in question, it is most material, though not essentially necessary, to determine when a criminal prosecution by way of information can be said to commence. It was contended on behalf of the plaintiff in error that the first application for a rule *nisi* is the commencement of the prosecution. But how can it be said that a prosecution has commenced against a person before he is summoned to answer any complaint? It is true that the application is to the court, asking for an order giving leave for an information to be exhibited. I should agree, if necessary, with the Master of the Rolls that, as before the statute of 4 & 5 Will. & M. c. 18, there could be no prosecution commenced until a criminal information had been exhibited, that is not altered by the fact of the statute requiring an order of the court before a criminal information can be filed. But, independently of that, it is merely asking the court to order something to be done before the prosecution can be prosecuted, and that is no more the commencement of a criminal prosecution than an application for an order for a particular person to issue a writ to commence proceedings in an action would be the commencement of the action. It was said that there was an analogy in the case of proceedings before magistrates, and, therefore, that there was authority to show that a prosecution before a magistrate commences when the information is laid before him. But such an information is for the purpose of asking him to issue a summons or warrant, whereas here the application is for the purpose of asking the court to direct their officer that something shall be done in order to bring the matter into court. The authority referred to, viz., *Clarke v. Postan* (6 C. & P. 423), in no way supports the proposition of the plaintiff in error. That was the case of an action against a person for having made a false charge of felony before a magistrate; nothing was said in the judgment as to when the prosecution had commenced. It is clear from the statement of the facts, not only that the information had been filed, but that the plaintiff had been summoned before a magistrate to answer the

charge. The plaintiff had been brought into court in order to answer the charge and the prosecution was commenced. A prosecution cannot be said to be commenced against a person until he is brought into court to answer the charge against him. Moreover, at p. 424 of the report it appears that one of the witnesses was clerk to the plaintiff's attorney, and had attended before the magistrate for the purpose of that charge. There was a summons before the magistrate, by whom it was dismissed. A much clearer authority is the case of *Rex v. Robinson*, which is referred to in *King v. Cole* (6 T. R. 640). The report says, at p. 642, that Lord Kenyon, C.J. "read a manuscript note of *Rex v. Robinson* (more fully taken than that in print in the note to *R. v. Jones*, 1 Str. 704, 3rd edit.), in which it was decided that the affidavits on a motion for leave to file a criminal information ought not to be entitled, and if they were they could not be read, that the affidavits produced on showing cause against the rule might or might not be entitled"—i.e., because then the defendant is summoned before the court—"and that all affidavits made after the rule was made absolute must be entitled." That is because then a criminal prosecution had commenced against the defendant, and therefore the affidavits were to be entitled accordingly. That is much more of an authority than *Clarke v. Postan* (6 C. & P. 423), where it was a summons before a magistrate, which was considered to be the commencement of the prosecution. In the present case the real commencement of the prosecution was when the information was filed, and there would be, in my opinion, the most manifest incongruity—in fact, an indecency—in allowing a decision come to by a court after hearing the parties, that the criminal information should be filed, to be overruled by the decision of the Director of Public Prosecutions. That would be to set up that officer over the court. In my mind, it would be an indecency to allow him to give a contrary opinion, and to prevent the order of the court from being acted upon. Of course, if the prosecution can be said to commence when the application is made for the rule *nisi*, the indecency would not be so great, though it was very strongly urged that the effect of that would be to oust the jurisdiction of the court by mere general words, whereas specific words would have been used if that had been the intention. In my opinion the prosecution cannot be said to commence when the application is made for the rule *nisi*. If it could, then, although the indecency would not be so great as in the other case, yet it would be sufficient to justify us in saying that the words in question ought not to be held to apply to criminal informations, because the court in granting the rule *nisi* has considered the matter, and has seen that there is enough at least for the defendant to be called upon to answer so as to enable the court to decide whether or no the matter should proceed further. The Master of the Rolls has mentioned that part of the case which turns upon the statute of 4 & 5 Will. & M. c. 18, but I may observe that there is nothing in that Act which will prevent the court from granting the order on an *ex parte* application. The Act only says that an order shall be made, and in no way says that the court, before granting the order, shall summon the parties before it. With respect to the other



parts of the case, I was startled when it was argued that if sect. 6 had been out of the way the plaintiff in error would be clearly right. We have not to decide the effect of sect. 3 as regards the particulars required by the Vexatious Indictments Act. But, as at present advised, I should be of opinion that the general words of sect. 3 do not apply to indictments directed by a judge or by the Attorney-General, or to cases where the consent of a judge or of the Attorney-General must be obtained, even assuming that that will not render sect. 3 inoperative, but that there will be still modes of prosecution, though they are not numerous, to which it will apply. Of course it very much reduces the effect of the section, but it must be recollected that sect. 6 was obviously introduced as applying to all libels, and that may explain the difficulty arising upon it. It was said that the preamble is to amend the law with reference to criminal prosecutions for newspaper libels. It is true that these words would include criminal informations as well as anything else. As I understand the argument the preamble is to be taken in connection with sect. 2, which, it was said, must apply to proceedings by way of criminal information, and therefore why should not sect. 3? If sect. 2 does so apply (and in my opinion it does) it answers the objection on the preamble, because it does amend the law affecting civil actions and criminal prosecutions for newspaper libel. It was intended that the person charged should not be made liable in criminal proceedings any more than in civil actions, if he could show that certain things had not been done. That is not a mode of procedure, but a defence, and it would be incongruous to say that in one form of prosecution there would be a defence and not in another. But sect. 3 gives a protection against vexatious proceedings by way of criminal prosecution, and if there are modes of criminal prosecution not within the mischief of the Act, and the application of the section to them would produce an absurdity, then there is a reason for excluding them, whereas it might not be advisable to exclude a defendant in a criminal information from the defence given in sect. 2. I am of opinion, therefore, that the plaintiff in error fails.

LINDLEY, LJ.—I have come to the same conclusion. The question arises upon the construction of the Newspaper Libel and Registration Act 1881. The term "criminal information" is not found in the Act, and we find no indication that the Act applies to such informations, except from what may be gathered by reasoning from the sections. It may be assumed that a criminal information is a form of prosecution. Sect. 3 is a wide section, and its words are negative, and very extensive, and would be wide enough to cover prosecutions by way of criminal information if there were not good reasons why they should not be so applied. If criminal informations are within the mischief intended to be guarded against by the Legislature, I think the language is large enough to include them. It is because criminal informations are within the mischief pointed at by sect. 2, and the general language in sect. 15 is large enough to include such prosecutions by way of criminal information, which are within the mischief, that it seems to me that both sections may include criminal informations, although they are not mentioned. The reason is, that the words are sufficiently

wide to cover them, and the reasons for extending them are the same as those for extending them to indictments and actions. In order to show the reason which induces me to say that sect. 3 does not apply to criminal informations, it is sufficient to point out what securities were already provided by law for persons prosecuted in that particular way. By comparing the sections from 2 to 7 we see that the object of the statute was to protect persons prosecuted for libel, and in particular to protect proprietors of newspapers from frivolous prosecutions. What protection was afforded before when they were proceeded against by criminal information? They had every conceivable protection which anyone could reasonably require. A criminal information could not be filed *ex officio* unless the Attorney-General thought that the matter was of so much public importance as to render that desirable. Take the case in question, viz., that of an ordinary prosecution by information at the suit of a private person. Such an information might have been, and probably often was, obtained vexatiously. That cannot be done now, but the court must be satisfied by affidavit that the prosecution is proper. What conceivable protection could a reasonable man require further? Therefore it is perfectly obvious that prosecutions by way of criminal information are not within the mischief of sect. 3. But it does not follow that because the case is not within the mischief of sect. 3 it is not within the general words. But the words are general, and there is upon the face of the section a plain indication that at all events *ex officio* informations cannot be included. It is ridiculous to suppose that in Ireland, at all events, that section can be intended to apply to such informations. There is no reason why it should in England. Apart, therefore, from general reasoning there appears to me to be an indication from the language of the section that *ex officio* informations are not included. To look further, is it to be supposed that Parliament intended by general words of this kind to bring about that which might be a scandalous conflict of jurisdiction between the Director of Public Prosecutions and the court or the Attorney-General? Are we so to interpret words which are capable of another meaning, and are satisfied with a less extensive construction? When the Act was passed the Director of Public Prosecutions was a public officer whose duty it was to act under the superintendence of the Attorney-General. Can it be conceived that he was to be set up to overrule the Attorney-General? The court ought not to construe the section so as to bring about an absurdity unless it is compelled to do so. The reasons which I have stated are sufficiently cogent to compel the court to apply the ordinary principles of construction, and to come to the conclusion that the general words were never intended to apply, and ought not to be construed to apply to criminal informations of any kind. Considerable difficulty arises on the construction of the Act, but the great difficulty does not arise in this case. Sect. 6 is strangely worded, and I do not profess to understand it. I have read the Act for the purpose of discovering the meaning to be given in that section to the words "and every offence under this Act," and I have not found it. But we see that all libels are made subject to the provisions of the Vexatious Indictments Act.



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How is that to be worked into the section which says that no criminal prosecution for newspaper libel shall be commenced without the fiat of the Director of Public Prosecutions? Working sects. 6 and 3 together, the question is as to the joint effect of the two. Where a judge directs a prosecution for libel there arises a difficulty which is theoretical rather than practical. Is the decision of the judge or the consent of the Attorney-General to be overruled by the Director of Public Prosecutions? That is so inconsistent and repugnant that it is almost idle to suppose that after the Attorney-General directs a prosecution under the Vexatious Indictments Act he is to be overruled by his subordinate. Therefore, although the difficulty is much greater than that with which we have to deal, I should hold with Field, J. that sect. 6 does not apply to criminal informations *ex officio* or to other informations, or to prosecutions for libel directed by a judge or the Attorney-General. There are certain modes of prosecution left to which sect. 3 can be applied without producing any absurdity or conflict of jurisdiction, or other inconvenient result. In my opinion the true construction is that which will avoid that result, and I am therefore of opinion that the judgment of the Queen's Bench Division must be affirmed. *Judgment affirmed.*

Solicitors for the plaintiff in error, *Lewis and Lewis.*

Solicitors for the prosecution, *Horns and Murray.*

Dec. 11 and 12, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

THE IMPROVEMENT COMMISSIONERS FOR THE DISTRICT OF NEWTON-IN-MAKERFIELD v. THE JUSTICES OF THE PEACE FOR THE COUNTY PALATINE OF LANCASTER. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Highway—Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), s. 13—Local Act before 1870 vesting highways in commissioners—Time when road ceases to be a turnpike road—Contribution from county to repair.*

*By the Newton District Improvement Act 1855 (18 & 19 Vict. c. c.) the maintenance of all the highways within a district which was traversed by a turnpike road running from Warrington to Wigan became vested in commissioners, who were the "highway authority" for the district, which was a "highway area" within the meaning of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 13.*

*The turnpike trust expired in 1877.*

*On a claim being made by the commissioners under 41 & 42 Vict. c. 77, s. 13, that the "county authority" should contribute one half of the expenses incurred by the commissioners as the "highway authority," it was contended on behalf of the justices, who were the "county authority," that the section did not apply, because the local Act of 1855 had caused a ceasing of the character of the turnpike road with respect to that part which traversed the Newton district, and that the section applied only to those roads which wholly ceased to be turnpike roads between 1870 and the passing of the Act.*

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

*Held, that, notwithstanding the local Act of 1855, the road did not cease to be a turnpike road within the meaning of 41 & 42 Vict. c. 77, s. 13, until 1877, when the turnpike trust expired, and therefore one half of the expenses incurred by the commissioners in maintaining the road within their district must be paid by the county authority.*

*Judgment of Mathew and Day, JJ. affirmed.*

THIS was an appeal by the defendants, the justices of the peace for the County Palatine of Lancaster, acting as the county authority, from the judgment of Mathew and Day, JJ.

The material facts are shortly stated in the head-note, and more fully in the special case, which is set out in the report in the court below (*ante*, p. 455, and 51 L. T. Rep. N. S. 707).

The section on the construction of which the decision turned is sect. 13 of the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), which provides that,

For the purposes of this Act, and subject to its provisions, any road which has, within the period between the thirty-first day of December one thousand eight hundred and seventy and the date of the passing of this Act, ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one-half of the expenses incurred from and after the twenty-ninth day of September one thousand eight hundred and seventy-eight by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction.

Dec. 11.—*Gorst, Q.C. and H. F. Blair*, for the defendants, in support of the appeal.

*Charles, Q.C. and A. Glen* for the plaintiffs.

The arguments were similar to those used in the court below.

*Cur. adv. vult.*

Dec. 12.—The following judgments were delivered:—

BRETT, M.R.—Before the year 1855 certain Turnpike Acts were in force which regulated a turnpike road running from Warrington to Wigan, and passing through a district called Newton-in-Makerfield. In 1855 a local Act was passed, giving to the commissioners for the Newton district the control of the road from Warrington to Wigan. Therefore that part of the road, so far as regarded its management, was taken from the turnpike trustees. There is nothing in the Act of 1855 which assumes to alter the Turnpike Acts, and therefore the road remained the same road after the Act of 1855 as it was before that Act. In 1878 the Highways and Locomotives Amendment Act (41 & 42 Vict. c. 77) was passed. That is a public Act, and deals with all the turnpike roads in the kingdom, and there is nothing in that Act to show that the Legislature took any notice of the difference in the management of the various turnpike roads or the provisions of the different local Acts. The object of the Act is apparent. Where a long road passed through small separate districts it was thought unfair to put all the expense of maintaining even a part of the road on these separate districts. Sect. 13 deals with only one

road, that is, the physical road which is within the Turnpike Act, and provides that a road which ceases to be a turnpike shall be deemed to be a main road. When the road has become a main road within the meaning of the section, then the provisions of the latter part of the section relating to payment of half the expenses by the county authority come into force. The statute deals with the whole of the turnpike road, and then speaks of that part which is within the district of the highway authority as a part of the entire road. It seems clear to me that this is the right construction of sect. 13. In the case of *The Justices of Lancaster v. The Mayor of Rochdale* (44 L. T. Rep. N. S. 316; 45 L. T. Rep. N. S. 425; 49 L. T. Rep. N. S. 368; 6 Q. B. Div. 525; 8 Q. B. Div. 12; 8 App. Cas. 494) the Divisional Court gave judgment as to all the roads there in question, making no distinction with regard to the circumstances of one road, but holding that such part of the road as was within the district did not become a main road within the meaning of sect. 13 until the whole of the road became a main road. The Court of Appeal came to the conclusion that where bits of road were taken out of and separated from the long roads, those bits became main roads. The House of Lords, however, held that these bits of roads never became main roads, but remained parts of main roads. That seems to me to have been Lord Bramwell's opinion. Lord Blackburn had some doubt, but he came to the same conclusion. If I had to decide between the view taken by the Court of Appeal and that taken by Lord Bramwell, I should be convinced by the judgment of Lord Bramwell. This view, I think, is made clearer by the judgment of Lord Blackburn in *The Justices of the West Riding of Yorkshire v. Reg. on the prosecution of The Mayor, &c., of Sheffield* (49 L. T. Rep. N. S. 786; 8 App. Cas. 781). It is true that in the *Rochdale* case the circumstances of one of the roads differed from the circumstances of the others, so far as related to the time of the expiration of the trust; but the case was dealt with as if all the roads had been in the same position, and as an authority the case is only useful for the principle on which the decision is based, for the question of the time when the roads were taken out of the turnpike trusts was not present to the minds of those who gave the decision. Here the management of this portion of the road was altered in 1855. The long road ceased to be a turnpike road in 1877, and therefore, under sect. 13 of the Highways and Locomotives Amendment Act 1878, it was deemed to be a main road, and half the expenses of that portion of it which is within the highway area must be paid by the county authority. For these reasons I am of opinion that the judgment of the Divisional Court is right, and ought to be affirmed.

CORRON, L.J.—I am of the same opinion. The appellants contend that the two cases in the House of Lords, which have been referred to, are authorities in their favour, while the respondents argue that the same cases are authorities the other way. I think the *Sheffield* case (*ubi sup.*) lays down a rule which we cannot depart from, and which is unfavourable to the appellants' contention. In the *Rochdale* case (*ubi sup.*) the House of Lords held that the whole road was to be considered in its entirety, and that when a portion of the road ceases to be a turnpike road

it cannot be said that such portion then becomes a main road. A main road is a road from one terminus to another, and when a turnpike road, considered as a whole, ceases to be a turnpike road, then the provision as to the expense of maintaining the road comes into force so far as regards that portion of the road which is within the area of the district highway authority. The facts of the *Sheffield* case were different from the facts here, but the principle laid down by Lord Blackburn applies. He says: "I will assume (what I do not decide) that the Legislature have, for whatever reason, said that the trustees shall neither spend money nor levy toll on any portion of the turnpike road from Wakefield to Sheffield which should at any future time be within the ambit of the contiguous houses forming the towns of Sheffield, Barnsley, and Wakefield. Would that prevent those portions from being part of the turnpike road from Wakefield to Sheffield, within the meaning of the Highways and Locomotives Amendment Act 1878, s. 13? If the words used had been like those of sect. 6, that those portions should cease to form or be part of the turnpike road, I should have thought so. The portion of the road which had been, by plain and express terms, made part of the turnpike road would, by equally plain and express words, be made to be no longer part of it. But when we are construing an Act of Parliament in which the Legislature have said that, when a turnpike road is made from one terminus to another, they will assume that it is a main road, that is a road for carrying through traffic from, in this case, Sheffield to Wakefield, I cannot think that a portion of that road is to be considered as no longer part of that turnpike road merely because no turnpike is to be erected on that part" (49 L. T. Rep. N. S. at p. 788; 8 App. Cas. at p. 793.) We have to consider in the present case whether this part of the road ceased to be part of the turnpike road in 1855. The principle of the decision in the *Rochdale* case, which is recognised by Lord Blackburn in the *Sheffield* case, is that, in considering the application of sect. 32 to a road, the whole road from terminus to terminus must be looked at, so that the whole road does not cease to be a turnpike road until the powers of the turnpike trust have expired; and, unless the portion of the road which is within the operation of the local Act is no longer to be considered to be a part of the turnpike road, it must be considered to be part of the road which ceases to be a turnpike road, and becomes a main road if the events named in sect. 13 have taken place during the time there mentioned, that is, between 1870 and 1878. The local Act in this case does not expressly say that the portion of the turnpike road which is within the Newton district shall cease to be part of the turnpike road. Here, as in the *Sheffield* case, powers are given to the local authority, and they are made liable to perform duties. Although the present case goes somewhat further than the *Sheffield* case, still the local Act here only gives the commissioners power over a particular part of the road. In the result the commissioners are relieved by a contribution from the county, but that cannot prevent our following the principle laid down by the House of Lords. In my opinion, the Act of 1855 does not prevent sect. 13 of the Act of 1878 from applying to a portion of a road which has become

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a main road. Mr. Gorst contends that this point is decided in the appellants' favour by the *Rochdale* case. It is true that on the facts of that case the decision of the House of Lords had the effect of preventing the county from being compelled to contribute to the expense of maintaining the roads within the highway area on which the local Act operated, but which was a part of the turnpike road considered as a whole; for the purposes of the decision, however, I think the facts of that case must be taken to have been as stated by Lord Blackburn, who said that in respect of some of the roads the trusts had expired. The ground of the decision applied to all the roads in that case, without distinguishing one from another, and in my opinion it is not an authority for the present appellants. I am therefore of opinion, having regard to the principle laid down in the *Sheffield* case, that this appeal ought to be dismissed.

LINDLEY, L.J.—I am of the same opinion. I think that, in order to construe sect. 13 of the Act of 1878, it is necessary to look at sects. 14, 15, 16, and 17. The special case shows that the district in question is a highway area within the meaning of the Act, that there was one road from Warrington to Wigan, and that the Newton district was formed in 1855, and comprised in it part of this road. The expression "any road," in sect. 13, means any turnpike road in a county, and the cases have decided that the words "ceased to be a turnpike road" mean that the whole turnpike road in the county must have ceased to be a turnpike road before the provisions of the section come into force. This road had ceased to be a turnpike road in 1877, and therefore by sect. 13 it became a main road. Sect. 15 provides that where it appears to any highway authority that any highway within their district ought to become a main road by reason of its being a medium of communication between great towns, the highway authority may apply for an order to that effect. By sect. 13 the whole road is to be deemed a main road, and then the provisions as to payment of half the expenses comes into operation. Sect. 13 expressly provides for the expenses of every part within the limits of any highway area, and by sect. 14 the following areas shall be deemed to be highway areas for the purposes of this Act, that is to say, first, urban sanitary districts; secondly, highway districts." The case therefore comes within sect. 13 as construed by the House of Lords. In the *Sheffield* case a part of the road was not subject to the turnpike trusts; still, when the trusts ceased and the whole road became a main road, the county authority became liable to pay half the expenses in respect of those portions of the road. It is urged that this construction will compel the county authority to bear half the expense of maintaining a road previously maintained by the district highway authority; but that also occurred in the *Sheffield* case, and any hardship thereby occasioned might be mitigated by the provisions of the 16th section. For these reasons I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors for appellants, *Ridsdale and Son*, for *Wilson and Hulton*, Preston.

Solicitors for respondents, *Field, Roscoe, and Co.*, for *J. E. Worsley*, Warrington.

## HIGH COURT OF JUSTICE.

## QUEEN'S BENCH DIVISION.

Monday, Nov. 24, 1884.

(Before GROVE and HAWKINS, JJ.)

REG. v. GILHAM AND OTHERS. (a)

*Wild Birds Preservation Act 1880 (43 & 44 Vict. c. 35), s. 3—Authority of owner or occupier of land.*

*By the 3rd section of the Wild Birds Preservation Act 1880 (43 & 44 Vict. c. 35) it is provided that any person who between the 1st day of March and the 1st day of August in any year after the passing of the Act shall knowingly and wilfully shoot or attempt to shoot any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, shall forfeit, &c., but the section is not to apply to the owner or occupier of any land, or to any person authorised by the owner or occupier of any land, killing or taking any wild bird on such land.*

*R., having with the authority of the occupier of certain land shot wild birds thereon, which were taken on other lands without the authority of the owners or occupiers thereof, was charged with an offence against the section.*

*Held, on case stated, that R. did not come within the exemption contained in the section, and was rightly convicted.*

THIS was a case stated by magistrates of the county of Sussex under 20 & 21 Vict. c. 43, for the opinion and direction of the court, the complainant thereon being dissatisfied with their decision in point of law.

The case was, so far as material, as follows:—

On the 19th April 1884 the defendant Richard Gilham was charged before us, at the instance of an officer of the Society for the Prevention of Cruelty to Animals, with having on the 15th and 17th March 1884 used a net for the purpose of taking wild birds, and also with having in his control or possession on the 17th March 1884 wild birds recently taken, contrary to the provisions of the Wild Birds Preservation Act 1880 (43 & 44 Vict. c. 35), and the defendants Richard Read, Charles Chatfield, John Smart, and Job Sherwood were charged before us for that they did on the 18th March 1884, contrary to the provisions of the said Act, knowingly and wilfully shoot and attempt to shoot wild birds.

The 3rd section of the Act aforesaid is as follows:

Any person who between the 1st day of March and the 1st day of August in any year after the passing of this Act shall knowingly and wilfully shoot or attempt to shoot, or use any boat for the purpose of shooting or causing to be shot, any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, or shall expose or offer for sale, or shall have in his control or possession after the 15th day of March, any wild bird recently killed or taken, shall, on conviction of any such offence before any two justices of the peace in England and Wales or Ireland, or before the sheriff in Scotland, in the case of any wild bird which is included in the schedule hereunto annexed, forfeit and pay for every such bird in respect of which an offence has been committed a sum not exceeding 1l., and in the case of any other wild bird, shall, for a first offence, be reprimanded, and discharged on payment of costs, and for every subsequent offence forfeit and pay for every such wild bird in respect of which an offence is committed a sum of money not exceeding 5s., in

(a) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

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addition to the costs, unless such person shall prove that the said wild bird was either killed or taken, or bought, or received during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom. This section shall not apply to the owner or occupier of any land, or to any person authorised by the owner or occupier of any land; killing or taking any wild bird on such land not included in the schedule hereto annexed.

The schedule to the Act annexed does not include the "sparrow."

The following facts were proved in evidence before us in relation to the charges against the said defendants:

The defendant Richard Gilham, in company with two other men, not charged before us, went out on the nights of the 15th and 17th March 1884 with nets to catch sparrows. A large number of birds were taken by him on those occasions, such birds being caught, as admitted by the defendant, in various places, including certain fields, and the defendant admitted that he had received no authority or permission from the owners or occupiers of any such places to catch any of the said birds. The defendant produced no evidence to show that he was authorised on such occasion, or on any other occasion, to take birds on the lands where the said birds had been caught by him.

The birds so taken by Gilham were sold by him to the manager of an hotel, and brought in bags into a small meadow adjoining the hotel and occupied therewith, and were taken from the bags and placed in traps for the purpose of being shot at in the course of a "starling and sparrow shoot," which had been advertised to take place at the hotel on the 18th March.

The defendants Richard Read, Charles Chatfield, John Smart, and Job. Sherwood took part in shooting at the birds as they were liberated from the traps. They paid at the rate of 1½d. a head for each bird supplied to the traps. The shooting of the birds took place in the said meadow with the permission of the said manager.

On behalf of the defendant Gilham, it was contended that the prosecution had failed to prove that he did not have authority to take the birds in the places where he actually captured them, no witnesses having been called by the prosecution, landowners or occupiers, to prove this; and on the behalf of the other defendants it was contended that they came within the exception at the end of the 3rd section of the Wild Birds Preservation Act 1880, because they had the authority of the occupier of the field used by them on the occasion in question, when they shot and attempted to shoot wild birds.

The complainant contended that the exemption relied on by the defendants Read, Chatfield, Smart, and Sherwood applied only to an owner or occupier, or someone employed by him, on his own land only, who took or killed wild birds actually free at the time they were found on such land, the proviso having been enacted to protect the crops on such land from destruction when birds are over-abundant; and the complainant further contended that the proviso did not apply to snarers like the defendant Gilham, who captured birds on certain land, and then carried away

such birds in bags to other land, for the purpose of putting them into traps and shooting at them for money, as on the occasion in question; and, moreover, that, as the defendant Gilham had called no evidence to show he was authorised to capture wild birds by the owners or occupiers of the lands on which he had taken the birds in question, but had admitted that he netted them without any such authority, we were bound to convict him for using nets on the 15th and 17th March for the purpose of taking wild birds, and for having wild birds recently caught in his possession. The complainant further contended that the proviso could not possibly apply to the other defendants, who killed wild birds in the meadow adjoining the hotel, the birds not having been taken on that land, for the words of the proviso "on such land" must be read with the words of the entire section, and therefore the defendants had committed an offence under the Act.

We were of opinion that all the contentions of the complainant were erroneous in law, and we therefore dismissed the summonses against the defendants.

The questions of law for the opinion of the court are therefore as follows:

1. Ought we to have convicted the defendant Gilham for using a net for the taking of wild birds, and of having wild birds in his control or possession, he not having given any evidence to show that the owners or occupiers of the land on which the birds were taken had given him any authority to take the birds thereon?

2. Were the other defendants under the circumstances set forth above within the exemption of the 3rd section of the Wild Birds Preservation Act 1880?

*Morten Smith* for the appellant.—The defendant Gilham admitted that he had received no authority or permission from the owners or occupiers of the lands on which he took the birds, and the decision of the magistrates is, therefore, in his case clearly erroneous. As to the other defendants, the exemption at the end of the section was inserted by the Legislature for the purpose of making it legal for farmers to protect their crops against the ravages of birds, but was clearly not intended to apply to such circumstances as those stated in the case before the court. This is shown by an examination of the schedule, which shows that all the birds which are generally supposed to prey upon the farmers' crops are carefully omitted. [HAWKINS, J.—Are not the defendants protected by the words "authorised by the owner or occupier of any land killing or taking any wild bird on such land"?] They were not authorised by the owners or occupiers of the lands to which the wild birds belonged and on which they were taken. The court will not allow the Act to be evaded by taking the birds secretly in one place and destroying them openly elsewhere, since it would always be possible to obtain in some way the authority of a small owner or occupier for this purpose.

*Raven* for the respondents.—The defendants are protected by the plain words of the Act, within which they acted, and the court will not strain the words of a penal statute so as to include them. Further, it is not to be assumed against

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them that they knew that the birds were improperly taken without the authority of the owners of the land on which they were taken, and the prosecution offered no proof that they were aware of this. Under these circumstances the justices were right in dismissing the summonses against them.

*Morten Smith* in reply.

GROVE, J.—In this case the defendants were charged under the Wild Birds Preservation Act 1880 (43 & 44 Vict. c. 35), with having committed offences against the 3rd section thereof under certain circumstances, which are set out at length in the case stated, and the justices were, after hearing the evidence and the arguments, of opinion that all the contentions advanced in support of the complaint were erroneous in law, and dismissed the summonses accordingly. With that view I for my part cannot agree, since it appears clear to my mind, having regard to the contentions urged before us, that the defendants ought, on the true construction of this section, to have been convicted. I will first deal with Gilham's case. On the facts before us, it appears that he took the birds in question in the month of March, which is within the prescribed period, and further, that he took them with nets. Now, the Act forbids the use of "any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird," and, that being so, how can it be said that there is no case against him? It is not shown that he had the authority or permission of the owner or occupier of the land on which he took the bird; in fact, the case states that he admitted that he had received no such authority or permission. Can there be stronger evidence against the man than his own evidence? How can it be said, when he actually admitted that he took them without any authority, that it was not so proved before the justices? It seems to me as plain as possible that the man took the birds without the authority or permission of the owner or occupier of the land, and that he ought therefore to be convicted. With regard to the other men the case is different. The facts are, that several dozen sparrows were put into bags, and were then taken out and put under flower pots, which were used as traps, and shot at as they were liberated from the traps. It has been argued to-day that, as far as these other defendants are concerned, it does not appear that these birds were not tame sparrows, and therefore outside the Act. Is it credible that anyone could suppose that these dozens of unfortunate birds were tame birds? It would of course be possible to collect some dozens of tame sparrows throughout the breadth of England, but I should think that it would take some time to do so. These birds, then, were shot on land occupied by the manager of an hotel in a field adjoining the hotel and occupied therewith, and they were shot with the permission of the landlord. It is argued that that was the land to which they belonged, and the land contemplated in the proviso to the section which states that, "This section shall not apply to the owner or occupier of any land, or to any person authorised by the owner or occupier of any land, killing or taking any wild bird on such land not included in the schedule hereto annexed." Now, in my view, that proviso means that, as some wild birds may damage crops or otherwise

inflict injury on persons owning land, the farmer or other occupier may shoot the birds for his own protection, and I do not think that it is intended to go any further than this. But it is also said in favour of the other defendants that for all they knew the defendant Gilham might have taken the birds on his own land, or the hotel keeper might have purchased them from persons who had captured them either on their own land or on land where they had the authority of the owner or occupiers to capture them, and that the shooters had the right to assume that the birds had been taken with the authority and permission of the owners and occupiers of the land on which they were taken. In my opinion that is such a strained construction of the words of the section that I should require to be convinced by very cogent reasoning that this was the meaning of the Legislature before I could accede to it. The Act, on the contrary, says in terms that the parties must bring themselves within the proviso by proof. The section clearly provides that any person committing the acts specified shall, on conviction, forfeit a certain penalty "unless such person shall prove that the said wild bird was either killed, or taken, or bought, or received during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom." Here the defendants have not, as far as I see, given a tittle of evidence to protect themselves from the consequences of the section, and I therefore think that this decision is entirely wrong, and that the case must be remitted to the justices to deal with the defendants according to the terms of the section. I only wish to say further that it must not be taken that I decide that, where a person takes birds on his own land and sends them to be shot on the land of another person, persons can legally shoot them there with the permission of the owner or occupier. I do not decide that, and it may or may not be so.

HAWKINS, J.—I am also of the same opinion. I am surprised to think that the gentlemen who decided this case could have come to the conclusion they did. To my mind the case is clear. The 3rd section of the Act enacts that, any person who between the 1st day of March and the 1st day of August in any year after the passing of the Act shall knowingly and wilfully shoot and attempt to shoot any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, or shall expose or offer for sale, or shall have in his control or possession, after the 15th day of March, any wild bird recently killed or taken, shall, on conviction, forfeit a certain penalty specified in the section, or, in certain cases, be reprimanded and discharged on payment of costs, unless such person shall prove that the said wild bird was either killed, or taken, or bought, or received during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom; and then there is a proviso that the section shall not apply to the owner or occupier of any land, or to any person authorised by the owner or occupier of any land, killing or taking any wild bird on such land not included in the schedule annexed to the Act. Now, with regard to Gilham, it is proved overwhelmingly that he committed an offence against

the Act in such a way that anybody would have a difficulty in thinking otherwise. He took the birds by use of a net, and took them between the 1st day of March and the 1st day of August, and he admitted that he had not the authority or permission of the owner or occupier of the land, and I do not see how it is possible that the case against him could be clearer. I also think that the case is equally clear against the other defendants. The argument with respect to them is, that it does not appear that these birds were not tame sparrows—that is to say, that several dozens of little birds in bags were not tame; and it is also said that they might have been taken by the hotel keeper on his own land adjoining the public-house. To my mind it is too ridiculous to suggest that anyone could have supposed that these birds were tame and were not wild birds within the meaning of the statute. In my view these defendants did “knowingly and wilfully shoot” at wild birds. They are therefore within the statute, unless they can prove that they had leave or licence. This they have not done, and they therefore come within the section. I do not wish to be understood to say, even if they had proved that the birds were taken with the leave and licence of the owners or occupiers of the lands on which they were taken, that even then they would be justified in shooting the birds in the circumstances disclosed in the case. I therefore have no hesitation in sending this case back to the justices.

*Case remitted.*

Solicitors for the appellant, *A. Lealie.*

Solicitors for the respondents, *G. F. Mant.*

*Saturday, Feb. 28, 1885.*

(Before DENMAN, J.)

WHEATCROFT v. THE LOCAL BOARD OF MATLOCK. (a)

*Sewer—Watercourse—Meaning of word “sewer”—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 4, 13, 18, 264.*

*The sewage of certain houses drained into a sewer, and, after passing through the sewer, was for a period of some years allowed to fall into an open watercourse, which, in its turn, flowed into a brook.*

*Held, that, under the circumstances of the case, the open watercourse was a sewer within the meaning of sect. 4 of the Public Health Act 1875.*

THIS was an action for trespass to the plaintiff's land and making excavations and carrying drain pipes under the same, and depositing large quantities of earth thereon.

The defendants pleaded that they were the local board for the district of Matlock, and that there was across the plaintiff's said close, which was within the said district, a certain open sewer or watercourse, which was under the provisions of the Public Health Act 1875 vested in and belonged to them, and that the sewer, being a nuisance and dangerous to health, the defendants, acting under the provisions of the said Act, improved the same by laying down sanitary pipes along the course thereof, and covering in the same with earth to the level of the adjoining land, and did such acts and things as were necessary

for the purposes of such improvement. The defendants further said that the alleged grievances and acts of trespass were done, or intended to be done, by them under the provisions of the Public Health Act 1875, and took place more than six months before the commencement of the action.

The defendants also pleaded in the alternative payment of 5*l.* into court. The plaintiff joined issue, and replied that 5*l.* was not enough to satisfy the plaintiff's claim.

At the trial before Denman, J. without a jury the facts appeared to be as follows: The plaintiff was the owner of a field called the Plantation within the defendants' district, which abutted on the north side on a highway called Stoney Way, and sloped steeply down to a brook which bounded it on the east side. It was proved that there was, before the alleged acts of trespass, running from the west end of the plaintiff's field along the north side of the field for a certain distance parallel to Stoney Way an ancient stone sough carried through the solid rock. With this sough, which was proved to have existed for a long time (certainly more than twenty years) were connected various old stone soughs, which had also existed for a similar period, and which during such period had received the sewage of a number of houses situated in a street called Church-street. From the point where the stone sough terminated an open ditch or watercourse ran along the north side of the plaintiff's field parallel to Stoney Way down to the brook, along which ditch the sewage coming down the sough found its way to the brook. There was a certain amount of discrepancy and uncertainty in the descriptions given by the witnesses of the size and character of this ditch; but a large number of witnesses, some of whom had known the place a long time, spoke to its being a defined channel or watercourse, and it was clearly proved to have become, and been for some time, very offensive from accumulations of sewage. Complaints having been made to the local board of the nuisance caused by this ditch, the board caused sanitary pipes to be laid down along the course of it and covered in with earth to the level of the adjoining land. The evidence of the defendants' witnesses was to the effect that the work was all done before the 18th Dec. 1883. The action was not brought till the 20th June 1884.

By 38 & 39 Vict. c. 55, s. 4 (interpretation clause):

“Sewer” includes sewers and drains of every description, except drains to which the word “drain” interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act.

By sect. 13:

All existing and future sewers within the district of a local authority, together with all buildings, works, materials, or things belonging thereto (with certain exceptions), shall vest in and be under the control of such local authority.

By sect. 16:

Any local authority may carry any sewer through, across, or under any turnpike road . . . and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it seems necessary), into, through, or under any lands whatsoever within their district.

(a) Reported by W. P. EYERSLEY, Esq., Barrister-at-Law.



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WHEATCROFT v. THE LOCAL BOARD OF MATLOCK.

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By sect. 17:

Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse . . . until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse.

By sect. 18:

Any local authority may from time to time enlarge, lessen, alter the course of, cover in, or otherwise improve any sewer belonging to them, and may discontinue, close up, or destroy any such sewer that has in their opinion become unnecessary, on condition of providing a sewer as effectual for the use of any person who may be deprived in pursuance of this section of the lawful use of any sewer. Provided that the discontinuance, closing up, or destruction of any sewer shall be so done as not to create a nuisance.

By sect. 19:

Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied.

By sect. 264:

A writ or process shall not be sued out against or served on any local authority, or any member thereof, or any officer of a local authority, or person acting in his aid, for anything done or intended to be done or omitted to be done under the provisions of this Act, until the expiration of one month after notice in writing has been served on such local authority . . . stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause, and on the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served; and unless such notice is proved the jury shall find for the defendant.

*Lawrence, Q.C.* and *Mirams* appeared for the plaintiff.

*Mellor, Q.C.* and *Lumley* appeared for the defendants.

The sections set out above were cited, as also the following cases:

*Reg. v. The Local Board of Godmanchester*, 34 L. J.

23, Q. B.; 35 L. J. 125, Q. B.;

*Booth v. Clive*, 10 C. B. 827;

*Hughes v. Buckland*, 15 M. & W. 346.

DENMAN, J.—This was an action against a local board of health for breaking and entering the land of the plaintiff, and digging holes and carrying drain pipes under the same, and depositing rubbish thereon. The defendants pleaded that there was a sewer within the meaning of the Public Health Act 1875, which was by that Act vested in them, and their property as such board; that it was dangerous to health; and that they, acting under the provisions of the Act, improved the same by laying down sanitary pipes and covering the same in; and only did such acts as were necessary for such improvement. They also relied upon sect. 264 of the Act, saying that the matters alleged were done or intended to be done under and by virtue of the provisions of the Act, and that no notice of action had been given in accordance with that section of the Act. They further alleged that the alleged grievances and acts of trespass were done more than six months before the commencement of the action, and in the alternative they brought into court 5*l.* The plaintiff joined issue on the defence, and replied that the 5*l.* was not enough to satisfy the plaintiff's claim. The plaintiff was the owner of a plot of

land at Matlock, and two cottages standing on it. The defendants were the local board of health for Matlock. The plaintiff's land stood on very steep ground, ground sloping towards a brook. At the higher angle of the ground were two cottages which drained into a sewer carried through solid rock. It was proved that this sewer had for years been used to take the sewage of several houses above the cottages, so that I entertain no doubt whatever that it was, and for a long time had been, a sewer within the meaning of the Act, sect. 4, and as such vested in the defendants by sect. 13. After the sewage of the two cottages, and of the houses above, had passed through the sewer opposite to and for some distance below the cottages, it had for some years been allowed to fall into an open watercourse running down across the plaintiff's land to the brook not very sharply defined, but which under the circumstances of the case I find to have been an open "sewer" within the meaning of the Act. This had been frequently complained of, and I think it clearly was in such a condition that it was proper for the board to cover it in and turn it into a pipe sewer, provided they proceeded legally within the powers given them by the Act. Assuming that they were not protected by the Act, I am of opinion that the 5*l.* paid into court would be ample compensation for any injury sustained by the plaintiffs; for, putting the case most strongly in his favour, I believe the evidence for the defendant, which was to the effect that it would not cost him 5*l.* to restore the sewer to its *statu quo*; and I can see no ground for thinking that higher damages would in this case be properly recovered. But I think the defendants are entitled to judgment on a ground independent of the amount paid into court, and of any question of damages. It was admitted that the plaintiff gave notice of action, but sect. 264 not only requires notice of action, but provides that "every such action," *i.e.*, every action against a local authority for anything done or intended to be done, or omitted to be done, under the provisions of the Act shall be commenced within six months next after the accruing of the cause of action. In the present case I do not think that the defendants were acting under sect. 16 of the Act as contended for by the plaintiff, but under sects. 18 and 19, which authorise any local authority from time to time to "cover in or otherwise improve any sewer belonging to them," provided that they shall cause the sewers belonging to them to be covered and kept so as not to be a nuisance. If this was so, at all events in the absence of any evidence that the plaintiff at the time refused to permit the land to be entered upon (in which case it is probable that sect. 305 might have applied, though I think upon the whole it is not applicable to such a case), I am of opinion that the defendants were clearly doing and intending to do what they did under the provisions of the Act, and therefore that they cannot be sued for anything done more than six months before action brought. I think that the plaintiff failed to show that any of the acts done by the board were done within six months of action brought. He gave some inconclusive evidence on the subject; but the evidence for the defendants upon the point was clear and specific, and corroborated by a document produced fixing the date of the completion of the work at a period antecedent to six months before action brought.



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I think, therefore, that the defendants are entitled to judgment, and I give judgment for them accordingly, with costs, and order that the 5*l.* in court be paid out to them.

*Judgment accordingly.*

Solicitors for the plaintiff, *Ohester and Co.*, for *Wheatcroft*, Belper, Derbyshire.

Solicitors for the defendants, *Gregory, Rowcliffe, and Co.*, for *Skidmore*, Matlock, Derbyshire.

Thursday, Dec. 11, 1884.

(Before MATHEW and DAY, J.J.)

REG. v. RAWLINS.

REG. v. DIBBIN. (a)

*Poor rate—Salary paid out of poor rate—Disqualification of guardian—5 & 6 Vict. c. 57, s. 14—Clerk of highway board—Clerk of school board—Not disqualified—Payment out of funds raised in a poor rate—27 & 28 Vict. c. 101, ss. 32, 33—33 & 34 Vict. c. 75, s. 54.*

*By 5 & 6 Vict. c. 57, s. 14: "No person during the time for which he may serve or hold the office of assistant overseer of any parish, nor any paid officer engaged in the administration of the laws for the relief of the poor, nor any person who, having been a paid officer, shall have been dismissed within five years previously from such office, under the provisions of the said first recited Act, shall be capable of serving as a guardian; and no person receiving any fixed salary or emolument from the poor rates in any parish or union shall be capable of serving as a guardian in such parish or union."*

*Held, that this section does not apply to a clerk of a highway board, or of a school board, whose salary is paid out of the highway or school board fund, although collected as a poor rate by the overseers, in pursuance of precepts issued to them under the Highway Act 1884 (27 & 28 Vict. c. 101) and the Elementary Education Act 1876 (33 & 34 Vict. c. 75).*

THIS was a rule calling on the defendant Rawlins to show cause why an information in the nature of a *quo warranto* should not be exhibited against him to show by what authority he claimed to exercise the office of a guardian of the poor of the parish of Wimborne Minster in the Wimborne and Cranborne Union, on the ground that he received a fixed salary from the poor rates of the union.

The affidavit on which the rule *nisi* was granted stated that Rawlins had been elected, and had acted as a guardian of the poor of the union; that he was clerk to the Wimborne Highway District Board, which included several parishes in the union, at the annual salary of 50*l.*, paid out of the moneys raised from the poor rate for the several parishes in the Wimborne Highway District; that the rates required for the purposes of the Wimborne Highway Board were raised by a precept from the waywardens of the board to the overseers of the poor of the several parishes within the highway district, except the parish of Wimborne Minster, to provide out of the poor rate to be levied for the parish the amount of the highway precept.

In answer to this affidavit Rawlins made an affidavit in which he stated that his salary as

clerk to the Wimborne Highway District Board was charged to a highway fund contributed by and charged upon the several highway parishes within such district in proportion to the rateable value of the property in each parish, as directed by 27 & 28 Vict. c. 101, s. 32 (a); that sect. 33 provided for the issuing of precepts by the highway board to the overseers, empowering them to levy a poor rate, out of which they were required to pay the highway rate; that this was done; that his salary as clerk was paid out of the district fund of such highway board, raised as aforesaid, and not out of the poor rate; that the board of guardians and the highway board were distinct

(a) 27 & 28 Vict. c. 101, s. 32: The salaries of the officers appointed for each district, and any other expenses incurred by any highway board for the common use or benefit of the several parishes within such district, shall be annually charged to a district fund to be contributed by and charged upon the several highway parishes within such district in proportion to the rateable value of the property in each parish; but the expenses of maintaining and keeping in repair the highways of each highway parish within the district, and all other expenses legally payable by the highway board in relation to such parish, including any sums of money that would have been payable out of the highway rates of such parish if the same had not become part of a highway district, except such expenses as are in this Act authorised to be charged to the district fund, shall be a separate charge on each parish.

By sect. 33 it is enacted that: For the purpose of obtaining payment from the several highway parishes within their district of the sums to be contributed by them, the highway board shall order precepts to be issued to the waywardens or overseers of the said parishes, according to the provisions hereafter contained, stating the sum to be contributed by each parish, and requiring the officer to whom the precept is addressed, within a time to be limited by the precept, to pay the sum therein mentioned to the treasurer of the board. Where a highway parish is not a parish separately maintaining its own poor, or where in any highway parish it has, for a period of not less than seven years immediately preceding the passing of the Highway Act 1882, been the custom of the surveyor of highways for such parish to levy a highway rate in respect of property not subject by law to be assessed to poor rates, the precept of the highway board shall be addressed to the waywarden of the parish, and in all other cases it shall be addressed to the overseers. Where the precept is addressed to a waywarden he shall pay the sum thereby required out of a separate rate, and such separate rate shall, in the case of a parish in which, for such period aforesaid, it has been the custom of the surveyor of highways to levy a highway rate in respect of property not subject by law to be assessed to poor rate, be assessed on and levied from the persons, and in respect of the property on, from, and in respect of which the same has been assessed and levied during such period as aforesaid, and in all other cases such rate shall be assessed on and levied from the persons, and in respect of the property on, from, and in respect of which a poor rate would be assessable and leviable if the parish of which he is waywarden were a place separately maintaining its own poor. No rate leviable by a waywarden under this Act shall be payable until the same has been published in manner in which rates for the relief of the poor are by law required to be published. A waywarden shall account to the highway board for the amount of all rates levied by him, and at the expiration of his term of office shall pay any surplus in his hands arising from any rate so levied, above the amount for which the rate was made, to the treasurer of the highway board, to the credit of the parish within which such rate was made, and such surplus shall go in reduction of the next highway rate that may be leviable in such parish. Where the precept is addressed to the overseers they shall pay the sum thereby required out of a poor rate to be levied by them, or out of any moneys in their hands applicable to the relief of the poor.

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bodies, and the guardians as such had no voice in any matter pertaining to the highway board.

*Bosanquet, Q.C. and Claud C. M. Plumptre* showed cause.—The fund out of which the defendant's salary is paid is a highway rate and not a poor rate, although collected as a poor rate by the overseers of the poor. In this particular parish the precept is directed to the waywardens, who levy a highway rate, and not to the overseers to levy a poor rate. Sect. 14 of 5 & 6 Vict. c. 57, does not apply to this case.

*Gore* in support of the rule.—By the Highway Act of 1864 (27 & 28 Vict. c. 101) ss. 32, 33, the salary is payable out of a fund raised by precepts issued to the overseers, who must pay the sum required out of a poor rate to be levied by them. The salary of the clerk is paid out of the poor rate, and he, being a person receiving a fixed salary from the poor rates in the union, is, by the express terms of 5 & 6 Vict. c. 57, s. 14, rendered incapable of serving as a guardian.

*MATHEW, J.*—I am clearly of opinion that the rule should be discharged. I construe the words of 5 & 6 Vict. c. 57, s. 14, "No person receiving any fixed salary or emolument from the poor rates in any parish or union," to mean "from any rates devoted to the relief of the poor." The object of the enactment was that persons under contracts with the parish should have nothing to do with the administration of the funds collected for the relief of the poor. By 27 & 28 Vict. c. 101, and other Acts of the same character, different rates for some purposes are thrown on to the poor rate for the convenience of collection. Lighting and school board, and a number of other rates, are so dealt with. But when the money raised in pursuance of a precept from the waywardens is received and used, it is stamped from the time of its collection as devoted to the payment of expenses incidental to the maintenance of the highway, and becomes in point of fact a highway rate, and is not within the terms or meaning of 5 & 6 Vict. c. 57, s. 14, or the mischief against which the enactment is directed.

*DAY, J.* concurred. *Rule discharged with costs.*

#### REG. v. DIBBIN.

In this case a similar question was raised with respect to the clerk of the school board for the district, whose salary was paid out of the local rate, raised under the Elementary Education Act 1870 (33 & 34 Vict. c. 75), s. 54, by the overseers of the poor.

*Bosanquet, Q.C. and Claud C. M. Plumptre* appeared to show cause.

*Gore*, in support of the rule, admitted that the question raised was decided by the judgment which the court had just delivered in *Reg. v. Rawlins*.

*Rule discharged with costs.*

Solicitors for the relator, *Roberts and Barlow*.  
Solicitors for the defendants, *Lovell, Son, and Pitfield*.

Monday, Dec. 15, 1884.

(Before *MATHEW* and *DAY, JJ.*)

*COLES* (app.) v. *FIBBENS* (resp.) (a)

*Local board—Common lodging-house—Resolution to register—Registration—38 & 39 Vict. c. 55, ss. 76, 89.*

*The respondent, having fulfilled the necessary preliminaries under sect. 78 of the Public Health Act 1875, applied to be registered as the keeper of a common lodging-house under sect. 76, and the local authority passed a resolution that his house should be registered.*

*The clerk did not carry out this resolution, and no formal registration of the respondent or his house was made, and eight months afterwards the local authority resolved that the respondent should not be registered, and two months later prosecuted him for keeping a common lodging-house without being registered. The justices refused to convict.*

*Held, upon a case stated, that, for the purposes of the Act, the resolution of the local authority constituted registration, and that the justices were right in refusing to convict the respondent.*

THIS was a case stated by justices for the opinion of the court.

1. At a petty sessions, holden at Eastbourne, in and for the borough of Eastbourne, in the county of Sussex, on the 19th May 1884, an information preferred by John Henry Campion Coles, the town clerk of the said borough, the appellant, against James Fibbens, the respondent, under sect. 86 of the Public Health Act 1875, charging that the said J. Fibbens, on the 30th April 1884, in the borough of Eastbourne aforesaid, did unlawfully receive lodgers in a certain common lodging-house there situate, kept by the said James Fibbens without having registered the said house as required by the Public Health Act 1875, was heard and determined by us, and we then dismissed the said information with costs on the grounds hereinafter appearing.

2. The appellant appeared in person, being a solicitor, and proceeding on behalf of the town council of the said borough, and made the statements hereinafter mentioned, which were taken as admissions, and upon these admissions we dismissed the information without calling upon the respondent's solicitor for his defence.

3. The respondent, who had kept a common lodging-house for some years without being registered, having been made aware by a notice from the urban authority, dated the 2nd May 1883, that registration was required by the Public Health Act, and that he must produce a certificate of character signed by three inhabitant ratepayers, rated for property of not less than 6*l.* rateable value, made a written application to the local authority, then the Local Board for the District of Eastbourne, to have his house registered as a common lodging-house. This application was dated the 2nd May 1883, and was in the proper form as supplied to him by the clerk of the board.

4. The respondent at the same time delivered to the local board a certificate of character signed by three inhabitant householders of the parish, respectively rated to the poor rate to the rateable value of 6*l.* and upwards, pursuant to the 78th section of the Public Health Act 1875.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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This was also in a form supplied to the respondent by the clerk of the board, and certified that the said James Fibbens was of good repute and character, and a fit and proper person to be, and to be registered as, a keeper of a common lodging-house in the parish aforesaid. No question was raised before us that this certificate was not in form and substance a compliance with the statutory requirement, and we find that it was so.

5. On the 7th May 1883 Walter Grant, the inspector of nuisances, made a report to the Eastbourne Local Board, setting forth the situation of the respondent's house, the total number of the rooms therein, with the cubical amount of air space, and the number of inmates it was fitted to accommodate, with some other particulars.

6. On the same 7th May 1883 the said report was laid before the meeting of the local board, and the following minute was made:

The report of the inspector of nuisances and the applications therein referred to for registration of certain houses as common lodging-houses, and a memorial and letter complaining of the manner in which Fibbens' house is conducted, were read and considered.

Resolved, that the same be referred to the clerk and medical officer.

7. On the 30th May 1883 a meeting of the sanitary committee of the local board took place, and the committee then recommended that the respondent's house should be registered as a common lodging-house.

8. On the 4th June 1883 the ordinary monthly meeting of the local board took place, and the report of the sanitary committee was brought before it, upon which it was resolved, "That Fibbens' house should be registered as a common lodging-house, in pursuance of the recommendation of the committee."

9. The clerk of the board did not make the entry in the register of the respondent's house as a common lodging-house in pursuance of this resolution, and in point of fact no formal registration thereof has ever been made. It was contended by the appellant that the non-registration of the respondent's house, however occasioned, was in itself sufficient to render him liable to a penalty for receiving lodgers afterwards, notwithstanding the passing of the resolution ordering the registration of the house. It was not disputed, and we find as a fact that the respondent did receive lodgers into his house on the day named in the information, which was subsequent to the passing of the resolution ordering the registration of the house.

10. We, however, were of opinion that the respondent ought not under the circumstances to be made liable to penal consequences from the omission of the clerk to make the proper entry on the register, and that he must be taken to have made such entry, as it was his duty to do, immediately on the passing of the above resolution.

11. The appellant then stated that a memorial, signed by a number of inhabitants, had been sent to the local board objecting to the registration of the house, and that another memorial, also signed by a number of the inhabitants, had been sent in to the town council. The appellant proposed to prove that, notwithstanding the

inspector's report, no inspection of the house had actually taken place, as required by the 78th section of the Public Health Act 1875. We, however, declined to hear such evidence, as we considered that the provision of the 78th section in that respect prescribed the duty of the local board, but that the respondent ought not to be affected penal by the omission of the board to take the prescribed steps before ordering the registration, and that, after the resolution of the board of the 4th June, ordering the registration of the house, we were bound to assume that they had fulfilled their own duties in a proper manner.

12. Under the foregoing circumstances, and upon the grounds already stated, we dismissed the information; but for the purposes of this case, and for the information of the court, the following further admissions were taken.

13. On the 22nd Aug. 1883 the inspector of nuisances, accompanied by Dr. Fussell, the medical officer of health, made a special visit to the premises and special report thereon; which report concluded by a statement that unless the recommendations of that report were properly carried out, they could not advise that the proprietor should be registered by the local authority.

14. The appellant produced a copy of the by-laws of the local board relating to common lodging-houses, under which and under the general provisions of the Public Health Act 1875, all the recommendations of this report could be enforced against the respondent after registration.

15. On the 22nd Nov. 1883 the medical officer and inspector of nuisances made a further joint report to the Sanitary Committee of Eastbourne, which had then become a board under a charter of incorporation, and they thereby advised that the premises should be registered.

16. On the 24th Nov. 1883 the last-mentioned report came before the sanitary committee, when the following minute was made:

The medical officer and inspector of nuisances reported that they had inspected the common lodging-house in Pevensy-road, kept by James Fibbens, and recommended that it should be registered.

Resolved, that the committee recommend the council to instruct the town clerk accordingly.

17. On the 3rd Dec. 1883 the report of the committee came before a meeting of the town council, and it was then

Resolved, that the report of the sanitary and hospital committee, with the exception of that part relating to Fibbens's common lodging-house, be adopted.

Resolved, that it be referred back to the sanitary and hospital committee to reconsider the application of James Fibbens to have his house in Pevensy-road registered as a common lodging-house.

18. On the 27th Dec. 1883 a meeting of the sanitary committee took place, when the following minute was made:

The committee having considered at length the question of registering the house in Pevensy-road, in the occupation of James Fibbens, as a common lodging-house:

Resolved, that it be postponed, as it appears to the committee that the certificate of character is unsatisfactory.

19. On the 7th Jan. 1884, at a meeting of the town council, it was

Resolved, that the report of the sanitary and hospital committee be adopted, and that it be referred to the committee to further consider the question of Fibbens's common lodging-house.

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20. On the 20th Jan. 1884 a meeting of the sanitary committee took place, when the following minute was made:

The committee discussed at length the question of registering the common lodging-house in Pevensey-road, kept by James Fibbens, and, after giving it their serious attention they can come to no other conclusion than to recommend the council not to register it.

21. On the 4th Feb. 1884, at a meeting of the town council, it was

Resolved, that the report of the sanitary and hospital committee be adopted.

22. And on the 7th April 1884, at a meeting of the town council, the appellant, as town clerk, was directed to prosecute the respondent for using as a common lodging-house a house not licensed to be used.

23. We, however, were of opinion that the town council had no power to licence, but only to register the premises, and that the respondent had done all that was necessary on his part to procure such registration, and that he was entitled, as of right, to be registered upon the 4th June 1883 immediately upon the passing of the resolution of that date.

24. The appellant further contended that the respondent's character was unsatisfactory to the knowledge of the town council, and that they had a right to exercise their own judgment upon the question of character and to refuse registration on that ground, notwithstanding that the requirements of the 78th section, as to furnishing a certificate of character, had been duly complied with; and he proposed to offer evidence that the respondent had been convicted of an offence, but we declined to hear such evidence, on the ground that the respondent had complied with the statute by furnishing a certificate of character as thereby required, and that the same had been accepted by the local board when they passed the resolution of the 4th June 1883, and no objection as to character was made until several months afterwards.

The questions for the opinion of the court were:

1. Whether we were right in holding that the respondent was entitled to registration immediately upon the passing of the resolution of the 4th June 1883, and could not be affected penally by the omission of the clerk to make the proper entry in the register in pursuance thereof.

2. Whether we ought to have admitted evidence of irregularity in the proceedings of the board or its officers (in that it was proposed to be proved that the inspector of nuisances had made the report of the house without actually inspecting it) with the view of invalidating the resolution of the board ordering the registration of the house.

3. Whether (if it be necessary for the decision of the case) the town council have a right to exercise their own judgment as to the character of an applicant for registration, or are bound to accept the certificate of character by the 78th section of the statute as sufficient.

If the court should be of opinion that under the circumstances aforesaid we ought to have convicted the respondent or ought to have heard evidence beyond the admissions which were made before us, then the case is to come back to us to be further proceeded with, either by convicting and sentencing the respondent or by hearing such other evidence and determining the case thereon;

and we request such direction as the court shall be pleased to give. Otherwise our judgment to stand, and the case to be dismissed with costs.

By the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 76:

Every local authority shall keep a register in which shall be entered the names and residences of the keepers of all common lodging-houses within the district of such authority, and the situation of every such house and the number of lodgers authorised under this Act by such authority to be received therein. A copy of any entry in such register, certified by the clerk of the local authority to be a true copy, shall be received in all courts and on all occasions as evidence, and shall be sufficient proof of the matter registered without production of the register or of any document or thing on which the entry is founded; and a certified copy of any such entry shall be supplied gratis by the clerk to any person applying at a reasonable time for the same.

By sect. 77:

A person shall not keep a common lodging-house or receive a lodger therein unless the house is registered in accordance with the provisions of this Act; nor unless his name as the keeper thereof is entered in the register kept under this Act.

By sect. 78:

A house shall not be registered as a common lodging-house until it shall have been inspected and approved for the purpose by some officer of the local authority; and the local authority may refuse to register as the keeper of a common lodging-house a person who does not produce to the local authority a certificate of character, in such form as the local authority direct, signed by three inhabitant householders of the parish respectively rated to the relief of the poor of the parish within which the lodging-house is situate for property of the yearly rateable value of 6*l.* or upwards.

By sect. 86:

Any keeper of a common lodging-house who (1) receives any lodger in such house without the same being registered under this Act . . . shall be liable to a penalty not exceeding 5*l.*, and in the case of a continuing offence to a further penalty not exceeding 4*s.* for every day during which the offence continues.

By sect. 88:

When the keeper of a common lodging-house is convicted of a third offence against any of the provisions of this Act relating to common lodging-houses, the court before whom the conviction for such third offence takes place may, if it thinks fit, adjudge that he shall not at any time within five years after the conviction, or within such shorter time after the conviction as the court thinks fit, keep a common lodging-house without the previous licence in writing of the local authority, which licence the local authority may withhold or grant on such terms and conditions as they think fit.

*Poland* argued for complainant, the appellant. —Sect. 76 of the Public Health Act 1875 is precise in requiring a formal register in each district, and sect. 77 forbids the keeping of a common lodging-house unless the name of the keeper be "entered in the register kept under this Act." It cannot be that a mere resolution of the board, never carried out and afterwards overruled, constitutes such a registration as the Act requires in the formal register.

*Henn Collins*, Q.C. (with him *Francis Turner*) appeared for the respondent, but was not heard.

*MATHEW*, J.—I think in this case the magistrates were right, and their decision should be upheld. In my opinion this man Fibbens was for the purposes of this Act registered at the time the last resolution of the board was passed, and Mr. *Poland* is trying to punish him for an offence he never committed, and for what could not have been contended was an offence at all but for the negli-

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gence of somebody else. It seems to me that the Act imposes an obligation on the local authority to complete the registration of a common lodging-house after they once pass over the opportunity for refusal provided by the 78th section. Here all the required preliminaries were fulfilled; the board did not refuse to register, but, on the contrary, passed a resolution that the respondent should be registered. What remained to be done was merely formal, and was omitted by no fault of the respondent. It is too clear on these facts that the town council entertain an intention of putting a stop to the respondent's business as they like, but their power is limited by sect. 88 to a third offence, and they have no jurisdiction to withdraw an authority which they have once granted except under that section.

DAY, J.—I am of the same opinion.

*Judgment for respondent.*

Solicitors for appellant, *Tippetts, Son, and Tickle*.

Solicitors for respondent, *Oode, Kingdon, and Cotton*, for *G. E. Hillman, Lewes*.

Monday, March 23, 1885.

(Before MATHEW and SMITH, JJ.)

REG. v. MAYOR, &C., OF WIGAN. (a)

*Town councillor — Resignation — Withdrawal — Declaration of vacancy—45 & 46 Vict. c. 50, s. 36.*

*A town councillor of a municipal corporation sent a letter resigning his office to the town clerk, and inclosed a cheque for the amount of the fine. At a meeting held five days afterwards, for the purpose among others of dealing with the resignation, it was proposed that the resignation be not accepted, and the councillor expressed his willingness to withdraw it. The matter was postponed, and two days later the councillor wrote to the town clerk withdrawing his resignation. At a subsequent meeting the council refused by a majority to declare the office vacant.*

*Held, upon a rule for a mandamus to the council, that they had no power to refuse, and that, under the circumstances, it was their absolute duty to declare the office vacant upon receipt of the resignation, according to the Municipal Corporations Act 1882, s. 36.*

This was a rule for a *mandamus*.

On the 4th Feb. 1885, at a quarterly meeting of the town council of the borough of Wigan, the following, after due notice of motion, appeared on the minutes:

Resignation of Mr. Councillor Ackerley. The following resignation was read, and the cheque therein referred to laid on the table. "Wigan, 30th June 1885.—Dear Sir: I beg to give you notice that I resign the office of Councillor for No. 5 or All Saints Ward of the borough of Wigan. In accordance with the Municipal Corporations Act I beg to hand you a cheque for 25s., the amount of the fine on resignation.—I am, dear Sir, yours faithfully, HENRY ACKERLEY. M. W. Peace, Esq., Town Clerk, Wigan."

Moved by Mr. Councillor Nevill, seconded by Mr. Councillor Phillips: "That the resignation of Mr. Ackerley be not accepted, and that the cheque be returned to him."

Mr. Ackerley stated that he was quite willing to withdraw his resignation, and that he should be glad if the council would allow him to do so.

On the suggestion of the Mayor, the matter was ordered to stand over until the town clerk had obtained the opinion of counsel on the question whether the town council could allow Mr. Ackerley to withdraw his resignation or not.

Subsequently the town clerk received the following letter:

Wigan, 6th Feb. 1885.—Dear Sir: I beg formally to withdraw my resignation of the office of Councillor of No. 5 or All Saints Ward of the borough of Wigan, dated the 30th January last.—I am, dear Sir, yours faithfully, HENRY ACKERLEY. M. W. Peace, Esq., Town Clerk, Wigan.

By 6 & 7 Will. 4, c. 104 (which was passed to amend the Municipal Corporations Act 1835, 5 & 6 Will. 4, c. 76, and is now repealed), s. 8:

And whereas no provision is made in the said Act for resigning any corporate office on payment of a fine or otherwise; be it enacted that every person elected into any corporate office in any of the said boroughs may at any time resign such office on payment of the fine which he would have been liable to pay for non-acceptance of the same office.

By the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 36:

(1.) A person selected to a corporate office may, at any time, by writing signed by him and delivered to the town clerk, resign the office on payment of the fine provided for non-acceptance thereof. (2.) In any such case the council shall forthwith declare the office to be vacant, and signify the same by notice in writing signed by three members of the council and countersigned by the town clerk, and fixed on the town hall, and the office shall thereupon become vacant.

On the 18th Feb., at a special meeting of the town council, the town clerk read an opinion of counsel to the effect that the town council had no power to allow Mr. Ackerley to withdraw his resignation, but a motion to declare the office vacant by reason of the resignation was lost by a majority of fourteen against twelve votes.

On the 25th Feb., at another special meeting, a similar motion was negatived by a majority of sixteen against thirteen votes.

On the 6th March 1885 a rule *nisi* was obtained, calling upon the mayor, aldermen, and councillors of the borough of Wigan to show cause why a writ of *mandamus* should not issue directed to them commanding them to declare and signify the office of Henry Ackerley as councillor for No. 5 or All Saints Ward in the said borough vacant by his resignation, pursuant to the Municipal Corporation Act 1882, s. 36, and to take all necessary proceedings and cause notice to be given and a meeting held for that purpose.

The *Solicitor-General* (Sir F. Herschell, Q.C.) and *Channell* now showed cause on behalf of the Corporation of Wigan.—The question here is not whether, under the circumstances, the council had power to accept Mr. Ackerley's resignation, but whether the resignation was complete without acceptance. Then there is a further question whether the inclosure of the cheque amounted to a payment of the fine. [Stopped by the Court.]

*Wright* supported the rule.—There remained nothing to be done to complete Mr. Ackerley's resignation according to the 36th section of the Municipal Corporations Act 1882. No objection was made at the time to payment of the fine by cheque, and no such objection can be taken now. Even under the old repealed Act of 1836, it was held in *Staniland v. Hopkins* (9 M. & W. 178), that a resignation was sufficient, although the town council refused to accept a fine. [MATHEW, J.—

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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Is there no *locus penitentie* or opportunity to correct a mistake? It is conceived not. Further, the circumstances here are not consistent with any mistake. The letter of resignation was received by the town clerk before he issued the notices of motion for the quarterly meeting. At the meeting some one proposed that the resignation be not accepted; and then for the first time, five days after the letter, Mr. Ackerley said he was willing to withdraw his resignation; the actual withdrawal did not take place till two days later. The duty of the council became absolute to declare the office vacant forthwith upon the receipt of the resignation and payment of the fine.

The *Solicitor-General* was further heard in opposition to the rule.

MATHEW, J.—In this case the rule must be made absolute. So far as appears, Mr. Ackerley continued in the mind to resign for at least five days, and even until the meeting held to accept his resignation, when on his expressing his willingness to withdraw, the council refused to accept his resignation. All the conditions laid down by the statute had been fulfilled upon the delivery of the resignation to the town clerk and payment of the fine. The council thereupon could do nothing but declare the office vacant. It has been urged that a proceeding of this kind can be altered or withdrawn before action is taken upon it; but even if that were possible in face of the words of this statutory provision, it does not appear that no action had been taken here. Some preparation had probably been made for a new election. At all events the words of the Act are clear, and we must enforce obedience to them.

SMITH, J.—I am of the same opinion. This case is governed by sect. 36 of the Municipal Corporations Act 1885. By the old Act of 1836 a member of a town council might resign on payment of a fine, and it was held that some acceptance of the resignation was necessary. But it seems that the provision of the new Act was intended to render unnecessary any such acceptance, and the only course open to the council at their meeting on Feb. 4 was to declare the office vacant.

*Rule absolute.*

Solicitors for prosecution, J. J. and J. O. Allen, for James Wilson, Wigan.

Solicitors for defence, Sharp, Parkers, Pritchard, and Sharp, for M. W. Peace, Town Clerk, Wigan.

Tuesday, March 24, 1885.

(Before MATHEW and SMITH, JJ.)

SANDGATE LOCAL BOARD (apps.) v. PLEDGE (resp.). (a)

*Rates—General district rate under Public Health Act 1875—Case stated by justices—Duties of justices as to enforcing general district rate—Summary Jurisdiction Act 1879—38 & 39 Vict. c. 55, ss. 4, 256—42 & 43 Vict. c. 49, s. 33—47 & 48 Vict. c. 43, s. 10.*

*Justices, sitting as a court of summary jurisdiction to hear an application to enforce payment of rates under sect. 256 of the Public Health Act 1875, have power to state a case in respect of matters arising out of such application under sect. 33 of the Summary Jurisdiction Act 1879.*

*When a general district rate, good on the face of it,*

*is sought to be enforced, the justices have no power to refuse to make an order for the payment of the rate on the ground that there is a concurrent rate made for the same purpose.*

This was a case stated by justices under 42 & 43 Vict. c. 49, s. 33. The material facts are as follows:—

The appellants were the local board of health and sanitary authority for the urban sanitary district of Sandgate, and the respondent was an auctioneer and house agent residing within the said district.

The appellants having incurred certain costs in an action in which they were unsuccessful, and having no fund out of which they could defray them, made a general district rate of eightpence in the pound.

The respondent was assessed to the said rate to the amount of 1l. 2s. 8d., and refused to pay it. The appellants then took out a summons calling upon the respondent to show cause why an order should not be made upon him for the payment of the said sum. At the hearing the following facts were proved:

At a meeting of the local board on the 30th Jan. 1884 an estimate was submitted and approved for a rate of 8d. in the pound. The estimate was not then signed.

On the 11th Feb., at another meeting of the board, the rate was sealed and ordered to be put into collection. This rate was not published nor put into collection, but was afterwards treated as abandoned.

On the 23rd Feb., at a meeting of the board, it was resolved that the estimate standing in the rate-book be approved, and that the clerk sign the same and give notice for making the rate, and that the rate of the 11th Feb. be made after the expiration of the time allowed by law. The estimate was signed.

On the 4th March, at a meeting of the board, it was resolved that the rate of the 11th Feb. be re-executed or made and that the seal be affixed, and the rate was sealed accordingly.

A second assessment of the property to be assessed was made on the 4th March and interleaved in the rate-book between the original estimate and the first assessment of the 11th Feb.

The rate of the 4th March was duly published and put into collection, and was the rate which the respondent refused to pay. When summoned before the justices the respondent objected to the payment of the rate on the following (among other) grounds: (1) That the rate of the 4th March was not a rate duly made under the provisions of the Act, as it was shown there were two rates made for the same purpose, viz., that of the 11th Feb. and the 4th March 1884; (2) that the local board had no power to re-execute or make an existing rate.

The justices were of opinion that the rate of 4th March was not a good rate on the face of it, for in the same rate-book, and in fact in the same rate, there was evidence of its being a double rate, one on 11th Feb. and one on 4th March, and made for the self same object, and that there could not exist two concurrent rates for the same purpose; also that the rate of 11th Feb. was enforceable, having been made on an estimate dated 30th Jan. not appealed against, and after having been signed and sealed by the board could not be

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abandoned, and dismissed the complaint with costs.

The questions for the court were (*inter alia*):

1. Whether the rate or assessment made by the board on 11th Feb. 1881 was good and valid; if not,

2. Was the rate of 4th March good and valid?

By 11 & 12 Vict. c. 63, s. 103:

If any person assessed to any such rate fail to pay the same when due, and for the space of fourteen days after the same shall have been lawfully demanded in writing, any justice may and he is hereby empowered to summon the defaulter to appear before him, or any other justice, at a time and place to be mentioned in the summons, to show cause why the rate in arrear should not be paid; and in case the defaulter fail to appear according to the exigency of the summons, or no sufficient cause for non-payment be shown, the justice may by warrant under his hand and seal cause the same to be levied by distress of the goods and chattels of the defaulter.

By 20 & 21 Vict. c. 43, s. 2:

After the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices, to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior courts of law to be named by the party applying.

By 38 & 39 Vict. c. 55, s. 4:

"Courts of summary jurisdiction" means any justice or justices of the peace, stipendiary or other magistrate or officer, by whatever name called, to whom jurisdiction is given by the Summary Jurisdiction Acts or any Acts therein referred to.

By sect. 256:

If any person assessed to any rate made under this Act by any urban authority fails to pay the same when due and for the space of fourteen days after the same has been lawfully demanded in writing, or if any person quits or is about to quit any premises without payment of any such rate then due from him in respect of such premises, and refuses to pay the same after lawful demand thereof in writing, any justice may summon the defaulter to appear before a court of summary jurisdiction to show cause why the rate in arrear should not be paid; and if the defaulter fails to appear, or if no sufficient cause for nonpayment is shown, the court may make an order for payment of the same, and, in default of compliance with such order, may by warrant cause the same to be levied by distress of the goods and chattels of the defaulter. The costs of the levy of arrears of any rate may be included in the warrant for such levy.

By 42 & 43 Vict. c. 49, s. 33:

Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and, if the court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated.

By 47 & 48 Vict. c. 43, s. 10:

Nothing in this Act shall alter the procedure for the recovery of or any remedy for the nonpayment of any poor rate, or of any rate or sum the payment of which is not adjudged by the conviction or order of a court of summary jurisdiction.

G. L. Denman for the respondent.—Before the appellants begin I have a preliminary objection to make, to the effect that justices sitting to entertain an application for the enforcement of a

general district rate under the Public Health Act 1875 have no jurisdiction to state a case in respect of such application under sect. 33 of the Summary Jurisdiction Act 1879. Proceedings relating to the recovery of rates do not come within the Summary Jurisdiction Act; justices have only ministerial functions to perform in respect of them. I submit they have no power to inquire into the validity of a rate under this 256th section of the Public Health Act 1875; they certainly had not the power under the 103rd section of the Public Health Act 1848, which is the corresponding section. I quite admit that different words are used in the later section, but I contend that the words "may make" are to be read as "must make;" where "may" is used in a statute which directs the doing of a thing for the public good, it is to be read as imperative: (*Hardcastle Constr. Stat. Law*, 155.) When justices are applied to for the enforcement of a rate they have no power to inquire into the validity of the rate; if the rate is good on the face of it, they must now make their order upon the defaulter for its payment; if, however, they are not satisfied as to its validity, or they doubt their jurisdiction to make the order; they may refuse to make it, and leave the complaining party to come to this court for a rule calling upon them to show cause why they should not make it. This was the proper course for the appellants to have followed in the present case. The justices have stated this case under sect. 33 of the Summary Jurisdiction Act 1879. The old procedure in stating a case was governed by 20 & 21 Vict. c. 43, s. 2, and the principles that governed the former procedure are equally applicable to the present. Under the earlier Act it has been decided that justices can state a case only when acting judicially and not ministerially; their order under sect. 256 is, as under the earlier law, entirely formal; the rate itself is the order. [SMITH, J.—You say that "may" is equivalent to "shall?"] Yes; this is an enabling statute, and permissive language in an Act dealing with procedure must be read as imperative:

*Rez v. Barlow*, Salk. 609;

*McDougal v. Paterson*, 6 Exch. 337;

*Julius v. Bishop of Oxford*, 42 L. T. Rep. N. S. 546; 5 App. Cas. 214.

When acting ministerially they have no power to state a case:

*Ex parte May*, 31 L. J. 161, M. C.

[MATHEW, J.—They may have power to state a case as to a question of jurisdiction, though not as to the validity of the rate.] I think not; the question of jurisdiction would be one simply of fact; their power of inquiry into the validity of the rate is limited to what appears on its face, and to no more:

*Walker v. Great Western Railway Company*, 29 L. J. 107, M. C.

MATHEW, J.—Before we decide this point we wish to be informed as to what was done by the magistrates.

*Meadows White*, Q.C. (*E. C. Glen* with him), for the appellants, after mentioning the facts of the case as above set forth, proceeded to argue the preliminary point.—The justices have now power under the Summary Jurisdiction Act 1879 to state a case in a proceeding for the enforcement of rates under the Public Health



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Act 1875. The cases cited by the other side were all decided under 20 & 21 Vict. c. 43, s. 2, the language of which is quite different from that of the Act of 1879, the latter being much wider in its terms. Under it a person aggrieved desiring to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction may apply for a case. Under the Public Health Act 1875, sect. 256, the enforcement of rates is referred to a court of summary jurisdiction. I quite admit that in the matter of enforcement of poor rates the justices have no power to state a case. But, as the Public Health Act 1875 refers the enforcement of rates levied under it to a court of summary jurisdiction, and the Summary Jurisdiction Act 1879 gives the right to a person aggrieved by a determination or other proceeding of a court of summary jurisdiction to have a case stated, it is quite clear that the justices have this power.

*Denman* in reply.—The power to state a case under the Summary Jurisdiction Act 1879 is given to justices only when they are acting judicially, but not ministerially:

*Reg. v. Price*, 42 L. T. Rep. N. S. 439; 5 Q. B. Div. 300.

*Cockburn*, C.J. in that case touches on this very point, and his remarks are in my favour (44 J. P. 248). [*SMITH*, J.—The words “no sufficient cause for nonpayment is shown” in sect. 256 of the Public Health Act 1875 must confer upon the justices a judicial discretion.] These words were in the Public Health Act 1848, and yet it has been held that they did not confer a judicial power, so as to enable them to state a case:

*Reg. v. Newman*, 29 L. J. 117, M. C.;  
*Walker v. Great Western Railway Company* (ubi sup.);

*Luton Local Board v. Davis*, 29 L. J. 173, M. C.

Sect. 10 of the Summary Jurisdiction Act 1879 is in my favour. If the justices have the power to inquire judicially into the validity of the rate, and so to state a case, it is now conferred upon them for the first time; and they have all the powers of the local authority under it; they may remit for poverty (sect. 211); and may treat it as a civil debt (42 & 43 Vict. c. 49, s. 6). It could not have been intended that there should be two judicial bodies inquiring into such questions, and with concurrent powers over the rate.

The COURT intimated that it was of opinion that the preliminary objection ought to be overruled, but would give its judgment after the argument on the merits.

*Meadows White*, Q.C. proceeded to argue on the merits.—I admit a concurrent rate is bad, because excessive and unnecessary; but that is a ground of appeal to quarter sessions, and not for the justices to inquire into. Here the local authority have not made two rates; the rate when presented to the justices for enforcement was valid and good on the face of it; and the justices were not entitled to go behind it and inquire whether there was a concurrent rate. They have no power to quash a rate valid on its face.

*Denman*.—The rate was bad on its face when presented to the justices. To prove their case, the appellants were obliged to produce their rate-book, and then it became evident that this was a

concurrent rate, and that fact makes the rate of March 4 bad:

*Reg. v. Fordham*, 11 Ad. & Ell. 73.

*MATHEW*, J.—I think this preliminary objection must fail, as the Legislature has by sect. 33 of the Summary Jurisdiction Act 1879 clearly conferred upon justices when sitting as a court of summary jurisdiction power to state a case in respect of their decision. I also think the magistrates ought to have enforced the payment of this rate. The rate appeared to be a valid one; that being so, their duties were ministerial only and not judicial, and they would only inquire into their own jurisdiction, but not as to the validity of the rate. The objection taken before the justices was, that the rate, which on its face appears to be valid, should be treated as invalid because it appeared from the rate-book that there had been a previous rate for the same purpose and on the same property. The fact that the magistrate's attention had been called to the two assessments, was no ground for their declining to deal with the rate in question. I am of opinion that the rate being good on its face, the justices had no power on the application to enforce it to go behind it, and that they ought to have made the order.

*SMITH*, J.—I entirely agree as to the preliminary point. I am of opinion that the combined effect of sect. 256 of the Public Health Act 1875, and sect. 33 of the Summary Jurisdiction Act 1879 confers upon the justices a power to state a case. I think the preliminary point was properly taken by Mr. Denman that it does not. As to the cases cited, I do not wish to be thought to overrule them, but to rest my judgment on the words of this 256th section of the Public Health Act 1875. Now, all the cases called to our attention seem to have proceeded on this principle, that a case cannot be stated by justices if they are proceeding ministerially. All of them were decided under 20 & 21 Vict. c. 43, s. 2. That section provides that, after the hearing and determination by a justice or justices of any information or complaint which he or they have power to determine in a summary way, either party to the proceeding may, if dissatisfied with the determination as being erroneous in law, apply to the justice or justices to state and sign a case setting forth the facts and grounds of such determination. The decisions cited seem to put a limit to their power to state a case under this section to cases where their inquiry is judicial. I do not wish to throw any doubt upon them. Here different circumstances arise. We are here not dealing with a poor rate, but with the enforcement of a general district rate under sect. 256 of the Public Health Act 1875. Now, this section provides that if any person assessed to any rate under the Act makes default in payment he may be summoned before a court of summary jurisdiction to show cause why the rate in arrear should not be paid by him. The definition of a “court of summary jurisdiction” is given by sect. 4 of the same Act; and it is “any justice or justices of the peace, stipendiary or other magistrate or officer, by whatever name called, to whom jurisdiction is given by the Summary Jurisdiction Acts or any Acts therein referred to.” Therefore we find that for the first time the local authority and the defaulting ratepayer are brought before a court of summary jurisdiction. When the parties are before the court, what are

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their rights? These are ascertained by sect. 33 of the Summary Jurisdiction Act 1879, which gives to any person aggrieved, who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction on the ground that it is erroneous in point of law or in excess of jurisdiction, the right to apply to the court to state a special case. Is there, then, any person in this case aggrieved by any proceeding? Certainly, the appellant board, because the justices have refused to make the order on the respondent which they were asked to make. The point in this case is properly raised by a special case, and I am of opinion that the cases cited to us do not in any way bind us in this particular instance.

*Objection overruled, and case remitted to the justices with the expression of the opinion of the court.*

Solicitors for the appellant, *Talbot and Tasker*, for A. D. and L. J. Brockman, Folkestone.

Solicitor for the respondent, *J. Minter*, Folkestone.

April 22 and 23, 1885.

(Before CAVE, J.)

MELLISS AND PIM v. THE SHIRLEY AND FREEMANTLE LOCAL BOARD OF HEALTH. (a)

*Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 174, 193—Contract not under seal—Ratification—Officer interested in contract—Effect of statutory penalty.*

*The plaintiffs contracted with the defendants by an agreement in writing, but not under seal, to act as joint engineers in the execution of certain works. The plaintiffs did various work in performance of their part of the agreement for twelve months. At the end of that time, and before the works contemplated by the original agreement were actually commenced, a memorandum under seal was duly executed by the defendants, reciting the previous agreement and purporting to confirm the same.*

*Held, that there was a valid contract under seal between the parties within the meaning of sect. 174 of the Public Health Act 1875, and that the plaintiffs could recover for work done both before and after the date of the sealed agreement.*

*The second plaintiff, at the time of both the agreements above mentioned, held the post of surveyor to the defendant board at a fixed salary.*

*Held, that the fact of the surveyor being interested in the contract did not render the contract void as against either of the plaintiffs, the consequences of a breach of sect. 193 of the Public Health Act 1875 being limited to the penalty fixed by the section.*

THE following facts were proved at the trial:—

Prior to Nov. 1882 the defendant board contemplated carrying out an extensive system of drainage in their district, and entered into negotiations with the plaintiff, Mr. Melliss, for the preparation of plans and superintendence of the proposed work by him in conjunction with Mr. Pim, the second plaintiff, who then held the appointment of surveyor to the board at an annual salary of 150l.

On the 14th Nov. 1882 the plaintiffs jointly

addressed to the board a proposal in the following terms:

Gentlemen,—We are willing to act as joint engineers for carrying out the outfall and sewage disposal works for the district of Shirley and Freemantle for the remuneration of 4 per cent. on the total outlay.

Certain further terms followed with regard to extra work. This proposal was accepted by the board in a letter from their clerk to the plaintiffs on the 20th Nov.

The plaintiffs then, working conjointly, prepared plans and estimates, attended inquiries, and did various work and incurred various out-of-pocket expenses in connection with the proposed scheme down to the 23rd Nov. 1883.

On the 17th Oct. 1883 they signed and forwarded to the board the following memorandum of agreement, requesting that the seal of the board might be attached to it:

Whereas the Shirley and Freemantle Local Board of Health are about to carry out works for the drainage of Freemantle and for the disposal of the sewage of the combined district, and have, under date the 14th Nov. 1882, received an offer from John Charles Melliss, civil engineer, of 232, Gresham House, London, E.C., and John Rose Hall Pim, civil engineer, of 61, Above Bar-street, Southampton, to act as their engineers for the same, and to prepare all the necessary plans and estimates, charging as their remuneration 4 per cent on the total outlay, and further charging [here follow the extras]. And whereas the Shirley and Freemantle Local Board of Health did accept such offer, such acceptance being conveyed to Messrs. Melliss and Pim in a letter from W. Godfrey Newman, Esq., clerk to the said board, under date the 20th Nov. 1882, the seal of the said local board is, in confirmation of such agreement and contract, hereby attached this 2nd day of November in the year 1883.

The seal of the board was duly attached to this memorandum in accordance with a resolution to that effect duly passed by a majority of the board. On the 23rd Nov. following an inquiry into the proposed scheme was held by an officer of the Local Government Board. The report on this inquiry was adverse to the scheme, which was subsequently abandoned. The plaintiffs now brought their action for work done and expenses incurred under the agreement recited and confirmed by the memorandum of the 2nd Nov. 1883, or alternatively for work done, &c., at the defendants' request. The defendants denied liability under the agreement, and pleaded sect. 193 of the Public Health Act 1875.

A. Charles, Q.C. (*F. O. Crump* with him) for the defendants.—The plaintiffs have no contract under seal within the meaning of sect. 174 of the Public Health Act. The agreement under seal was after the work had been done, and it cannot be said here that the defendants have had the benefit of the contract:

*Hunt v. The Wimbledon Local Board*, 39 L. T. Rep. N. S. 35; 4 C. P. Div. 48;

*Young v. The Corporation of Leamington*, 46 L. T. Rep. N. S. 555; 8 Q. B. Div. 579.

The original contract is void, and that being so, ratification is ineffectual:

*Ashbury Railway Carriage Company v. Riche*, 33 L. T. Rep. N. S. 450; L. Rep. 7 H. of L. 653.

Secondly, the contract is void under sect. 193 of the Public Health Act, Pim being an officer of the board. Apart from the statute it would be void as contrary to public policy. It is mischievous to the ratepayers for the surveyor of the board to be receiving a percentage on work done

(a) Reported by E. A. BENNETT, Esq., Barrister-at-Law.

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for the board. That, in fact, is the mischief against which sect. 193 is directed. As for Melliss, the contract is a joint contract, and, if illegal, void against all parties to it.

*Meadows White, Q.C. and Muir Mackenzie* for the plaintiffs.—Where a contract is good but for the absence of statutory formalities, the defect may be remedied by formal ratification. It is enough that there was a contract under seal before any cause of action arose. *Ashbury Railway Carriage Company v. Riche*, was a case of a contract which the company had no power to make. As to the other point, sect. 193 does not avoid every contract in which an officer may be interested. An officer may contract, but at his peril. At the most the contract is only void against Pim. They cited, among other cases,

*Foster v. The Oxford, Worcester, and Wolverhampton Railway Company*, 13 C. B. 200.

CAVE, J.—The first point raised for the defendants is, that the plaintiffs were not entitled to recover, on the ground that there was no contract under seal, as required by the 174th section of the Public Health Act 1875. [His Lordship recited the facts in connection with the two agreements.] Now, it seems to me, looking at the peculiar circumstances of this case, that there was on the 2nd Nov. 1883 a perfectly good agreement, authenticated with the seal of the board. What took place, so far as one can gather, was this: The plaintiffs, finding that they were not in possession of a contract under seal, appear to have gone to the board and made the following arrangement: "We will go on on the footing upon which we have been going on all along, if you will pay us according to the terms agreed upon, and will pay us as if the seal had been affixed in November 1882." Now, whatever might be the result in point of law, if the seal of the local board were not affixed until after the work was actually done—upon which I do not desire to express at present any opinion—it appears to me that, while the contract is still open, and while it may fairly be contended that it was for the advantage of the local board that the contract should be carried out in its entirety, it is open to the board to affix their seal to the contract, and that, by so doing, they render the whole contract good. If it could have been shown to me that this document of the 2nd Nov. 1883 was not entered into honestly, with a view to the advantage of the district, but simply for the purpose of putting money into the pockets of the plaintiffs which they were not at that time in a position to claim, possibly some difference might have followed in my decision. But no such case has been made out, and I come to the conclusion that, in point of fact, this memorandum of agreement was honestly made by the board in the belief that, under the peculiar circumstances in which they were, it was for the interest of the ratepayers that these gentlemen should continue to act as engineers, and that it was for the benefit of the ratepayers that, as some portions of the work had been done, the plaintiffs should be paid for the work which had so been done upon the terms that they would on their part carry out the contract in its entirety. I therefore come to the conclusion that there is a good and binding agreement under the seal of the board. The second point made was, that Mr. Pim is an officer of the

board, and that, as such, he is forbidden by sect. 193 of the Act to be interested in any bargain or contract made with the board for the purposes of the Act. Whether Mr. Pim does or does not fall within the scope of that section it is not necessary for me to consider, because I come to the conclusion that, if he does fall within the scope of that section, that section does not make the contract void. I think it may be taken that, when the Legislature forbids that a thing should be done, you must look to the purview, as it is called, of the Act and the surrounding sections in order to see whether the consequence of that prohibition is to make the doing of that thing unlawful, so that any contract in which that thing exists as a part is rendered a void contract; or whether the Legislature intends that the penalty for doing the thing shall be confined to that penalty which is expressly declared in the Act to follow upon the doing of that which is forbidden. Now, I have no doubt considerations of public utility are very usefully regarded when you come to consider whether the Legislature did or did not mean in such cases as these that the whole contract should be void. There is a case which has a slight, but not very great bearing upon this, the case of *Foster v. The Oxford, &c., Railway Company* (*ubi sup.*). That was a decision upon the 85th section of the Companies Clauses Consolidation Act, which enacted that "no person holding an office or place of trust or profit under the company, or interested in any contract with the company, shall be capable of being director." The question raised was, whether the contract thereupon became void. [His Lordship cited at length the judgment of Jervis, C.J.] Partly upon the consequences that would result from such a construction, as well as upon the words of the provision itself, the court came to the conclusion that the only penalty was that the director ceased to be a director, and that the contract was not void. Now, the same result as that referred to by Jervis, C.J. would follow in this case; that is to say, that if the contract is void it would follow that, wherever there was a contract with a joint-stock company, and any shareholder of that company was an officer of the board, the contract would be void. The directors of any company could never contract with a local board without going carefully through the list of their shareholders in order to see whether any minor official of the board did or did not happen to hold some very small share in the company, with a penalty, if they made a mistake on that point, of not being able to sue at all for the value of the goods they had supplied or the services they had rendered. I think it would require somewhat strong language on the part of the Legislature to bring one to the conclusion that they intended such a result as that. On the other hand, we find that the section does provide, in express terms, a penalty in case of non-compliance with its provisions, that the officer is to be incapable of afterwards holding any office or employment under the Act, and is also to forfeit and pay a sum of 50*l.* When you look at the class of persons against whom the legislation is directed, I think there is no ground for saying that these consequences do not make up an adequate punishment. I am therefore of opinion that the penalty for a violation of sect. 193 is that pointed out in the section, and that the

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effect of the section is not to make the contract void.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Keen, Rogers, and Co.*

Solicitors for the defendants, *Speechly, Mumford, and Landon*, for *Lamport and Trimmell*, Southampton.

Tuesday, Feb. 24, 1885.

(Before Lord COLERIDGE, C.J. and SMITH, J.)

WEST MIDDLESEX WATERWORKS COMPANY v. COLEMAN; COLEMAN v. WEST MIDDLESEX WATERWORKS COMPANY. (a)

*Water rate—Basis of assessment—Rent—Annual value—Dwelling-house occupied partly for domestic and partly for trade purposes—Licence attached to premises—Premium paid in respect of premises—Water supplied for domestic purposes—10 & 11 Vict. c. 17, s. 68—15 & 16 Vict. c. cliz. s. 39.*

*In arriving at the annual value of a dwelling-house for the purpose of assessment to the water rate, all the circumstances affecting its value are to be taken into consideration.*

*When a dwelling-house is used partly for domestic purposes and partly for trade purposes, in arriving at the annual value for the purpose of assessment to the rate for water supplied for domestic purposes, its increased value from being used in trade is to be taken into account, and its mere value as a dwelling-house unconnected with the trade carried on in it is not its true annual value.*

*C. was lessee under a lease for fifty years of a licensed public-house which was supplied with water by the West Middlesex Waterworks Company. Under the lease C. paid the lessor a sum of 7500l. by way of premium, and a rent of 122l. 10s. per annum. C. paid for his licence 35l. per annum. The company under their special Act was to supply water for domestic purposes at a rate per cent. upon the annual value of the dwelling-house or other place supplied. A supply of water for domestic purposes was not to include a supply of water for any trade, manufacture, or business requiring an extra supply of water. The water company claimed to assess the annual value of the premises at 165l. per annum; C. claimed to assess them at the annual value of 70l. per annum. The dispute was referred to a metropolitan police magistrate, who fixed the annual value at 122l. 10s. per annum, in which he included the 35l. paid by C. for his licence, but did not take into consideration the 7500l. paid as premium. Both parties objected to his decision, the company claiming that he ought to have taken the 7500l. into consideration, and C. contending that he ought to have excluded the 35l. per annum paid for the licence.*

*The magistrate stated a case for the decision of the Superior Court.*

*Held, on appeal, that, as in arriving at the annual value of a dwelling-house for the purpose of assessment to the water rate all the circumstances affecting its value are to be taken into consideration, the magistrate was right in including the 35l. paid for the licence, and was wrong in ex-*

*cluding from his consideration the sum of 7500l. paid by way of premium.*

THIS was a cross appeal brought by way of a case stated by one of the magistrates of the metropolitan police courts in pursuance of 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49. The case stated was as follows:—

1. Jacob Coleman was the occupier of the "Carlton Bridge Tavern" public-house, 45, Woodfield-road, Westbourne Park, in the parish of Paddington, and he was supplied with water by the West Middlesex Waterworks Company. A dispute having arisen between them as to the annual value of that house, the parties duly appeared before the magistrate on the 12th June last, in order that he might determine the said dispute under 10 Vict. c. 17, s. 68. The magistrate adjourned the case for consideration, and on the 1st Aug. determined the case by fixing the annual value at 122l. 10s., and both parties being dissatisfied with his decision, he stated the case at the request of both of them. The company had recently raised the water rate, contending that it should be assessed on an annual value of the premises of 165l. per annum. Coleman, the tenant, contended that the rate should be assessed as it had previously been on an annual value of 70l. per annum.

2. On the hearing of the summons the following facts were either proved or admitted by both parties:

3. The premises consisted of a dwelling-house at the corner of the road in which Coleman carried on the business of an ordinary public-house. There were no rooms for the accommodation of the public, but the whole of the trade done by him consisted in selling spirits, wine, and beer across the bar to any persons who came and applied for the same, which was wholly carried on on the ground floor, and was described by Coleman as purely a bar trade. Coleman held the ordinary magistrate's licence granted to him under the Licensing Act 1872, and other Licensing Acts, and the Excise licence granted in pursuance thereof. He lived on the premises with his wife and children, and the water was supplied to him for domestic purposes. He paid besides an extra charge of 15s. for trade purposes.

4. Coleman held the premises under two leases respectively dated 26th July 1880 and Christmas 1882. The material part of the leases was as follows: That in consideration of the sum of 7500l. paid by the lessee (Coleman) to the lessor (one Marsh), and also in consideration of the rents and covenants contained therein, the lessor demised and leased unto the lessee a piece of ground together with the messuage or tenement erected thereon (being the public-house referred to) to hold the public-house for the term of fifty years from Midsummer 1880, and the small piece of ground for thirty-two years from the same date, paying the yearly rent of 107l. 10s. quarterly, and a piece of ground which was afterwards added to the premises on a lease for thirty years from Christmas 1882, at a rental of 15l., making the total rent of the house and premises 122l. 10s. per annum. The pieces of land were so small that they were properly treated in law as part of the house. The lease contained the usual covenants on the part of the lessee to do all the repairs, pay the insurance,

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to pay the rent, to keep up the licences, and solely to use the premises as a public-house. The lessor covenanted not to carry on the trade of a licensed victualler within one-third of a mile of the said premises without returning and repaying the sum of 500*l.* as liquidated damages.

5. In addition Coleman on entering the premises paid the lessor the value of the trade fittings, and also has paid 35*l.* per annum for his licence under 43 & 44 Vict. c. 20, s. 43.

6. It was further proved that the gross rental of other houses of a similar description in the neighbourhood, let as dwelling-houses, was 50*l.* per annum, or 60*l.* as shops. That the sum of 7500*l.*, and rent agreed to be paid by the lessee, had been calculated on what the lessor, who was the former occupier carrying on the trade of a publican there, had been able to make in such house.

7. For poor-rate and other rateable purposes, the net assessed value was inserted in the valuation list of the parish made in 1881 at 168*l.*, but both parties agreed that the magistrate was in no way bound by the value appearing in the said list.

8. The counsel for the company contended that, as a bargain had been made between the landlord and tenant so recently as 1880, the best evidence of the annual value was the fact that Coleman had agreed to pay for the right to occupy the premises, and for the benefit he was likely to derive from their occupation by carrying on the trade of a publican 7500*l.* down and an annual sum of 122*l.* 10*s.*, and that the annual value ought to be arrived at by taking the rent actually paid, and also by taking into account the sum of 7500*l.*; and that that amount paid to the landlord was a material element for the magistrate's consideration, although not an absolute test for determining the value of the premises, and that the tenant could afford to pay to the landlord a rent of 497*l.* 10*s.*, being the rent of 122*l.* 10*s.* plus 375*l.*, or 5 per cent. on 7500*l.*, in all 497*l.* 10*s.*, and which, he contended, was the yearly worth or annual valuation of Coleman's occupation. The company also contended that, as the trade carried on in the public-house was the ordinary bar trade from the passers by and from the inhabitants in the immediate locality, it could not be treated as paid solely for goodwill or profits of the business.

9. The counsel for Coleman contended that the sum of 7500*l.* was paid for goodwill and profits alone; that the magistrate ought to disregard the additional value given to the house by reason of its being fitted up as a public-house, or by reason of the house being a licensed public-house, and that he should determine the value by taking the gross rental of other houses of the same description in the neighbourhood, in which case the net annual value would be no more than 70*l.* per annum.

10. After taking into consideration the annual value of house property used as dwellings and shops of the same description as Coleman's in the immediate neighbourhood, the situation, and the fact of the house having a licence as a public-house, and after making reasonable and fair deductions, the magistrate assessed the annual value at 122*l.* 10*s.* It appeared to him that the rent agreed to be paid by Coleman annually was a substantial rent for the premises, and a fair

value for a house for domestic purposes upon which the water rate would be assessed; and that the 7500*l.* was in fact paid for goodwill, and calculated upon past and supposed accruing profits, and as such should not, under 15 & 16 Vict. c. 159, s. 39, be taken into consideration in determining the annual value of the premises. He was of opinion that he had a right, on determining the annual value, to take into consideration the licence attached to the premises. The following cases were cited: *Allison (app.) v. Churchwardens and Overseers of the Township of Monkwearmouth Shore* (resps.) (23 L. J. 177, M. C.) and *Rees v. Bradford* (4 M. & S. 317).

The questions for the opinion of the court were: (1) Whether the magistrate was right, in the mode of determining the annual value of the premises, in excluding any consideration of the sum of 7500*l.*, and in including the increased value of the same by reason of a licence being attached to them; (2) and whether he was right in his decision in the case.

The water company appealed against the decision of the magistrate on the ground that it was too favourable to the respondent Coleman, as the amount of the premium should have been taken into consideration in arriving at the annual value of the premises. And the appellant Coleman appealed because it was too favourable to the water company, as the amount of licence attached to the premises ought not to have been taken into consideration in estimating their annual value.

By 10 & 11 Vict. c. 17, s. 68:

The water rates, except as hereinafter and in the special Act mentioned, shall be paid by and recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices.

By 15 & 16 Vict. c. clix. s. 39:

The company shall, at the request of the owner or occupier of any house in any street within the limits of this Act, in which any pipe of the company shall be laid, or of any person who, under the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier, or other person, a sufficient supply of water for their domestic purposes, at the rates hereinafter specified (that is to say),

Where the annual value of the dwelling-house, or other place supplied, shall not exceed two hundred pounds, at a rate per centum per annum on such value not exceeding four pounds, and where such annual value shall exceed two hundred pounds, at a rate per centum per annum on such value not exceeding three pounds.

By sect. 42:

A supply of water for domestic purposes shall not include a supply of water for . . . any trade or manufacture or business requiring an extra supply of water.

By sect. 44:

It shall be lawful for the company to supply any person or body within the limits of this Act with water, to be used within the limits aforesaid, for other than domestic purposes, at such rate and upon such terms and conditions as shall be agreed upon between the company and the person or body desirous of having such supply of water.

The *Solicitor-General* (Sir F. Herschell, Q.O.) and *Poland* appeared for the water company.—The question here is whether the magistrate has proceeded on a right principle in determining the annual value of this dwelling-house. My opponents say these premises are to be regarded

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as a mere dwelling-house, and nothing more, but I contend we are to take these premises such as they are, and determine what, under the circumstances, such as whether used as a shop or public-house, or their situation, a landlord would get from a tenant from year to year, after allowing certain deductions. What "annual value" now means is clearly settled:

*Dobbs v. Grand Junction Waterworks Company*, 40 L. T. Rep. N. S. 541; 9 App. Cas. 49.

The contention of the other side is cut away from them by a decision of the Court of Queen's Bench in the time of Lord Campbell, which is contained in the unreported case of *The Norwich Waterworks Company v. Snowden*, in which, under the term "house," the whole of the premises, which were partly used as a dwelling-house and partly as a retail shop, were found rateable, though the appellant contended that the house only, and not the shop, ought to have been rated. This case is a clear authority that where premises consist of house, shop, and other premises, all communicating, as in this case, it is a house, and to be treated as a dwelling-house for the purpose of the annual value under the Waterworks Act. That being so, what the landlord gets for these premises, both as dwelling-house and public-house, is their annual value, and here the landlord does not get the 122l. 10s. a year as put by the magistrate, but he gets 7500l. paid down in addition; now, if the premium had not been so much, the rent would have been higher. To ascertain the annual value of the premises their total value is to be taken into consideration:

*Rees v. Bradford*, 4 M. & S. 317.

The goodwill of a business is to be taken into account in estimating the rateable value of premises in respect of which it exists:

*Allison v. Churchwardens and Overseers of Monkwearmouth*, 23 L. J. 177, M. C.

On the authority of this case I submit the finding of the magistrate set out in paragraph 10 of the case was wrong. [Lord COLERIDGE, C.J.—I take it that he arrives at the figures 122l. 10s. by adding to what he thinks is a fair rent for the house the increased value it possesses by reason of its having a licence.] Yes, but I say he was wrong in not taking into account the 7500l.; he is not necessarily to include the whole of it, but he must not put it out of consideration in determining the annual value. Suppose here the tenant had paid 300l. a year instead of 120l. with a lump sum by way of premium, he would be rightly rated in respect of the increased rent. He pays this rent and premium for the value of the premises to him not as mere domestic premises, but as a public-house with trade. For these reasons I submit that the decision of the magistrate excluding consideration of the 7500l. was wrong.

*Webster, Q.C. and Sutton for Coleman*.—The proper value of these premises is 70l., and not 122l. 10s. per annum. The magistrate was not entitled to take into consideration the licence. The annual value to be arrived at is the annual value for domestic purposes, including here the public bar, which, I admit, must be brought into calculation. Coleman pays 15s. extra for water used by him in carrying on his trade, and, if the

contention of the Solicitor-General be right, he is to be charged twice over for this. I say that the rateable value under the Poor Law Act of Will. 4 and the annual value of premises for domestic purposes are quite different. In the latter trade purposes cannot be included, and in respect of such trade purposes the company are entitled to make an extra charge. I admit all circumstances which enhance the annual value of these premises for domestic purposes are to be included, but I submit the magistrate is not to take into consideration a value which is purely due to trade as distinct from domestic purposes. The "annual value" for domestic purposes is not to be enhanced merely by the tenant carrying on a trade. I therefore first submit that this 7500l. is not to be taken into consideration, and that the *Monkwearmouth* case is no longer law, it having been doubted in the case of *The Overseers of the Parish of Sunderland v. The Sunderland Poor Law Union* (18 C. B. N. S. 531). This large premium is the result of a good trade carried on by a successful manager of the business. I say it is one thing to say that the value of the occupation is enhanced by a number of circumstances for poor-law rating purposes, and another to say that the annual value of a house as a dwelling-house for domestic purposes is to be enhanced by the same circumstances. I submit then that the premium ought not to be included. I come to my next point, that we are rated too high, and that the 35l. per annum we pay for the licence ought not to be added to the rateable value of this house. *Snowden's* case is distinguishable from this, and was decided on the words of the particular Act because there was no clause enabling the Norwich Water Company to charge in respect of trade premises. The money expended for the purposes of trade is not to be included in estimating the value of the property. I admit (against myself for to-day) that if the dwelling-house or place is more valuable because it is on the top of a public-house, or forms part of a public-house, that may be taken into consideration, but I submit an annual charge which represents the value of the licence is no part of the annual value. Here the payment for the licence is no evidence of the annual value, for, if the licence is lost, the Solicitor-General must contend that the value of the house goes down, but that cannot have been intended to happen. I quite admit that the whole of the structure of this house, bar and all else included, must be taken into consideration; but, having valued it as a whole, there is nothing to justify the magistrate including the amount of the licence. Again, this Act has drawn a clear distinction between the supply for domestic purposes and the supply for trade purposes. The *Sunderland* case is in my favour, and *Dobbs's* case is not against me, for all it decided was, that "annual value" of a house means the net annual value to the owner who occupies it. I do not concede, in the case of rating of a large shop, that the whole of it is to be included where no water is used in any portion of it. I do not argue it, because it does not form an essential part of my case. I submit that the rating cases were not binding on the magistrate, and, under the terms of this Act, they have no application. Lastly, I do not see any difference between the licence and goodwill. If I have



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made good my point, that no part of the premium paid is admissible, as being only a sum of money paid in respect of the trade to be carried on, I go some way towards showing that the money to be expended in carrying on the trade is not to be taken into consideration. I quite agree that, if this premium had been paid for occupation purposes, it would be in the nature of capitalised rent, and ought to be taken into consideration; but where it is a premium for trade purposes only, and is in effect only a price given to carry on a particular trade on the premises, then, under the terms of sect. 39 of this Act, it should not be so taken into consideration, for the words "annual value" in that section refer to domestic, and not to trade purposes.

*Poland* in reply.—I submit there is no difference in the principle of valuing for poor-rate purposes and for charges under the Water Companies Act, in which case the thing to be arrived at is the annual value of the premises. This sum of 7500*l.* is rent in another form, and, though the rent is not a conclusive test of the annual value, it is a material element to be taken into consideration. This house must be valued as a whole, including the trade portions. Trade profits must be taken into consideration in arriving at the annual value; and the Legislature has provided for this in the Inhabited House Duty Act (14 & 15 Vict. c. 36), in which it is provided that the annual charge upon a dwelling-house which is used for trade (including licensed) purposes is to be charged upon the annual value, although at the reduced rate of sixpence instead of the ordinary rate of ninepence. The true value of premises is the profit to be derived from the occupation of them by the tenant:

*Reg. v. London and North-Western Railway Company*, 29 L. T. Rep. N. S. 910; 9 Q. B. Div. 134;  
*Reg. v. Verrall*, 1 Q. B. Div. 9.

For these reasons I submit the magistrate was wrong in not taking the premium of 7500*l.* into consideration in arriving at the annual value of these premises.

Lord COLERIDGE, C.J.—In determining this case we are not to say what the value of the occupation is. That must be a matter of fact left to the magistrate to determine. We are only to determine whether the mode of determining the annual value of the premises was right on the part of the magistrate. These cases are always, to my mind at least, difficult cases to decide, but, after the best consideration I can give it, I think that the magistrate has not arrived at the annual value by the right mode. It appears to me that he has been wrong in excluding altogether from his consideration the sum of 7500*l.*, which was paid by the lessee to the lessor. He says it appeared to him that that was in fact paid for goodwill. If he had found as a fact that it was paid for goodwill, I myself should have hesitated long before I overruled him or attempted to overrule him, if he had found that as a matter of fact which was really in its nature a matter of fact; but I cannot help seeing that the magistrate wishes to submit to us whether he was right in excluding that from the account as matter of law, and whether in setting out, as he does set out, the very terms of the lease, he ought not to have taken in that as one of the terms upon which he was to determine the value of the occupation.

In my opinion, he is to do so as much as he would have to do so in the way Mr. Webster has conceded he must do so, supposing it had been an unquestioned dwelling-house—nothing but a dwelling-house—and the value of the occupation or the money paid for the occupation had been partly by a premium paid upon entering the premises, and partly by a rent fixed to a considerable extent by the payment of that premium. It is plain to my mind that the value of the occupation must be determined by a consideration of all the circumstances attending it, and, amongst other circumstances, the sum the lessee has thought it worth while to pay to the lessor for the occupation which he has got from the lessor. I think therefore the learned magistrate was wrong in excluding altogether from his consideration the sum of 7500*l.* What value he should have given to it, how he is to split it up, to what extent he will modify his determination by taking it into account, is not for me to say. He must take it into account in determining the value of the occupation. I think he has been right in including the value of the licence. It seems to me that what he has got to do under this Act of Parliament is to determine the annual value. "Annual value" in this Act of Parliament has been determined by the highest tribunal in the land to mean annual value in the hands of the occupier, or annual value to the owner, with certain deductions, familiar to us all, which are necessary to be made in order to arrive at that annual value. Now, it appears to me that the fact of this house being a licensed house is, while the licence lasts, an element of its value; it is a circumstance which makes the lessee willing to give more for it, and enables the lessor to get more. It seems to me, therefore, that it enters fairly into the consideration by which the annual value of a dwelling-house is to be determined. I have been much impressed by the argument of Mr. Webster, and I am by no means sure that if it were necessary for him to contend to the full extent of his argument, there might not be a great deal in it, and that it might not eventually turn out to be correct. However, he has not pressed upon us his argument to the full extent, and I am unable to see, unless he presses his argument to the full extent, and says it is only upon so much of the building as is occupied as a dwelling-house that the annual value is to be arrived at for the purpose of ascertaining the percentage at which the water shall be delivered, unless he is prepared to go that length, I am unable to see any material reason why he should exclude a particular element such as, in this case, the possession of the licence attached to the house. If that question ever arises, I desire to be considered as having my mind perfectly free to give an opinion upon it; but it being admitted, as I understand for the purposes of this argument, that the whole of the premises occupied must be taken into account for some purposes, and for the purpose of arriving at the annual value, it seems to me that one of the elements of that annual value is the licence which is for the present attached to it, and that during the continuance of that licence the annual value in the hands of the occupier is increased thereby. I think, therefore, upon the first ground, that the learned magistrate was wrong, and I think upon the second ground that the learned magistrate was right.



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**SMITH, J.**—The question we have to determine in this case is how and in what way the annual value of this Carlton Bridge Tavern is to be computed for the purpose of the water rate. Now, both sides go together thus far: They say *Dobbs v. The Grand Junction Waterworks Company* (*ubi sup.*) decided this, that the annual value means the net value of the premises to the owner; that is, take the gross, and then make all proper deduction. The net annual value is the annual value within the meaning of this statute. Neither side controverts that point, for the very best reason, because that has been settled; but now they divide. The Solicitor-General says that, that being the meaning of annual value, you must ascertain the worth of the premises to the owner as they stand, occupied as they are. Mr. Webster says "No, I limit that; it is only the value of the premises to the owner as they stand, occupied as they are for domestic purposes, and not for trade purposes." That is the first point which it seems to me we have to decide, and Mr. Webster insisted that this statute limits the liability of the owner to premises standing as they do, occupied as they are, for domestic purposes, and not for trade purposes. In the first place, as Mr. Poland has pointed out, there is no such exception in the Act. He has pointed out that in the Inhabited House Duty Act, when they wanted to make the exception, when part of the premises are occupied for trade and a part for domestic purposes, there is an express provision put in to show how the portion which is occupied for trade is to be rated. Mr. Poland says there is no such exception in these words. It is also insisted by Mr. Poland that there is no such implied exception, and I must say I think he is right, because the 39th section says this: "The company shall, at the request of the owner or occupier of any house in any street within the limits of this Act, in which any pipe of the company shall be laid, or of any person who under the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for their domestic purposes at the rates hereinafter specified;" that is, the owner of any house, used at it may be, when he wants water for domestic purposes, is entitled to have it supplied to him by the West Middlesex Waterworks Company. Now, at what rate is it to be supplied? When the annual value of the dwelling-house or other place, within the meaning of this statute, no matter how occupied, is once ascertained, then it is to be supplied upon its annual value—when it shall not exceed 200*l.* at the rate of 4 per cent., and when it does exceed 200*l.* at the rate of 3 per cent. Now, what is the annual value? It seems to me "the annual value" there means the annual value to the owner of the house as it then stands, and as it then is occupied. Now this is a public-house. What is the annual value to the owner at the time when this assessment is made? It is a public-house, it has a licence, and everybody knows that a licensed house is more valuable to an owner than an unlicensed house. It seems to me that the learned magistrate was quite right in computing the value of this house, not as a beerhouse without a licence, but as a licensed house. It seems to me that so far he is perfectly

right in the conclusion he has so arrived at; but in assessing the annual value of these premises he has excluded the sum of 7500*l.* that was paid when the present tenant went into possession of that house in the year 1882. The learned magistrate states it appeared to him that the 7500*l.* was paid solely for goodwill. It was conceded by Mr. Webster that, if this had been an ordinary dwelling-house, and the lessee had paid the 7500*l.* and a rent of 122*l.* 10*s.* a year, that premium must be taken to be in the nature of a capitalised rent. Mr. Webster says that cannot be so, and is not so in this case, because it was paid solely for the trade; but, this being a licensed house, and, as I have already said, it being of enhanced value to the owner because it is a licensed house, it seems to me, when assessing the annual value, impossible to strike out the premium the man has paid to occupy the house as a licensed house for fifty years, if the licence so long exists. Mr. Cooke was right in taking into consideration the fact of this house being a licensed house; but I think that he also should have taken into consideration the fact that the sum of 7500*l.* was paid as a premium to go into the house. Therefore I am of opinion that the company are entitled to judgment.

*Case remitted.*

Solicitors for the water company, *Baileys, Shaw, and Gillett*,  
Solicitors for Coleman, *Peckham, Maitland, and Peckham*.

*Tuesday, Dec. 2, 1884.*

(Before GROVE and HAWKINS, JJ.)

**RUDLAND (app.) v. THE MAYOR, ALDERMEN, AND BURGESSES OF SUNDERLAND** (resps.). (a)

*Local government—Urban sanitary authority—Bye-laws unreasonable—Width and construction of new street—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 157.*

*By the 157th section of the Public Health Act 1875 (38 & 39 Vict. c. 55) it is provided that every urban authority may make bye-laws with respect to (inter alia) the level, width, and construction of new streets and the provisions for the sewerage thereof.*

*An urban sanitary authority having made the following bye-law thereunder: "Every person who constructs a new street shall cause the kerb of each footpath in such street to be put in such level as may be fixed or approved by the urban sanitary authority. No person shall commence the erection of a building in a new street unless and until the kerb of each footpath therein shall have been put in pursuant to the preceding requirement. Every person offending against this bye-law shall be liable for each offence to a penalty of forty shillings:"*

*Held, on case stated, that the bye-law was unreasonable, and therefore void.*

THIS was a case stated by justices of the borough of Sunderland in the county of Durham for the opinion of the court, the appellant being Henry Rudland, and the respondents the mayor, aldermen, and burgesses of the borough acting by the council.

The case was, so far as material, as follows:—

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

Q.B. Div.] RUDLAND v. THE MAYOR, ALDERMEN, AND BURGESSES OF SUNDERLAND. [Q.B. Div.]

The respondents, by their officer in that behalf duly authorised, on the 21st April 1884, caused to be laid an information against the appellant for that he the said appellant, between the 7th and the 21st Jan. 1884, at the township of Bishopwearmouth in the said borough, unlawfully did commence the erection of a building in a new street, to wit, Percy-terrace, before the kerb of each footpath therein had been put in pursuant to bye-law 4a, made under the 157th section of the Public Health Act 1875 (38 & 39 Vict. c. 55) contrary to the statute in such case made and provided, and a summons was thereupon issued to the said appellant requiring him to appear on Friday, the 25th April, to answer the said information, and such summons was duly adjourned till Wednesday, the 30th April, when the appellant and respondent and their respective solicitors appeared before us, and the following facts were proved or admitted before us.

The respondents are the urban sanitary authority for the borough of Sunderland under the Public Health Act 1875.

On the 26th Feb. 1879 the respondents made certain bye-laws under and by virtue of sect. 157 of the Public Health Act 1875, which bye-laws were allowed by the Local Government Board on the 8th July 1879, and were duly published and have not since been repealed, altered, or revoked. No 4a of such bye-laws is in the words following:

4a. Every person who constructs a new street shall cause the kerb of each footpath in such street to be put in at such level as may be fixed or approved by the urban sanitary authority. No person shall commence the erection of a building in a new street unless and until the kerb of each footpath therein shall have been put in pursuant to the agreement. Every person offending against this bye-law shall be liable for each offence to a penalty of forty shillings.

On the 2nd Feb. 1883 Mr. George A. Middlemiss, as the owner of certain building ground within the said borough, of which Percy-terrace forms part, gave notice to the respondents as such authority as aforesaid, and in pursuance of No. 30 of the said bye-laws, of his intention to lay out certain new streets on his land, and submitted plans and sections thereof.

Percy-terrace, as shown on the said plans, is a proposed row of thirty-seven houses two storeys high, facing for its whole length the Stockton and Sunderland branch of the North Eastern Railway there. Between the boundary wall of the railway and the front walls of the houses there is a strip of land forty feet wide, and the plans show that it was proposed to place gates at either end of this strip and inclose it.

Such plans were disapproved by the respondents as such authority as aforesaid.

On the 20th July 1883 the said Mr. Middlemiss wrote and sent to the respondents' engineer a letter inclosing an amended plan, on which Percy-terrace is shown with gates at the south end, and is marked private.

At the hearing of the said summons the appellant put in a further plan showing what the intentions of the landowner were with regard to the laying out of the place in question.

No street plan for the said land has ever been approved by the said urban authority.

Between the 7th and the 21st Jan. last the appellant commenced the erection of a new building, to wit, a house in Percy-terrace aforesaid; that is to say, on the 7th Jan. last no com-

mencement had been made with the house, and on the 21st Jan. last the concrete foundations had been put in, and two or three courses of bricks had been laid thereon.

At the date of the hearing of this information the house had been roofed.

The kerbs of each footpath therein had not been put in at the time of such commencement to build, nor had such kerb been laid at the time of hearing the said information. Several other houses adjoining the appellant's house, and adjoining each other, forming part of the proposed row of twenty-seven houses, had been built or were in course of erection at the time of hearing such information.

On behalf of the appellant it was contended—

(1.) That Percy-terrace was not a new street within the meaning of the said bye-law, or of the said Act of Parliament pursuant to which such bye-law was made, forasmuch as it was proposed to inclose it as a private ground for the use in common of the occupiers of the houses on the side thereof, and to cause the portion immediately adjoining the houses to be laid out as flower gardens, and the portion adjoining the railway wall to be planted with shrubs, and to make a gravel drive between the flower gardens and the shrubs.

(2.) That bye-law 4a was void forasmuch as it was unreasonable, and the respondents had no authority under sect. 157 of the Public Health Act 1875 to make such a bye-law, and that the said bye-law 4a was repugnant to the laws of England and to the provisions of the Public Health Act 1875.

(3.) That the requirements of the respondents as to the kerbing mentioned in the said information were (if legally necessary at all, which was not admitted) part of the work to be done and performed under the 150th section of the Public Health Act 1875, and that the notices and other procedure required by such section should have been given and complied with by the respondents before any proceedings against the appellant could have been legally taken.

We were of opinion that Percy-terrace was a street within the meaning of the Public Health Act 1875, and of bye-law 4a, and we were of opinion that bye-law 4a was a valid and subsisting bye-law, and we convicted the appellant, and fined him 10s. and costs, and the appellant thereupon required us to state and sign a case setting forth the facts and grounds of our decision.

The questions for the opinion of the court are: First, Is Percy-terrace, under the circumstances above set out, a street within the meaning of the Public Health Act 1875, and the bye-law 4a? Secondly, Is the bye-law 4a above referred to a valid and subsisting bye-law?

If the court is of opinion that the above questions or either of them ought to be answered in the negative the conviction is to be quashed, but if the court is of opinion that both the said questions ought to be answered in the affirmative, the said conviction is to stand.

Gully, Q.C. (with him *Edge and Meek*) for the appellant.—It is not now contended that the place in question is not a new street, but it is contended that the appellant was wrongly convicted, inasmuch as the bye-law in question is unreasonable,

and therefore void. First, it is unreasonable because it dictates the order in which the work is to be executed. The construction of a street means the construction not only of the roadway over which passengers and vehicles pass, but also of that which in popular language is part of the street, viz., the houses on both sides (*Baker v. The Mayor of Portsmouth* 37 L. T. Rep. N. S. 381, 822; 3 Ex. Div. 4; *Robinson v. The Barton Eccles Local Board* 8 App. Cas. 798); and, although it is reasonable to make bye-laws as to, for instance, the height of the buildings, the materials to be used, and matters of that kind, it is not reasonable to say which piece of the work shall be done first. This bye-law, if held to be good, has the effect of preventing an owner from putting in a single brick until the kerb of the footway has been put in, an order of work which is highly inconvenient. Secondly, the owner of a particular plot must, before he can begin to build, wait until the whole of the landowners on both sides of the street have put in the kerb belonging to their respective plots. It would be sufficiently unreasonable if a landowner had to wait until the portion of the street opposite to his land had been kerbed, in which case he would have to wait until the owner of the land on the opposite side of the street chose to put his kerb in; but as this bye-law stands, a single owner out of perhaps many may, if he does not wish to build, delay the owners of all the other plots on both sides of the street. There are many cases in which bye-laws have been held to be unreasonable. In *Waite v. The Garston Local Board* (17 L. T. Rep. N. S. 201; L. Rep. 3 Q. B. 5) the local board had, under the 34th section of the Local Government Act 1858 (21 & 22 Vict. c. 98), empowering them to make bye-laws with respect to the drainage of buildings, to water-closets, privies, ashpits, and cesspools in connection with buildings, made a bye-law that no dwelling-house should be erected without having, at the rear or side thereof, a good and sufficient back street or roadway, at least twelve feet wide, communicating with some adjoining public street or highway, for the purpose of affording access to the privy or ashpit of such house, and it was held that such bye-law was unreasonable. In *Hattersley v. Burr* (14 L. T. Rep. N. S. 565; 4 H. & C. 523) again, it was held that a local board of health had no power under the 34th section of the Local Government Board Act 1858, to make a bye-law that before beginning to dig or lay the foundation of any new building a written notice thereof of one month at the least should be left with the clerk at one of the monthly meetings of the board, accompanied with plans and sections, and that anyone neglecting or refusing to give such notice should be liable to a penalty of 5l. "The 34th section of the Local Government Act 1858," says Pollock, C.B. in that case, "has imposed a restriction on the common law right of people to build as they please, and it is important that the enactment should not be vexatiously carried out." Again, in *Heap v. The Rural Sanitary Authority of the Burnley Union* (12 Q. B. Div. 617), it was held that a bye-law made by a rural sanitary authority purporting to act under the 44th and 276th sections of the Public Health Act, and prohibiting the keeping of swine within the distance of fifty feet from any dwelling-house within their district, was unreasonable, and therefore bad. It is submitted that the bye-law now before the court comes

within the principle of those cases. It is a bye-law of such a stringent character that a man leaving a gap in the kerb for the purpose of leading in bricks for building would be subject to a penalty, and it is therefore impossible to say that it is not vexatious and unreasonable. Lastly, the putting down of the kerb is part of the paving and channelling of the street which is provided for by the 150th section of the Act, under which the authority cannot compel a landowner to do the work himself, being merely authorised on his refusal to do the work themselves and charge him with the cost. This bye-law is an attempt to go beyond the provisions of the statute and compel owners to do work which the statute has purposely abstained from compelling them to do. It is therefore unreasonable upon that ground. This conviction ought therefore to be quashed.

*Collins, Q.C. (with him E. Bidley).*—This is a reasonable bye-law. The Act gives power to make bye-laws with respect to the level, width, and construction of new streets. This bye-law has to do with the level, on which it is obviously necessary for the local authority to decide, and the time to decide this is clearly before the buildings are commenced. It is not only reasonable, but for the convenience of the landowner in order that he may know to what level to work in erecting his buildings. The question of bye-laws as to the level of a new street was much discussed in the case of *Robinson v. The Barton-Eccles Local Board* (*ubi sup.*), and no doubt was expressed as to the validity of the bye-laws on that subject which were before the court in that case. Lord Selborne, in his judgment (p. 806), goes through those bye-laws, and their importance and necessity is obvious, since otherwise the levels of adjoining streets would never be made uniform. [*HAWKINS, J.*—Is not fixing the level a question of drawing a plan, as distinct from the putting in of the kerb which is an act of construction? If you fix the level on a plan, and the builder does not adhere to it, he would be committing a default in construction.] It is reasonable that the level should be definitely fixed by some material mark. [*HAWKINS, J.*—Where does the statute say that you may compel a man to wait until all the owners on each side of a street have put down the kerb at the level decided upon and marked on the plan, before he begins to build his house? Is not such a bye-law unreasonable if its effect may be to prevent a man from building for any length of time?] It is not unreasonable to ask an owner to put in the kerb of the footway as a first step, since it fixes the level beyond the possibility of mistake. [*GROVE, J.*—But is not the kerb mentioned in the bye-law the kerb of the whole street?] The bye-law only deals with persons applying to construct a whole new street, and in the case of small freeholders making a portion of a street, only deals with the particular portion of the street belonging to each. Besides, the owners of the plots, knowing of the existence of the bye-law, ought to protect themselves by refusing to purchase unless the vendor covenants to put in the kerb or to bind his assigns to do so.

*Gully, Q.C.* was not called upon in reply.

*GROVE, J.*—I am of opinion that this bye-law as to which our opinion is asked is not a valid

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bye-law, but is, on the contrary, unreasonable. It is, I know, an extremely difficult matter in all cases of this description to decide whether a particular bye-law is or is not unreasonable; but I think that this bye-law is unreasonable on the grounds which I am about to state. I object to it, because I find in it no limit either of time or of place. As to place, it would appear from the bye-law that, whether a new street is broad or narrow, short or extensive, the kerb of each footpath in it must be fixed and put in on both sides before the owner of any portion of land abutting on it can begin to build. It is to be observed that it does not say such portion of the street as abuts on the portion of land belonging to each particular owner, but, on the contrary, applies to the whole street. If it applied only to the particular piece of the street opposite to that on which a man might be going to build, there might be some ground for arguing that it was reasonable; but it is not so, for, if it means anything, it means that each owner must wait until the whole kerb is put in. I think such a requirement is unreasonable, for it is quite clear that, in the hands of a despotic local authority, considerable pressure might by its aid be brought to bear on owners of building land. Then in the next place there is no limit as to time. The bye-law in question says that "every person who constructs a new street shall cause the kerb of each footpath in such street to be put in at such level as may be fixed or approved by the urban sanitary authority," and that "no person shall commence the erection of a building in a new street unless and until the kerb of each footpath therein shall have been put in pursuant to the preceding requirement." It is contended on behalf of the authority that it is impossible that this provision can delay a man building beyond a reasonable time. In my opinion, it is very difficult to say what is a reasonable time when we consider the infinite variety of the cases in which the question might arise; and, supposing an urban sanitary authority chose to provide that all parties purchasing lands might have an indefinite time to put the kerb down, those who did not want to build would not put the kerb down at all. The bye-law, therefore, places it in the power of an urban sanitary authority to dictate to a man when he shall build; and such a power is, in my opinion, unreasonable. It is argued that the cases quoted are much stronger than the present, and it certainly was an extreme thing to say, as the authority in the case of *White v. The Garston Local Board* (*ubi sup.*) endeavoured to do, that a man should set apart a portion of his own land for the purpose of making a street, and giving the authority access to the back of his premises, and also to say, as in the case of *Heap v. The Burnley Union* (*ubi sup.*), that swine should not be kept within fifty yards of a dwelling-house. Still, however, I am of opinion that, within the principles on which those cases are decided, this bye-law is unreasonable, and therefore bad.

HAWKINS, J.—I am of the same opinion, although I had some doubt during the argument in the case. The 157th section of the Public Health Act 1875 (38 & 39 Vict. c. 55) says that "every urban authority may make bye-laws with respect to the following matters; (that is to say) (1) With respect to the level, width, and construction of new streets, and the provisions for the sewerage

thereof." I can quite understand why the Legislature should give power to a local authority to regulate the level and width and mode of construction of the various streets, and I see that they have actually, in this section, given that power, but I do not see that they have given any power to the authority to regulate the time at which the works should be done. I also doubt whether the authority has power to make these provisions with respect to matters which have been specifically provided for by the 150th section, since they amount to imposing on landowners an absolute duty to do certain things under pain of incurring a penalty, while that section merely provides that if they decline to do them, there shall be no penalty, but the authority shall themselves do them, and recover the expenses. For the reasons stated I think that the bye-law is unreasonable, and that the conviction ought to be quashed. There will be no leave to appeal.

*Conviction quashed.*

Solicitors for the appellant, *Botterell and Roche*.

Solicitors for the respondents, *Johnson and Weatheralls*.

March 21 and April 1, 1885.

(Before MATHEW and SMITH, JJ.)

THE BRISTOL WATERWORKS COMPANY (apps.) v. UREN (resp.).

UREN (app.) v. THE BRISTOL WATERWORKS COMPANY (resps.). (a)

*Water rate—Basis of assessment—Gross sum assessed to the poor rate—Gross estimated rental—Water supplied for domestic purposes—Dwelling-house with garden attached—Separate charge for water supplied to garden—Dwelling-house and garden to be treated as a whole tenement for rating purposes—25 & 26 Vict. c. xxx. ss. 68, 71—28 & 29 Vict. c. xxvi. s. 32.*

*Sect. 68 of the Bristol Waterworks Company Act 1862 obliges the company, at the request of the owner or occupier, to furnish every such occupier of a private dwelling-house, or part of a dwelling-house, in any public street or road within the limits of the Act, a sufficient supply of water for the domestic use of every such occupier, at the annual rents or prices therein mentioned.*

*Sect. 32 of the Bristol Waterworks Company (Amendment) Act 1865 provides that, if any dispute shall arise as to the amount of the annual rack rent or value of any dwelling-house or premises supplied with water by the company, such dispute shall be decided by two justices. Provided that the amount of the annual rack rent or value to be fixed by such justices shall not be less than the gross sum assessed to the poor rate, or less than the rent actually paid for such dwelling-house or premises; and sect. 71 of the same Act provides that a supply of water for domestic purposes shall not include a supply of water . . . for watering gardens by means of any tap, tube, pipe, or other such like apparatus, or for fountains . . . or for any ornamental purpose whatever.*

*U. was a consumer of water supplied by the water company, and occupied a private dwelling-house with a garden attached; the area of the garden*

(a) Reported by W. F. EVANSLEY, Esq., Barrister-at-Law.

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was about three-quarters of an acre. U. paid a separate annual sum of 11. 1s. for the supply of water to his garden. In the rate-book it appeared that the gross estimated rental of the tenement, including garden, occupied by U. was 240l., and the sum at which he was assessed to the poor rate was 204l. Under the above sections the water company claimed to assess U. to the water rate in respect of water supplied for domestic use on the gross sum (that is, the gross estimated rental) at which he was rated to the poor rate. This claim of the company included the rateable value of the garden, notwithstanding the separate charge made in respect of its water supply. The separate rateable value of the garden was found to be 24l. U. disputed their claim, and the dispute was referred to three justices for their decision. Before them it was contended on behalf of the water company: (1) That U. should be assessed to the water rate on the gross sum at which he was rated to the poor rate; and (2) that though the supply to the garden was separately charged for, its rateable value was to be included, making together with the house one whole tenement. U. contended: (1) That he ought to be rated only on the net sum at which he was rated to the poor rate; and (2) that a reduction should be made in respect of the rateable value of the garden attached to his house, which ought not to be included in the general assessment of the value of his premises to the water rate for the water supplied for domestic purposes, because the water supplied to the garden was separately charged for.

The justices held that U. ought to be rated on the gross sum at which he was assessed to the poor rate, but that in arriving at that sum a deduction ought to be made in respect of the garden, for the water supply of which a separate charge was made. Both parties being dissatisfied, appealed from this decision to the High Court, by way of two cases stated by the justices.

Held, on the appeal of the water company, that the consumer was rightly rated on the gross estimated rental at which he was assessed to the poor rate.

Held, on the appeal of the consumer, that the justices ought not to have made any deduction in respect of the garden from the general assessment of the value of his premises to the water rate for

water supplied for domestic purposes, but that the value of the whole tenement, dwelling-house and garden together, was the proper basis of assessment.

THESE were two cases stated under 42 & 43 Vict. c. 49, s. 33, by way of cross appeals from the decisions of three justices of the city and county of Bristol. The material facts of the first case, in which the consumer was appellant, were as follows:—

1. On the 3rd Nov. 1884 the appellant W. Uren, and the respondents the Bristol Waterworks Company, appeared on the hearing of a summons in reference to a dispute which had arisen between them "as to the amount of the annual rack rent or value of a dwelling-house and premises" known as Crofton House, Clifton Down, in the city and county of Bristol, occupied by the appellant and "supplied with water by the company."

2. By the Bristol Waterworks Act 1846 and certain other Acts the respondents were incorporated and became a company, and carried on business as such for the purpose of supplying Bristol and certain other places with water under the provisions of the said Acts.

3. By the Bristol Waterworks Act 1862 the aforesaid Acts were repealed, subject to the provisions of that Act, but the respondents were to remain incorporated by the name of "The Bristol Waterworks Company," with power to purchase, hold, &c., hereditaments for the purposes of their undertaking.

10. By sect. 4 of the same Act, the Waterworks Clauses Act 1847 was incorporated with the Bristol Waterworks Acts, "except where otherwise specially provided."

11. By sect. 2 of the Bristol Waterworks Amendment Act 1865 the Waterworks Clauses Act 1847 was incorporated therewith without exception.

13. The appellant, W. Uren, resided in his own house, called Crofton House, situate at Clifton Down, Clifton, in the city and county of Bristol, surrounded by its own garden grounds, and having a detached coach house and stable.

These premises abut upon a road in which a main pipe of the said company was laid.

14. The property was described in the rate-book as follows:

No. of Assessment.	Name of Occupier.	Description of Property.	Extent.	Gross Estimated Rental.	Rateable Value.	Amount.
1408	Uren, William.	House and Stables. Crofton House, Clifton.		£ 240	£ 204	£ s. 11 18

15. The evidence of an experienced land agent proved that some years previously he and two other competent valuers considered the gross annual value of the house, stables, and garden was 270l. and the net value for rating purposes 230l.

16. It was also proved and admitted that property in the neighbourhood had depreciated in value of late years. It was also admitted that the appellant had in consequence applied for and obtained a reduction in the annual value by the Assessment Committee for Clifton to the figures mentioned in the present rate-book, viz., 240l. as the "gross estimated rental" and 204l. as the "rateable value."

17. The respondents claimed as the water rent,

in respect of all the appellant's premises, at the following rate per annum:

Two and a half per cent. (under sect. 68 of the Act of 1862) on 240l.	£ s. d. 6 0 0
One per cent. (under sect 69 of the same Act) on 240l.	2 8 0
One per cent. (under sect. 26 of the Act of 1865) on 240l.	2 8 0
	£10 16 0

For two water-closets in the dwelling-house (under sect. 68 of the Act of 1862).....	1 0 0
For watering the garden by means of a tube and pipe.....	1 1 0
	£12 17 0

19. It was contended on behalf of the appellant that, in cases where the occupier was owner, the

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Legislature had only authorised the "water rents" to be charged on the "annual value," that the "annual value" was, according to the reported cases, the "net annual value," as defined by the Parochial Assessment Act 1836, and that in fixing such "annual value" the justices were not to make it less than the "rateable value" in the rate-book, which was the only "sum assessed to the poor rate," viz., in the present case not less than 204*l.* (subject to a deduction for the garden).

21. It was contended on behalf of the waterworks company that the reported cases referred to did not apply to the present case, in consequence of the word "gross" being inserted in sect. 32 of the Bristol Act of 1865, which word was not to be found in any statute upon which the reported decisions had been given, and that the word "gross" being used in this statute, the justices were bound to take 240*l.* as such gross sum.

The justices considered that their decision should be given in favour of the respondents for the following reason:

They were directed by the 32nd section of the local Act of 1865 to fix the amount for the annual rack rent or value at not less than "the gross sum" assessed to the poor rate; and in consequence they found the value of the dwelling-house and premises to be 240*l.*, the amount of "the gross estimated value" inserted in the first two columns of the poor rate, which have reference to the annual value of the premises.

The question for the opinion of the court was:

Whether (subject to the deduction which the justices made in reference to the assessment of the garden separately charged for and the subject of a separate appeal) they, in fixing the annual rack rent or value, were correct in taking the figures in the column of the rate-book headed "gross estimated rental," instead of those in the second of the two columns which were to be found under the head "rateable value."

The material facts of the second case, in which the waterworks company were appellants, were as follows:—

The respondent, W. Uren, was the owner and occupier of a dwelling-house, garden, and stables called Crofton House, Clifton Down, in a public road in which a main pipe of the appellants was laid. The appellants had, at the request of the occupier of the said house and premises, furnished to the occupier of the said dwelling-house and premises a supply of water for the domestic use of such occupier under sect. 68 of the Act of 1862, and were entitled to charge for such supply a percentage under such section, one per cent. under sect. 69 of the said Act, and one per cent. under sect. 26 of the Act of 1865. The appellants had so supplied as aforesaid to two water-closets in the said dwelling-house, and to certain taps within the said dwelling-house and stables. The said dwelling-house was open and surrounded by the said garden, and the said occupier had always since the said supply been permitted by the appellants, and had been at liberty, to water his said garden with water supplied at the taps within the said house. That the garden was a little short of three-quarters of an acre in area. That the gross annual value of the dwelling-house, if occupied, without the garden, would be diminished by 10 per cent.

It was contended on behalf of the respondent that, in accordance with several reported cases, the company could only charge the percentage of  $\frac{1}{4}$  per cent. on the rateable value, or the net sum assessed to the poor rate, which must be taken as the annual value; but the justices decided that, subject to the deduction hereinafter mentioned, the company might charge on the gross annual value of the dwelling-house and premises.

It was contended on behalf of the appellants that the justices could not reduce the amount of the annual rack rent or value of the premises supplied by water below the said sum of 240*l.*, and that they could not separate the estimated value of the garden from such estimated value of the house and other premises, and that they could not decide that the value of the dwelling-house was 216*l.*

It was also contended that the supply of water to the dwelling-house included, and necessarily included, a supply of water to the garden, and that the charge of 21*s.* was not a charge for the supply of water to the garden, but for the use of the tap and tube erected in the garden, and that the percentage for water supplied to the garden might be charged for as well as the tap and tube. It was further contended that the justices had no jurisdiction to decide, and could not lawfully decide, that the percentage allowed by the Act was to be calculated on the said sum of 216*l.*, or on the estimated value of the house apart from the garden.

The justices delivered their judgment as follows:

"This is a dispute between Mr. Uren and the Bristol Waterworks Company as to the amount of the annual rack rent or value of a dwelling-house and premises, being Crofton House, stables, and garden at Clifton Down, supplied with water by the company. We are directed by the 32nd section of the local Act of 1865 to fix such amount at not less than the 'gross sum assessed to the poor rate,' and we in consequence find the value of such dwelling-house and premises to be 240*l.*, the amount of the gross estimated value in the first column of the poor rate, which gross estimated value it has been proved includes the value of the garden, and that garden is supplied with water by the company and charged for under another section. This arrangement requires us to separate the annual value of the garden from the estimated value of the premises. According to the evidence, 10 per cent. would be a fair deduction in respect of the garden. We consequently find the value of the dwelling-house and premises in two ways: First, as a whole, viz., 240*l.*; secondly, the value of the garden 24*l.*, which would give 216*l.* as the value of the dwelling-house, upon which the percentage allowed by the Act must be calculated."

The appellants being persons aggrieved were desirous to question this determination as erroneous in point of law and in excess of jurisdiction, and applied to them as a court of summary jurisdiction, pursuant to sect. 33 of the Summary Jurisdiction Act 1879, to state the facts of the case.

The questions for the opinion of the court were:

(a) Whether they were right in assessing the value of the dwelling-house and other premises at 216*l.* separately from the garden.

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(b) And whether they were right in directing that the percentage of the Act was so to be calculated; and, if not,

(c) What sum should have been decided by them, under the 32nd section of the Bristol Waterworks Company Amendment Act 1865, as the annual amount of the rack rent or value of the said dwelling-house and premises supplied with water by the company.

By sect. 25 & 26 Vict. c. xxx. s. 68 :

The company are, at the request of the owner or occupier, to furnish to every occupier of a private dwelling-house or part of a private dwelling-house, in any public street or road within the limits of this Act, in which or within one hundred yards of which any main pipe of the company shall be laid, a sufficient supply of water for the domestic use of every such occupier, at annual rents or prices (hereinafter called "water rents") not exceeding the following, that is to say,

When the annual rack rent or value of the premises so supplied with water shall not exceed five pounds, five shillings.

And when the same shall exceed five pounds and shall not exceed six pounds, six shillings.

And when the same shall exceed two hundred pounds, at a rate not exceeding two pounds ten shillings per one hundred pounds per annum.

And for every water-closet or bath there shall be paid the sum of not more than ten shillings per annum.

By sect. 71 :

Provided also that a supply of water for domestic purposes shall not include a supply of water for baths, or for cattle, or for horses, or for washing carriages, if the same horses or carriages are kept for hire, or by common carriers, or are the property of a dealer, or for steam-engines, or for railway purposes, or for warming or ventilating purposes, or for working any machine or apparatus, or for any trade, manufacture, or business whatsoever, or for watering gardens by means of any tap, tube, pipe, or other such like apparatus, or for fountains, or for flushing sewers or drains, or for public baths, or for any ornamental purpose whatever.

By sect. 73 :

It shall be lawful for the company to supply any person with water for other than domestic purposes at such rate and upon such terms and conditions as shall be agreed upon between the company and the persons desirous of having such supply of water, but such last-mentioned supply shall not be furnished by the company so as to prejudice or diminish the full and adequate quantity required for domestic purposes.

By 26 & 27 Vict. c. 93, s. 12 :

A supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or for washing carriages where such horses or carriages are kept for sale or hire, or by a common carrier, or a supply for any trade, manufacture, or business, or for watering gardens, or for fountains, or for any ornamental purpose.

By 28 & 29 Vict. c. xxvi. s. 32 :

If any dispute shall arise as to the amount of the annual rack rent or value of any dwelling-house or premises supplied with water by the company, such dispute shall be decided by two justices for the city of Bristol, provided that the amount of the annual rack rent or value to be fixed by such justices shall not be less than the gross sum assessed to the poor rate or less than the rent actually paid for such dwelling-house or premises.

The *Solicitor-General* (Sir F. Herschell, Q.C.) (*A. Charles, Q.C. and J. R. Poole* with him).—In these cases there are two appeals: the first, in which the water company are appellants and the consumer respondent, is, whether the consumer is to be charged for water supplied for domestic purposes upon the whole value of his premises including his garden; and the second, in which the consumer is appellant, is whether he is to be rated under the water company's Act on the gross

estimated rental of his premises, or on the sum at which he is actually assessed to the poor rate. At present it is open to me to deal with the first point, which is my appeal. This I will do shortly, and reserve for my reply any further remarks I may have to make. Whatever the proper basis of assessment may be under these Acts, the respondent's garden must be included in the value of the premises which are to be supplied with water. The water company claimed to charge him for water supplied for domestic purposes on the gross estimated rental of his premises—that is, house and garden—which appears from the rate-book to be 240*l.* per annum. To this the consumer objected, and claimed to have a deduction of the value of the garden, inasmuch as he was charged separately for the supply to it. The justices made a deduction of 24*l.* from the gross value of the premises. In so doing they were wrong, and were bound to follow the assessment in the rate-book, even though they might be satisfied that it included land in respect of which the water rate could not be charged under the domestic supply. The occupier, if dissatisfied with his assessment, must go to the assessment committee and get the property divided in accordance with the way the water company should charge. The estimated value of the garden cannot be separated from the estimated value of the whole of the premises. This point was practically determined by the late Master of the Rolls in the *Lambeth Waterworks Company v. Lowe* (not reported). *Busby v. The Chesterfield Waterworks Company* (El. Bl. & El. 176) is also in point.

*B. E. Webster, Q.C.* (*Goodere* with him) for the consumer.—The first point to be considered is the appeal of the water company against the decision of the justices in favour of the consumer, allowing a deduction to be made in respect of the value of the garden. It is submitted that their decision is right. The premises here consist of a house and a large garden, about three-quarters of an acre in extent. Now, the company under the 68th section of their special Act of 1862 are entitled to charge so much for water supplied to the consumer's premises for domestic use. Here the garden is not supplied with water for domestic use, and it cannot be intended that they should charge as for domestic use for premises they do not so supply, and at the same time make a subsequent separate charge for water so supplied to those premises. The consumer is here charged on a special bargain under sect. 71 of the Act of 1862, an extra guinea for the water supplied by a tap to his garden. A small garden or mere strip of land may, no doubt, be included in the terms "premises supplied," but where, for instance, it was one several acres in extent, it surely could not be so included. Here the garden is a very large one for its situation, and is separately charged for, and not under the domestic use rate. On whatever value of the premises the water company may charge, it must be only in respect of the premises supplied with water for domestic use. When computing the annual value of these premises, under such circumstances it is only right and fair that the rateable value of the garden as distinct from the house should be ascertained, and not included in the value of the whole of the premises. The gross annual value of these premises is 240*l.*, and from that the value of the garden should be deducted, and



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that was done in this case by the justices, who made a deduction of 10 per cent. The case of the *Lambeth Waterworks Company v. Lowe* (not reported) is not against me, for there was no separate bargain in that case to supply water to the garden; and that of *Busby v. The Chesterfield Waterworks Company* (El. Bl. & El. 176) is not in point. It is on this ground of there being a contract and bargain to water the garden that it is submitted that the justices were entitled not to take wholesale the figures of the rate-book. As to the second point, the justices were wrong in considering themselves bound by the words "gross sum assessed to the poor rate" in sect. 32 of the Act of 1862, in consequence of which they took the gross estimated rental of these premises instead of the rateable value. Sect. 32 is not a charging but a limiting section; that is, it limits the lowest amount to which the justices may go. They have to find the annual value, and it makes no difference whether the words "annual rack rent" or "annual value" are used. "Rack" means full; "annual rack rent" means "full annual rent," and "annual value" means "full annual value."

*Dobbs v. The Grand Junction Waterworks Company*,  
49 L. T. Rep. N. S. 541; 9 App. Cas. 49.

[SMITH, J.—You read in then the word "net" after the word "gross" in sect. 32?] Yes; and it is submitted that the two terms are not inconsistent. The Public Health Act 1875, sect. 211, uses the expression "full net annual value." The governing words here are "assessed to the poor rate," and not "gross" nor "sum." The clause means the full sum at which the consumer is rated to the poor rate. The column containing the "gross estimated rental" is not an assessment; it is a mere computation for the purpose of arriving at the ultimate assessment, and not the assessment itself. [MATHEW, J.—What is the meaning of the words "rent actually paid?"] These words are not the governing words, and do not mean more than the "actual annual value." The two expressions furnish only one standard. The minimum pointed out to the justices was not the "gross estimated rental," but "rateable value."

*Dobbs v. The Grand Junction Waterworks Company*  
(ubi sup.).

The term "net" or "gross" before "annual value" does not alter the true amount of the latter; and "annual value" means "net annual value." The words "assessed to the poor rate" apply only to "rateable value," and not to gross estimated rental:

*Dobbs v. The Grand Junction Waterworks Company*,  
47 L. T. Rep. N. S. 504; 10 Q. B. Div. 337.

The principle adopted by the Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 96) supports this contention. The word "gross" in the clause under discussion is a mere epithet, and means no more than "full" or "actual." The minimum standard at which the consumer under this section is to be rated for the water charges is the actual amount at which he is assessed to the poor rate.

Sir F. Herschell in reply.—The water rate here is not to be charged with reference to "annual value," but to "annual rack rent," which are in this case the governing words, and do not mean the same thing. What "annual value" now

means is well known. [SMITH, J.—Are there two standards created by the words "annual rack rent or value?"] No; "value" is synonymous with "rack rent." Where the term "rack rent" is used there no deductions can be made, as where "annual value" is used. This sect. 32 is a charging section, and entirely different to the one in *Dobbs v. The Grand Junction Waterworks Company* (ubi sup.). It has been suggested that "rack rent" might mean something less than full rent; but that is not the natural nor plain meaning of the word; and "rack rent" does not mean the "full annual value," but the full amount to be got from a tenant, apart from any question of profit to the landlord. In sect. 71 the words "gross sum assessed" are used, and put as a minimum. Now, if the rent actually paid for these premises is, for instance, 500*l.*, it has been admitted that the justices cannot fix the basis of assessment at less than 500*l.*; so, if it had been 240*l.*, they could not have fixed it at less than 240*l.*, because, whichever of these two minima is the highest, that must be taken; but it has been argued that, notwithstanding the rent paid is 240*l.*, yet the amount at which he is to be charged is only 204*l.*, as being the rateable value. The words "gross sum assessed to the poor rate" were inserted in this Act after the passing of the Parochial Assessment Act 1836. "Gross" means something from which a deduction is to be made; therefore, the gross sum assessed is a gross value from which a deduction is to be made to arrive at the net value; and the "net annual value," under the Parochial Assessment Act, cannot be ascertained before ascertaining what the gross sum was; and this is the "gross estimated rental" of the rate-book. To talk of "gross net annual value" is a contradiction in terms. The dictionary meaning of "rack rent" is the full or uttermost rent that can be got for the premises, and that is the meaning assigned to it in sect. 66 of the Income Tax Act 1872. As to the other point, that is, the meaning of the expression "premises to be supplied," it is not to be confined to the house only, but to the house with the garden attached, that is, everything within the curtilage of the house. The consumer is not here separately charged for a moderate or ordinary domestic use of water in his garden, but only for extra use of it which he gets through the tap. The sum assessed in the rate-book is the proper basis of assessment, and it is not permissible to go behind it.

Webster, in reply on his own appeal.—"Rack rent" is not different from "rent," nor from "full annual value;" and the "full annual value" has been held to be the proper basis of assessment, where the term "annual rack rent or value" was used:

*Warrington Waterworks Company v. Longshaw*,  
46 L. T. Rep. N. S. 815; 9 Q. B. Div. 415.

"Rack" means nothing more than full (2 Bl. Com. 43), and is equivalent to full rent in contradistinction to rent reserved with a premium. "Full annual value" is the same as "net annual value," and "rent or redditus" has never been held to be anything different from "annual value."

*Sheffield Waterworks Company v. Bennett*, 27 L. T. Rep. N. S. 199; and 28 L. T. Rep. N. S. 509; L. Rep. 7 Ex. 406.

The rent actually paid in the present section does

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not mean the actual money that passes, but only the actual or true value. It is not contended that the highest minimum is not to be taken, but what the standard of the minimum is depends upon the meaning of the word "rent," which does not mean the rent in fact paid. Lastly, the consumer is not rated on his gross estimated rental, but on the rateable value of his premises.

*Our. adv. vult.*

April 1.—SMITH, J. delivered the judgment of the court.—These cases were argued before my brother Mathew and myself. The questions raised by these cross appeals are: (1) What is the meaning of the terms "the gross sum assessed to the poor rate" in sect. 32 of the Bristol Waterworks Amendment Act 1865; (2) whether that sum (whatever it may mean) is to be the sum assessed upon the private dwelling-house, together with the garden attached, or only the sum assessed upon the dwelling-house itself. The two material sections upon which these questions arise are sect. 68 of the Bristol Waterworks Act 1862 and sect. 32 of the Bristol Waterworks Amendment Act 1865. By sect. 68 of the Act of 1862 the company are, at the request of the "owner or occupier, to furnish to every occupier" of a private dwelling-house or part of a private dwelling-house, in any public street or road within the limits of this Act, in which or within one hundred yards of which any main pipe of the company shall be laid, a sufficient supply of water for the domestic use of every such occupier, at annual rents or prices (hereinafter called "water rents") not exceeding the following, that is to say, when the annual rack rent or value of the premises so supplied with water shall not exceed five pounds, five shillings; and when the same shall exceed five pounds and shall not exceed six pounds, six shillings. Sect. 32 of the Bristol Waterworks Amendment Act is as follows: [Reads it.] Now, what is the meaning of the phrase "shall not be less than the gross sum assessed to the poor rate" in sect. 32? The Solicitor-General, on behalf of the water company, insisted that it means the gross estimated rental and not the rateable value, or, in other words, the gross and not the net annual value of the premises. He argued that the word "gross" is a well-known term, and does not mean "net," and he pointed out that the Amendment Act 1865 was passed shortly after the passing of the Union Assessment Act 1862 (25 & 26 Vict. c. 103), by sect. 15 of which Act the meaning of "gross estimated rental" was defined. He also referred to the schedule of the Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 96), as showing that in an assessment to the relief of the poor there is the column calculated upon the gross estimated rental and the column calculated upon the rateable value; and he contended that in the Bristol Waterworks Amendment Act 1865 the term "gross sum assessed to the poor rate" means what it says, and not the net or rateable value of the premises assessed, as contended for by the other side. Mr. Webster, for the consumer, argued that this is not so, and that the phrase "gross sum assessed to the poor rate" means the full sum assessed to the poor rate, that is, the net, and not the gross annual value. His argument was as follows: He said, "rack rent" is only a rent of the full value of the tenement, or near it, and cited Blackstone's

Commentaries, bk. 2, chap. 3, p. 43; that the phrase "annual rack rent or value" had been held in statutes then under consideration to mean "rateable value," or, in other words, "annual value," and he cited in support of this the case of the *Sheffield Waterworks Company v. Bennett* (27 L.T. Rep. N. S. 199; L. Rep. 7 Ex. 409) and the *Warrington Waterworks Company v. Longshaw* (46 L.T. Rep. N. S. 815; 9 Q. B. Div. 145). He said that the phrase "less than the rent actually paid" had been held to mean "annual value" in *Dobbs v. The Grand Junction Waterworks Company*, by the Queen's Bench Division (46 L.T. Rep. N. S. 817; 9 Q. B. Div. 151), and that "annual value" had been held by the House of Lords in that case in the statute then under consideration to mean "net annual value" (49 L.T. Rep. N. S. 541; 9 App. Cas. 49), and consequently he said that the term "rent actually paid" in sect. 32 of the Amendment Act of 1865 must mean "net annual value." It is impossible, he says, to suppose that the Legislature intended to create two different standards of minima in sect. 32 of the Act of 1865, and that, therefore, the term "gross sum assessed to the poor rate" in sect. 32 of that Act must be held to mean "net annual value," and not "gross estimated rental." We pressed him at the time to state what he proposed to do with the word "gross" in the section, and he was forced to read the section as if it contained after the word "gross" the word "net," or, in other words, to read it thus, "gross net sum." He admitted that such a phrase was certainly novel, but still insisted that this was the proper wording of the section. The result of his argument is, that we are to read "gross sum assessed to the poor rate" to mean "net sum assessed to the poor rate," or, in other words, net annual or rateable value. We are unable to do so. It seems to us that the fallacy of his argument is exactly that which was pointed out by the late Master of the Rolls in *Southwell v. Bowditch* (35 L.T. Rep. N. S. 196; 1 C. P. Div. 374). Sir George Jessel thus demonstrates it: Contract A. has been held by the court to mean so and so. Contract B. then comes up for adjudication. It is somewhat similar to contract A., therefore, says the court, it must be held to mean the same thing as contract A. Contract C. then comes on for discussion. It is somewhat like contract B., and the courts have interpreted contract B., therefore contract C. must be held to mean the same as contract B., and so on, till at last contract X. is held to mean the same as contract A., though wholly dissimilar. We think that what Lord Watson pointed out in his judgment in *Dobbs' case* (9 App. Cas. 6) is very applicable to the present, viz., that it is not because in that case the term "annual value," or indeed the term "actual amount of rent paid," was held to mean "net annual value," that in every statute those words must be read as meaning "net value." It seems to us that if the word "gross" had been in the statute discussed in *Dobbs' case* (*ubi sup.*) (and, indeed, in the other cases) before the words "annual value," the decisions would not have been what they were. The water companies in those cases would not then have had to attempt to insert that word, and which, as Lord Bramwell in his judgment (p. 56) pointed out, was what they were in reality seeking to do. We cannot in the section now in

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question read "gross sum assessed to the poor rate" as meaning "full net sum," or "gross net sum," or, indeed, as "net annual value," as insisted upon by the consumer; and in our judgment it seems to us that, whatever may hereafter be held to be the true meaning of the phrase "rent actually paid" in sect. 32 of the Bristol Waterworks Amendment Act 1865, the Legislature has clearly expressed its intention and meaning by the phrase "the gross sum assessed to the poor rate." The Act of 1865 was passed with full knowledge of the Parochial Assessment Act 1836, which dealt and distinguished between "gross estimated rental" and "rateable value," and also of the Union Assessment Act 1862, which in sect. 15 specifically defined what gross estimated rental was, and in our judgment the phrase "gross sum assessed to the poor" means the "gross estimated rental," and not the net annual value as contended for by the consumer. It should be noticed as to the meaning to be placed upon the phrase "the rent actually fixed" in sect. 32 of the Act of 1865, that the Act was passed before any of the cases cited by Mr. Webster on the other Acts were determined. In our judgment the case of *Brown v. The Bristol Waterworks Company* was well decided, and the learned counsel in that case gave up nothing by refusing to argue the point now above discussed and adjudicated upon. As to the second point, namely, whether the gross sum assessed to the poor rate is to be the sum assessed, as it is assessed, upon the dwelling-house and garden, or only upon the dwelling-house itself, it is necessary as to this point to consider sect. 71 of the Bristol Waterworks Act 1863 in addition to the two sections above mentioned. That section is as follows: "Provided also that a supply of water for domestic purposes shall not include a supply of water for baths, or for cattle, or for horses, or for washing carriages, if the same horses or carriages are kept for hire, or by common carriers, or are the property of a dealer, or for steam-engines, or for railway purposes, or for warming or ventilating purposes, or for working any machine or apparatus, or for any trade, manufacture, or business whatsoever, or for watering gardens by means of any tap, tube, pipe, or other such like apparatus, or for fountains, or for flushing sewers or drains, or for public baths, or for any ornamental purpose whatever." By sect. 68 of the Act of 1862 the company is to furnish, at the rates therein specified, every occupier of a private dwelling-house or part of a private dwelling-house with a sufficient supply of water for domestic use. The question here is, what is meant by supplying a private dwelling-house or part of it with water for domestic use. Does it mean or imply the dwelling-house *per se*, or the dwelling-house with its appurtenances, as they may happen to stand assessed to the poor rate in the rate-book? We do not think that it necessarily means the dwelling-house with its appurtenances as assessed to the poor rate in the rate-book, for it might well be that the property occupied as a whole and so assessed might consist of a dwelling-house together with such appurtenances, the supplying of which latter with water would clearly not be for domestic use. Suppose a dwelling-house, together with such an amount of land, to be assessed to the poor rate upon the rate-book, that the occupier keeps thereon a herd

of cows or other animals, could it be said that the watering of such animals was a domestic use or purpose? It seems to us not, though, as was pointed out by the late Master of the Rolls in the unreported case of *Lowe v. The Lambeth Waterworks Company*, if only one cow or so were kept and the milk was used in the house, the watering of such cows might well be held a domestic use. It seems to us to be in each case a question of fact, to be determined as each case arises. In our judgment the assessment in the rate-book is not necessarily to be taken as the standard. Does it then mean dwelling-house with its appurtenances, or only dwelling-house or part of it *per se*? It is admitted on all hands that these waterworks statutes supply a rough-and-ready way of estimating upon what and at what rate the water rate is to be levied and paid. Sect. 71 of the Bristol Waterworks Act 1862 seems to us to contemplate that the supply of water to a private dwelling-house for some garden purposes might well be considered as for domestic use, for it therein enacts what shall not be considered as domestic purposes, though, as was pointed out by Sir George Jessel in *Lowe v. The Lambeth Waterworks Company*, every purpose not enumerated in the section cannot be considered a domestic purpose. The case of *Busby v. The Chesterfield Waterworks Company* (El. Bl. & El. 176) upon the statute then in question, shows that water used for washing a private carriage and watering a private carriage-house may well be considered as a domestic use. The Court in that case would not adopt the argument that "domestic use" meant solely the use by the family for the consumption and cleanliness of those resident within the house. In *Lowe v. The Lambeth Waterworks Company* Sir George Jessel held that the word "house" in the Act meant the tenement supplied with water, and not merely the house itself. In our judgment the water used for the mere amenities of the house, such as in this case, the watering of a flower garden surrounding and attached to and occupied with the house, may legitimately and fairly be held to be used for domestic purposes within the meaning of the statute in question. It should be noticed that the value of the whole of the premises, that is, house and garden, is assessed; and it seems to us that the water company does not suffer detriment by so holding. It is, however, urged that in this case the consumer has contracted to pay and does pay 1l. 1s. per annum for watering his garden by means of a special tap, as is provided for by sect. 71 of the Bristol Waterworks Act 1862. This is so, but it does not seem to us that this fact should alter the area upon which, and consequently the amount upon which, the water rate should be assessed. If a consumer desires to use such an amount of additional water as a special tap, tube, or pipe will supply, there is nothing, as it seems to us, unreasonable in holding that he should pay for such accommodation in excess of what he would otherwise pay; and we are of opinion that the true rendering of the statutes before us is, that the consumer in this case is to pay upon the value (as before defined) of the dwelling-house with its appurtenances for water used, not merely in the dwelling-house itself, but also in watering the flower garden surrounding and attached to and occupied with the house, and used and enjoyed, as the garden in this case

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is, as a mere amenity of the house. If this view is correct, as we think it is, inasmuch as the house *plus* garden is assessed to the water rate, the consumer pays and the company receives the 1*l.* 1*s.* per annum for the additional water likely to be used by reason of the additional accommodation afforded; and the consumer also pays and the company also receives for the water ordinarily used and supplied to the whole tenement for domestic use. We are of opinion that the appeal of the consumer should be dismissed, and that the appeal of the company should be allowed, and in each case with costs.

*Judgment accordingly.*

Solicitors for the water company, *Clarke, Woodcock, and Ryland*, for *Fussell, Prichard, Swann, Henderson, and Wall*, Bristol.

Solicitors for the consumer, *Torr, Janeways, Gribble, and Oddie*, for *E. Salmon*, Bristol.

Wednesday, Dec. 3, 1884.

(Before HAWKINS and DAY, JJ.)

HYDE (app.) v. ENTWISTLE (resp.). (a)

*Highways—Encroachment—Limitation of time for conviction*—3 Geo. 4, c. 126, s. 118—9 Geo. 4, c. 77, s. 18—*The Annual Turnpike Acts Continuance Act 1865* (28 & 29 Vict. c. 107), s. 2.

By 9 Geo. 4, c. 77, s. 18, no person may be convicted of an offence against 3 Geo. 4, c. 126, s. 118—which enacts that any person causing an encroachment within a certain distance of the centre of a turnpike road shall be subject to a penalty—after the expiration of six months from the time when such offence shall have been committed.

The period of six months mentioned in the section begins to run from the time that a substantial encroachment of the highway has been caused, and not from the final completion of the encroaching building or other encroachment.

THIS was a case stated by justices of Lancashire, under 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as therein stated.

The following were, so far as material, the facts set out in the case:—

At a petty session held at Middleton in and for the division of Middleton, in the county of Lancaster, on Feb. 28, 1884, an information and complaint was preferred by the respondent, Frederick Entwistle, clerk to the Middleton and Tonge Improvement Commissioners, being the local authority having the care of the road hereinafter mentioned, against the appellant, Joseph Hyde, of Bowlee, Middleton, under the statute 3 Geo. 4, c. 126, s. 118, for that he on the 27th Oct. 1883, at Bowlee aforesaid, unlawfully did make a certain encroachment on a certain road there situate, which having been a turnpike road did after the passing of the Act of Parliament 28 & 29 Vict. c. 107 become and thence hitherto has been and still is an ordinary highway, by erecting a porch at the side of such road, the said encroachment being within the distance of thirty feet from the centre of the said road and within three miles from the market town of Middleton, contrary to the statute in such case made and provided.

On the hearing of the said information and

complaint the appellant was convicted and adjudged to pay a fine of 10*s.* and costs, but, being dissatisfied with the determination of the justices as being erroneous in point of law, applied to them to state a case setting forth the facts and the grounds of their determination.

The following were the facts proved and found by the justices at the hearing of the information:

The appellant is the owner of a plot of land, with a house standing upon it, abutting on a road which was formerly a turnpike road, and after the passing of 28 & 29 Vict. c. 107 became and is an ordinary highway.

Between the front wall of the house and the metalled part of the road there is a raised pathway varying in width from 5ft. 7in. to 7ft. 10in. of a height of three to four feet opposite the door of the appellant's house. The pathway is bounded on its outer edge by kerbstones, the first row rising to the height of about 9in. above the level of the road, while the second row is set back about half-a-yard towards the appellant's house and is about the height of the first row and commences upon a level with the top of the first row. At the southerly end the pathway declines in height until it reaches the level of the road where it terminates. While proceeding along the road from the northerly end of the appellant's house there is no footpath on that side of the road, but on the other side of the road there is.

The road was formerly a turnpike road and is an old highway, and the state of things above described has existed so far back as the memory of any witness called before us could reach. The said pathway has always been open to the public, and no person has ever been prevented from using it. It has been used occasionally by the trustees of the road while a turnpike road for temporarily storing materials for the repair of the road. The appellant and his predecessors in title have used it for the purpose of access to the front door of the appellant's house and to the gate of his garden adjoining.

In the month of July 1883 the appellant began to erect a porch in front of his house projecting 6ft. 9in. on to the said pathway and in the direction of the centre of the highway.

The evidence was, and we found as a fact, that the erection of the said porch was not completed until Oct. 1883.

The appellant claimed the said pathway as his own property, and contended, first, that the information was not laid within six months after the date of the offence charged, as required by the 18th section of 9 Geo. 4, c. 77; and, secondly, that a question of title to land arose which the justices had no jurisdiction to decide.

The justices held that the porch, though its erection was begun more than six months before the date of the information, was not completed until within six months before that date, and therefore held that the information was in time. They also held that the Act of Parliament compelled them to decide whether the said pathway across which the appellant made the porch was or was not on the side of the old turnpike road and within the highway, and they decided in the affirmative, and the evidence adduced did not satisfy them that there was any ground for the appellant's contention that he was the owner of the said pathway or any part of it.

The questions arising upon the above state-

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ment for the court therefore are: first, was the information and complaint laid within six months of the date of the offence as required by the 18th section of 9 Geo. 4, c. 77<sup>p</sup> and secondly, was the jurisdiction of the justices ousted by reason of the appellant's contention that he was the owner of the said pathway?

If the court should be of opinion that the said conviction was correct in law and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information and complaint is to be dismissed.

The following statutes became material in the course of the argument.

3 Geo. 4, c. 126, s. 118, is:

And be it further enacted, that if any person shall make or cause to be made any dwelling-house or other building, or any hedge or other fence on or at the sides of any turnpike road in such manner as to reduce the breadth or confine the limits thereof, or shall fill up or obstruct any ditch at the side thereof, or shall make or cause to be made any dwelling-house or other building or any hedge or other fence on any common or waste land on the side or sides of any turnpike road within the distance of thirty feet, if within three miles of any market-town, or if beyond that distance within twenty-five feet from the middle or centre thereof; or shall make any drain, gutter, sink, or watercourse across, or otherwise break up or injure the surface of any turnpike road, or of any part thereof, or shall plough, harrow, or break up the soil of any land or ground, or in ploughing or harrowing the adjacent lands shall turn his or their plough or harrow in or upon any land or ground within the distances aforesaid from the middle or centre of any turnpike road made or to be made, or make any other encroachment on any turnpike road within the distances aforesaid from the middle or centre thereof; every person so offending shall forfeit for every such offence forty shillings to such person as shall make information of the same; and it shall be lawful for the trustees or commissioners who have the care of any such road to cause such dwelling-house or other building, hedge, ditch, or fence, drain, sink, watercourse, gutter, or other encroachment to be taken down or filled up at the expense of the person or persons to whom the same shall belong, &c.

9 Geo. 4, c. 77, s. 18, is:

And be it further enacted, that no person or persons shall or may be convicted of any offence or offences contrary to the provisions of this Act, or of the said recited Acts (including 3 Geo. 4 c. 126), or of any local turnpike Act, in a summary way before any justice or justices of the peace, after the expiration of six months from the time when any such offence or offences shall or may have been committed.

The Annual Turnpike Acts Continuance Act 1865 (28 & 29 Vict. c. 107), s. 2, is:

The sections relating to encroachments on turnpike roads contained in 3 Geo. 4, c. 126, shall continue in force in relation to any road which, having been a turnpike road, may at any time after the passing of this Act become an ordinary highway in the same manner as if such road had continued to be a turnpike road; and in the construction of the said section the highway board shall be deemed to be the trustees or commissioners where the road is within the jurisdiction of a highway board, and in other cases the surveyor or other local authority having the care of the road shall be deemed to be such trustees or commissioners.

*Bigham*, Q.C. for the appellant.—It cannot now be contended that the jurisdiction of the justices was ousted by the appellant's contention that he was the owner of the pathway:

*Reg. v. Phillimore and others*, 51 L. T. Rep. N. S. 205; *Williams v. Adams*, 5 L. T. Rep. N. S. 790.

Under the circumstances, however, set out in the case the information was out of time,

not being laid within six months after the date of the offence charged, within the meaning of the 9 Geo. 4, c. 77, s. 18. This question was discussed in *Coggins v. Bennett* (2 O. P. Div. 568), where it was decided that an encroachment such as is forbidden by this section is not a continuing offence. "It appears to me," says Lord Coleridge, C.J., in that case, "that what the Legislature contemplated was some single definite act which when done should be the subject of a remedy in this summary way." Here the porch was commenced much more than six months before the date of the information, and it is absurd to say that the definite act of encroachment which Lord Coleridge speaks of did not take place before the last touch was given to it which rendered it in the opinion of the justices complete. [DAY, J.—Surely you cannot split up the construction of a work into various parts. Is it not intended that the time of limitation should commence from the completion of it?] It would be unreasonable to say that a local authority can lie by and wait for the completion of a large building before they come forward to say that it is an encroachment and demand its demolition. The time of limitation begins to run therefore as soon as the thing, whatever it may be, becomes an encroachment. The porch is not more of an encroachment on the highway by reason of a roof being put upon it than it was without a roof [HAWKINS, J.—*Coggins v. Bennett* (*ubi sup.*) does not, I think, touch this question. There a fence was erected within 15ft. of the centre of a highway, and the decision was that its mere continuance there after completion was not a fresh offence.] In the case of a building the definite act of encroachment from which the time of limitation runs is complete when the surface of the highway is occupied by it.

*Meadows White*, Q.C. (with him *F. O. Crump* and *Trollope*) for the respondent.—There must be substantial completion of the encroachment before the time of limitation begins to run. It could not be said that a man by digging the foundation of his building and waiting for six months had escaped the statute and could not be prevented from putting up a building encroaching on the highway. The magistrates have found that the porch was not there as an encroachment until within six months of the date of the information. [DAY, J.—They find that the erection of it was commenced in July.] It was not the intention of the Legislature that the time of limitation should run from the commencement of an encroachment, and the justices were in this case right in convicting the appellant.

HAWKINS, J.—I am of opinion that this case ought to be remitted to the justices to consider and decide the question whether so much of this porch had been erected before the six months preceding the date of this information commenced to run as to constitute a substantial encroachment on the highway, and, if there was so much of the porch erected before that time, I think that they ought to dismiss the summons.

DAY, J.—I agree, but I think that if before the six months began to run there was some encroachment on the highway, and if within the six months there was a substantial addition made to that encroachment, I think that that would constitute a fresh offence, and that the time would

begin to run from that additional substantial encroachment.

*Case remitted.*

Solicitors for the appellant, *Chester, Mayhew, Broome, and Griffiths*, for *W. Weld*, Liverpool.

Solicitors for the respondent, *Carter and Church*, for *Jackson and Godby*, Rochdale.

March 14 and 21, 1885.

(Before DENMAN, J.)

SELLOES v. MATLOCK LOCAL BOARD. (a)

*Public Health Act 1875—Erection of urinal—Nuisance—Alteration by local authority of level of street—Interference with adjoining owner's right of access to premises abutting on the street—Injunction—Compensation—38 & 39 Vict. c. 55, ss. 39, 149, 264, 308.*

*Where a local board erects a urinal in such a position as to be a nuisance injurious to neighbouring premises, the owner of such premises is entitled to an injunction restraining the local board from continuing the nuisance, since sect. 39 of the Public Health Act 1875 does not confer upon the local board a right to create a nuisance without being liable to an action.*

*Where a local board is a highway authority, it has the power to alter for the accommodation of the public the level of any street, though such alteration may interfere with the free access of the adjoining owners to their property abutting on the street. Any remedy that the adjoining owners may have, except on the ground of unreasonable conduct on the part of the local authority, should be by way of compensation under sect. 308 of the Public Health Act 1875, and not by injunction.*

*The defendants, the Local Board of Matlock, erected a urinal on a piece of ground part of which belonged to the plaintiff. The urinal was erected near to a petrifying well belonging to the plaintiff; this well was an object of interest in the neighbourhood, and was leased by the plaintiff; it was a source of profit to the lessees. It was proved that, especially in hot weather, the urinal was a nuisance to those visitors who came to see the well, and that its continuance in its present position would depreciate the value of the well and the premises near it.*

*Held, that the plaintiff was entitled to an injunction restraining the local board from continuing the nuisance on the plaintiff's land or so near to it as to cause a nuisance to the plaintiff or her tenants or lessees.*

*Held, also, that sect. 308 of the Public Health Act 1875 did not apply to such a case so as to make compensation and not an action the proper remedy.*

*The plaintiff possessed an inn and stables which stood back from the high road, and in front of them was an open space which until shortly before the action had been open to and on a level with the road. The defendants had made a footpath on the road outside the plaintiff's land with raised kerb-stones, but left openings so that carriages could still go in from and out into the road, but not at every part of the boundary. The plaintiff claimed an injunction against the local board restraining them from maintaining the kerb-stones and erections as being an interference with*

*her right to have access for all purposes to every portion of the highway adjoining the property.*

*Held, that as sect. 149 of the Public Health Act 1875 gives power to the local authority to cause the soil of any street which is or at any time becomes a highway repairable by the inhabitants at large within any urban district to be raised, lowered, or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers, the defendants could not be restrained by injunction from keeping up the raised footpath for the accommodation of the public, and that any remedy, except on the ground of unreasonable conduct on the part of the local authority, ought to be sought by way of compensation under sect. 308 of the Public Health Act 1875.*

THIS was an action tried before Denman, J. at the winter assizes 1885 held at Derby, and was reserved for further consideration. The facts appear sufficiently in the judgment.

The plaintiff claimed an injunction to restrain the defendants from maintaining and continuing, either upon the plaintiff's land or partly upon the plaintiff's land and partly on the highway adjoining the plaintiff's land and premises at Matlock, in the county of Derby, a public urinal there erected by the defendants, and alternatively from maintaining and continuing the urinal upon lands adjoining the plaintiff's lands and premises, so as to be a nuisance to the plaintiff's land and premises, and from maintaining and continuing certain kerb-stones and erections obstructing access from the highway to and from the plaintiff's land and premises thereto adjoining, and otherwise from interfering with the plaintiff's use and enjoyment of plaintiff's land and premises.

By 38 & 39 Vict. c. 55, s. 39:

Any urban authority may, if they think fit, provide and maintain in proper and convenient situations, urinals, water-closets, earth closets, privies and ashpits, and other similar conveniences for public accommodation.

By sect. 149:

All streets being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all building implements and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority.

The urban authority shall, from time to time, cause all such streets to be levelled, paved, metalled, flagged, channelled, altered and repaired as occasion may require; they may from time to time cause the soil of any such street to be raised, lowered or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers.

By sect. 264:

A writ or process shall not be sued out against, or served on any local authority, or any member thereof, or any officer of a local authority, or person acting in his aid, for anything done or intended to be done, or omitted to be done under the provisions of this Act, until the expiration of one month after notice in writing has been served on such local authority, member, officer, or person, clearly stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause; and on the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served; and unless such notice is proved the jury shall find for the defendant.

(a) Reported by W. P. EVERSLY, Esq., Barrister-at-Law.



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Every such action shall be commenced within six months next after the accruing of the cause of action, and not afterwards, and shall be tried in the county or place where the cause of action occurred, and not elsewhere.

By sect. 308 :

When any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of 20l., the same may at the option of either party be ascertained by and recovered before a court of summary jurisdiction.

*Dugdale, Q.C. and Appleton* for the defendants.—This action is substantially one for a trespass, therefore the local board were entitled to a notice of action under sect. 264 of the Public Health Act 1875, though where it is only for an injunction they are not so entitled :

*Flower v. Low Leyton Local Board*, 36 L. T. Rep. N. S. 286; 5 Ch. Div. 347.

The 39th section of this Act enables the urban authority to erect and set up these conveniences, and if any damage is done to persons by their act, the proper remedy is by reference to arbitration. There is a case of *Vernon v. Vestry of St. James, Westminster* (44 L. T. Rep. N. S. 229; 16 Ch. Div. 440), which may be cited against us; but that case is distinguishable from the present on the ground that the Public Health Act 1855 did not contain in its compensation clause such wide terms as are used in sect. 308 of the Public Health Act 1875.

*Mersey Docks and Harbour Board v. Gibbs*, 14 L. T. Rep. N. S. 477; L. Rep. 1 H. L. 98;

*Metropolitan Asylum District v. Hill*, 44 L. T. Rep. N. S. 653; 6 App. Cas. 193,

are in our favour. The urinal in question was a considerable accommodation to the public; its situation was proper and convenient; and the propriety and convenience of these erections is a matter for the local board alone. An injunction against them should only be granted where they exceeded their rights and there was no other remedy available :

*Story's Equity Jurisprudence*, sect. 864;  
*Goodson v. Richardson*, 30 L. T. Rep. N. S. 142;  
9 Ch. App. 221.

A nuisance under sect. 91 of the Public Health Act 1875 must be something injurious to health, and there are subsequent sections which provide a machinery for its abatement :

*Mayor, &c., of Scarborough v. Scarborough Sanitary Authority*, 34 L. T. Rep. N. S. 768; 1 Ex. Div. 344.

As regards the kerb-stones, the local board were clearly acting within their rights and authority under sect. 149 in raising the path, to which the plaintiff objects.

*Mellor Q.C. and W. Graham* for the plaintiff.—The plaintiff here does not seek damages or compensation for the trespass, but she claims, as she is entitled to do, an injunction to restrain the local board from continuing the existence of an undoubted nuisance; therefore no notice of action on her part was necessary. This is not a matter for which the plaintiff could have obtained an adequate remedy under the compensation clause of the Act, viz., sect. 308. That section only applies where the thing complained of was done

upon a public highway. The board has no right to commit a trespass upon private property, nor to make such an erection as this on a public highway where it will be a nuisance to a neighbouring landowner. The local board cannot erect a urinal even upon land which is vested in them so as to be a nuisance to individuals in the neighbourhood :

*Vernon v. Vestry of St. James, Westminster (ubi sup.)*.

*Cour. adv. vult.*

*March 21.*—*DEKMAN, J.* (after describing the property).—I am therefore of opinion that there is no ground for holding that the plaintiff's predecessor in title had dedicated the land to the public in such a way as to justify the defendants in treating it as part of the highway. The defendants therefore, in 1883, erected the urinal mainly or partly on the plaintiff's land. The plaintiff's evidence has also satisfied me that the urinal is a nuisance in the sense in which a similar erection was held to be a nuisance in the case of *Vernon v. Vestry of St. James, Westminster* (44 L. T. Rep. N. S. 229; 16 Ch. Div. 440). It was contended by Mr. Dugdale and Mr. Appleton for the defendants that no injunction could be granted because notice of action had not been given, and because the action had not been brought within six months of the act done, and that sect. 264 of the Public Health Act 1875 applied. But it is now well settled that that section affords no answer to an action for an injunction to restrain a nuisance (*Flower v. Low Leyton Local Board*, 36 L. T. Rep. N. S. 286, 760; 5 Ch. Div. 347), and I cannot draw any distinction between the case of an injunction founded on a trespass or an actionable nuisance and any other sort of injunction, as I was invited to do. It was also contended that sect. 308 applied, and that the remedy was by compensation and not by action. This would be so if the Act contained any powers to the board to erect urinals upon private ground, but there are none. Nor do I think that it can be contended, after the decision in *Vernon v. Vestry of St. James, Westminster (ubi sup.)*, though decided on somewhat different language, that the power given by sect. 39 of the Act of 1875 to erect urinals in "proper and convenient places" carries with it a right to create a nuisance without being liable to an action. Indeed, I think the language of the section there relied on was more favourable to the local authority than the words of sect. 39. I am, for these reasons, of opinion that the plaintiff, who was bound to protect the interests of her lessees, is entitled to an injunction restraining the defendants from continuing the urinal upon the plaintiff's land, or so near to it as to cause a nuisance to the plaintiff, her tenants, or lessees. As to the rest of the plaintiff's claim, I think it is much less substantial. Besides the triangular piece of land she has some land abutting upon the same high road, consisting of an inn and some stables. These stand back from the road, and in front of them is an open space which has been left open to, and on a level with, the road until recently, when the defendants made a footpath on the road outside the plaintiff's land with raised kerb-stones, but left openings so that carriages can still go in from and out into the road, although not at every part of the boundary as heretofore. The plain-



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tiff contended that this was an interference with her right to have access for all purposes to every portion of the highway adjoining the property. The defendants, as to this cause of action, relied upon sect. 149 of the Act, and I think that that section does give the defendants power to do what they have done. The words are very large and apply to all "streets being highways repairable by the inhabitants at large;" that this is such a highway I cannot doubt. It was a turnpike road, but the trusts have expired, and it is part of the main road from Manchester to Derby. It is therefore vested in the board, and placed under its control by sect. 149. Then that section provides that "the urban authority shall from time to time cause all such streets to be levelled, paved, altered and repaired as occasion may require," and that "they may from time to time cause the soil of such street to be raised, lowered, or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers." Looking at the whole of the clause together, I think it cannot be contended that wherever any person has land adjoining the road which has remained undistinguished from the road perhaps for centuries, we can, as a matter of course, restrain the local authorities from making a raised footpath for the accommodation of the public on a part of the road which is vested in them, whenever by so doing they may render it impossible for the time for the owner of the land to draw up a carriage close to the exact boundary of his land, or to enter his land at every inch of the boundary. I am of opinion that this is a case in which the landowner's remedy, at all events, in the absence of any unreasonable conduct on the part of the local authority, is to claim compensation under sect. 308 of the Act. Moreover, I am of opinion in this case that no substantial injury has been done to the plaintiff by the kerb-stones complained of. As to this part of her claim, therefore, I decline to make any order restraining the defendants. With regard to the costs, I think that they must be paid by the defendants, so far as the general costs of the action and the costs of the part upon which the plaintiff has succeeded are concerned; but, so far as the defendants have been put to any costs by resisting the claim for the discontinuance of the existing kerb-stones, they must be allowed to set these off against the costs allowed to the plaintiff.

*Judgment for the plaintiff as to the nuisance; no order for an injunction as to the obstruction of access to plaintiff's land.*

Solicitors for the plaintiff, *Brownlow and Howe*, for *Brown and Ainsworth*, Stockport.

Solicitors for the defendants, *Le Riche and Son*, for *T. H. Newbold*, Matlock Bath.

## CROWN CASES RESERVED.

Saturday, May 9, 1885.

(Before Lord COLERIDGE, C.J., CAVE, DAY, SMITH, and WILLS, JJ.)

REG. v. MACDONALD. (a)

*Larceny by bailee—Contract by infant—Hire and purchase system—Conversion of hired goods during bailment—Special property—24 & 25 Vict. c. 96, s. 3.*

*M., a minor, hired furniture on the "hire and purchase" system under a contract by which he undertook to pay for the furniture in quarterly instalments. After having paid four of such instalments, and previously to the fifth instalment becoming due, M. removed and sold the furniture without the knowledge and consent of the person from whom it was hired, and having been indicted for larceny of furniture of which he was a bailee, was found guilty.*

*Held, upon a case reserved at the trial, that, though the contract was void by reason of M.'s minority, the bailment was nevertheless completed on the delivery of the furniture; that the bailment created a special property in the furniture while in M.'s possession; and that the abuse of such special property was an act of larceny under 24 & 25 Vict. c. 96, s. 3, of which M. was rightly convicted.*

THIS was a case reserved at the Easter Quarter Sessions for the county of Devon for the decision of the Court for Consideration of Crown Cases Reserved, from which it appeared that John Lawrence Macdonald was indicted at such sessions for larceny as bailee of goods, the property of James Humphrey Brown.

On the trial it was proved that the prosecutor was a draper and furniture broker in Torquay, and that in March 1884 he supplied goods to the prisoner under a contract in writing entered into with him by the prisoner, which contract was in the words following, that is to say:

This indenture, made and entered into this 7th day of March 1884, between James Humphrey Brown, of 53, Lower Union-street, in the parish of Tormoham, in the county of Devon, of the one part, and John Lawrence Macdonald, of Glendower, Torre Vale, in the parish of Tormoham, Devon, of the other part, witnesseth that the said James Humphrey Brown, his heirs and assigns, agree to let on hire all and every the goods, furniture, and effects particularly specified in the schedule hereto annexed, and which goods, furniture, and effects have been placed in or upon a certain messuage or dwelling-house and premises known as Glendower aforesaid. Now this indenture witnesseth that the said John Lawrence Macdonald agrees to hire for the term of forty-two months at the sum of 8l. per quarter all and singular the goods and effects the property of the said James Humphrey Brown, his heirs and assigns, and which goods are more fully described in the schedule or inventory marked "A." and signed by the said James Humphrey Brown and the said John Lawrence Macdonald at a quarterly rental of 8l. payable by quarterly instalments on the 7th day of June, the 7th day of September, the 7th day of December, and the 7th day of March, and so on as long as the hiring hereby created shall continue. And further it is hereby agreed and declared by the said John Lawrence Macdonald that he will not injure or damage the said furniture, goods, and effects, or give any bill of sale upon them, or even remove the same or any part of them without the consent in writing of the said James Humphrey Brown, his heirs and assigns, first had and obtained for either purpose, and shall and will keep and preserve the said furniture, goods, and

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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effects, and every part thereof, in such state and condition as at present (reasonable wear and tear only excepted), making good and replacing all such articles of the same kind and value as may be broken, damaged, or destroyed. And it is hereby agreed by the said John Lawrence Macdonald that if the instalments of hire be not paid according to the terms hereinbefore stated, or if any execution be allowed from any court or courts to be levied upon the said goods, furniture, and effects explained or set forth in the inventory, then, and in either of such cases, the said James Humphrey Brown, his heirs or assigns or authorised agents, shall have immediate power to enter in upon the said messuage or dwelling-house and take full possession of the said furniture, goods, and effects, and remove the same therefrom without any further consent of the said John Lawrence Macdonald, who shall bear and pay all legal expenses that may arise by the said James Humphrey Brown, his heirs and assigns, being put unto by the removal thereof; and further, it is expressly understood and agreed by the said James Humphrey Brown and the said John Lawrence Macdonald that the goods, furniture, and effects have been fully purchased and paid for. And the said John Lawrence Macdonald shall pay for the insurance against loss by fire of the said furniture, goods, and effects in the sum of 100*l.* from the 7th day of March 1884, and shall discharge the premium of the said policy, to be in the name and in the favour of the said James Humphrey Brown. And, lastly, it is hereby agreed between the said parties that, until default shall be made by the said John Lawrence Macdonald in the terms and conditions before expressed, the said John Lawrence Macdonald shall and may quietly hold and enjoy the said goods, furniture, and effects under the provisions and terms hereinbefore stated, paying interest on the total amount contained in the aforesaid schedule at the rate of 5 per cent. per annum monthly or quarterly.

It was further proved that the prisoner paid the first four quarterly instalments, and no more, and that he afterwards, without notice to the prosecutor, and without the consent or knowledge of the prosecutor, removed the goods mentioned in the indictment, being part of those supplied him under the contract, and sold the same.

It was also proved that the prisoner was born on the 21st May 1865, and so was not of full age when he entered into the contract above set out, and the objection was thereupon raised by counsel on his behalf that there was no case to go to the jury, inasmuch as the only larceny attempted to be proved against the prisoner was larceny of goods of which he was at the time bailee by virtue of the contract above set out. Whereas, by reason of the prisoner being under age when he entered into the contract, the contract was void, and therefore did not operate to create a bailment within the meaning of the 24 & 25 Vict. c. 96.

The Court let the case go to the jury, and on the jury returning a verdict of guilty, sentenced the prisoner to four months' imprisonment with hard labour, but reserved the point raised for the decision of the court. The question for the court to decide was whether, upon the facts above set out, there was any evidence before the court to support the charge laid in the indictment.

The Hon. B. Coleridge for the prisoner.—The foundation of the indictment here was the bailment. A bailment is a contract, resulting from delivery (Story on Bailments), and the question therefore is, Can an infant enter into a contract of bailment? In *Mills v. Graham* (1 Bos. & Pull. New Rep. 140) Mansfield, C. J. said: "For want of a capacity in the infant to make a complete contract, no bailment was made." The contract was therefore incomplete by reason of the prisoner's minority, and no bailment being made, he cannot

be convicted of larceny as bailee. [CAVE, J.—A bailment implies a promise. In the case of an infant you say a promise would not be implied?] The question was raised with regard to a married woman, the wife of a carrier, who took goods of which her husband was a bailee, in *Reg. v. Robson* (9 Cox C. C. 29), but in that case there was a count for simple larceny, and the court decided upon that count, and do not seem to have been quite certain whether a married woman could be convicted of larceny as a bailee. I submit that this point is, therefore, doubtful at least. [CAVE, J.—Two counts are never required now. A bailee may, under sect. 3, be convicted on a count for larceny.] In *Reg. v. Robson* the learned judges merely expressed their minds. [Lord COLERIDGE, C. J.—It seems to have been admitted that the wife was not a bailee, as she could not contract, but that was immaterial, because in that case there were two points raised.] To support the indictment here, the prosecution must rely on the contract. [CAVE, J.—Not unless it was in the indictment.] The possession here was rightful. [CAVE, J.—No, not if the bailment was void. The defendant was only in possession on the condition that the goods should be returned if the instalments were not paid. If he was not a bailee, he had no right to the goods. SMITH, J.—If a man delivers goods to an infant, and the infant refuses to return the goods, does trover lie?] An action for trover will not lie against an infant for goods which are not necessities. Where goods are delivered to a man who afterwards sells them fraudulently, that man is not guilty of larceny. [DAY, J.—A bailee is a man entrusted with the possession of goods subject to a condition.] The prisoner was not a trustee; had he obtained the goods with a fraudulent intention, he would no doubt be liable. [SMITH, J.—If a minor hires a horse, and rides off with it, is not he guilty of stealing the horse?] In *Wright v. Lennard* (30 L. J. 366, C. P.) Byles, J. said: "The law is settled that a married woman is with her husband liable for her torts; but that, on the other hand, she is not liable on her contracts made during coverture. The law is the same as to infants. They are liable for their torts, but not, with certain exceptions, upon their contracts." And in *Bartlett v. Wells* (31 L. J. 57, Q. B.) Cockburn, C. J. said: "The decisions inequity do not show that a fraud is an answer to a plea of infancy, which both in law and equity is a defence to any proceeding on the contract. Granted that equity may compel the infant to make restitution, but that at once converts the action from an action on the contract to one in tort." Though you can bring an action for tort against an infant, it is otherwise where the tort is concerned with a contract. In *Burnard v. Haggis* (32 L. J. 191, C. P.) there was an independent tort. [CAVE, J.—Why is the prisoner here not guilty of a crime, although he obtained the furniture under a contract?] Because the terms upon which he was in possession of the furniture were embodied in a contract. In *Jennings v. Rundall* (8 T. R. 335) it was held that a plaintiff could not convert an action founded on contract into a tort so as to charge an infant defendant. [SMITH, J.—If an infant sells goods trover will lie, but not an action for their non-delivery.] If the prisoner has committed anything, surely it has been a breach of contract. He had a special property in the fur-

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niture and had the lawful possession of it, he could therefore have maintained an action of trover in respect of it. [WILLS, J.—But when he sold the goods he put an end to the bailment by his wrongful act, which was an act inconsistent with the bailment.] The relationship between the parties was nevertheless one of bailment, and therefore could not found criminal proceedings. The instalments due having been paid, the prisoner had a special property in the furniture. [DAY, J.—I do not think that he was bound by the contract; he was a simple bailee and bound to give up the goods intrusted to him.] In *Reg. v. Wilson* (49 L. J. 13, M. C.) which was a prosecution of an infant under the Debtors Act, it was held that the infant's contracts being void under the Infants' Relief Act 1874, he could not be convicted under the Debtors Act. [WILLS, J.—That case failed because the infant could have no creditors.] In order to convict of larceny it is necessary that there should have been a fraudulent intention at the time of delivery. In *Reg. v. Matthews* (28 L. T. Rep. N. S. 645) it was held that a conviction of larceny could not be sustained where it was found that at the time of finding cattle on his land the prisoner did not intend to steal them, but that the intention came on him afterwards. [CAVE, J.—There was no condition annexed to delivery there. A condition will prevent the obtaining legal possession. Here, although the contract is not enforceable, it nevertheless shows the condition upon which the furniture was delivered, and it shows that trover would have lain, and though the price could not have been recovered from the infant, the goods themselves could.] The only evidence of the manner in which the prisoner became possessed of the goods is the contract, that contract, being by the Infants' Relief Act void, cannot be evidence, and there is therefore no evidence of larceny by the prisoner when a bailee of this furniture.

*McKellar*, on behalf of the Crown, was not called upon.

LORD COLERIDGE, C.J.—I am of opinion that this conviction must be affirmed. The prisoner was indicted for larceny as a bailee. I am not sure that the whole argument has not been upon an irrelevant point, for it is doubtful whether the words "as bailee" are rendered necessary by the Act, sect. 3 of which enacts that: "Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny." I will assume, however, that the words "as bailee" are material, and that being so, it is said, on behalf of the prisoner, that he cannot be convicted under such an indictment, because he obtained the goods, in respect of which he was indicted, on a contract which is void; that since, by reason of his infancy, he could not enter into a contract, he could not be guilty of larceny as a bailee. Now, a contract certainly does arise out of a bailment; but, on the other hand, a bailment is "a delivery of goods in trust, upon a contract, express or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purpose of the bailment

shall be answered:" (2 Kent's Com. 559.) Bailment is then completed by delivery; it is a delivery of goods in trust. Here the goods were delivered under circumstances which created a special property in them, and, while that special property existed, the prisoner, if he abused that special property, is guilty of larceny under the statute. The Act was passed to provide against this kind of crime. In my opinion the prisoner, though a minor, has been guilty of this offence because he had a property under the bailment separate from any contract.

CAVE, J.—I am also of opinion that this conviction must be supported. Bailment is a delivery of goods upon a condition, and, though in the case of an infant a contract cannot be implied, the delivery upon condition nevertheless exists. In my opinion the delivery on condition creates a property in the goods as against the world until the condition is fulfilled, and the infant can maintain an action even if the real owner of the goods disturbs him in the possession of that property. The law recognises a special property such as that created by the delivery of the furniture in the present case, and in my opinion the prisoner is a bailee, and though he cannot be liable in an action of contract, he is within the mischief of the Act, and the conviction was therefore, in my opinion, right.

DAY, SMITH, and WILLS, JJ. concurred.

*Conviction affirmed. (a)*

Solicitors for the prosecution, *Ford, Lloyd, Bartlett, and Michelmores*.

Solicitors for the prisoner, *Hamlyn and Hutchins*.

*Saturday, June 13, 1885.*

(Before LORD COLERIDGE, C.J., GROVE and FIELD, JJ., HUDDLESTON, B., and CAVE, J.)

REG. v. SAMPSON. (b)

*False pretences—Sale of farm stock—Stock subject to bill of sale—Onus of proof of consent of bill of sale holder—Representation of ownership.*

*S. was tenant of a farm over all the live and dead stock on which, and all other live and dead farm stock which at any time thereafter should be in or about the premises, he had granted a bill of*

(a) A doubt having been expressed by one of the learned judges who formed the court when the above decision in *Reg. v. Macdonald* was given, as to the correctness of the decision, the case was re-argued upon the 20th inst., before a Court composed of the following judges, viz.: Lord Coleridge C.J., Grove and Denman, JJ., Pollock, B., Field, J., Huddleston, B., Manisty, Hawkins, Mathew, Cave, Day, Smith, and Wills, JJ. Previously to the commencement of the argument Lord Coleridge, C.J. said that the court did not intend to sit as a court of appeal from the Court of Criminal Appeal as composed on the 9th May, but were about to sit, because of the doubt already referred to, in order to consider, with the assistance of the learned counsel engaged in the case, the soundness of the judgment delivered by that court; and did not intend by any judgment they might give to affect the record of that judgment. After hearing an elaborate argument on the part of both the counsel for the prisoner and the counsel for the prosecution, the learned judges retired to consider their judgment; and upon returning into court Lord Coleridge, C.J. announced that the majority of the judges were of opinion that the conviction had been rightly upheld on the previous occasion.

(b) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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*sale. In the ordinary course of business S. would have been at liberty to sell stock on the farm, but two months after the granting of the bill of sale he sold all the farm stock which was upon the farm without anything being said as to the ownership of the stock, or as to the existence of the bill of sale. No evidence was given by S. at the trial of an indictment against him for false pretences to prove that he had obtained the leave of the bill of sale holder to the selling of the stock in question.*

*Held, that the onus lay upon S. of proving that he had leave to sell the stock, and not upon the prosecution; that S. had by the act of selling the stock represented himself as being the absolute owner thereof; and that the prosecutor had paid for the stock in the belief that S. had authority to sell the same, and was guilty of the offence of obtaining money by false pretences.*

Reg. v. Hazlewood (48 J. P. 151) not followed. (a)

CASE stated for the decision of the Court for the Consideration of Crown Cases Reserved by the Dorsetshire Quarter Sessions, as follows:—

At the Easter Quarter Sessions for the county of Dorset, holden at Dorchester, on the 7th April 1885, Joseph Stone Sampson was charged on an indictment (a copy of which is hereunto annexed) with obtaining money by false pretences, on the 21st March 1878, with intent to cheat and defraud.

Sampson in 1878 rented and carried on a farm at Longburton, in the said county, which farm he had held for many years.

On the 21st Jan. 1878 he gave a bill of sale to the National Deposit Bank, Nos. 16 and 17, Russell-street, Covent Garden, Middlesex (of which said bank Alexander Sargant Cochrane, banker, was described as the sole proprietor), of all his furniture, live and dead farm stock, growing crops, utensils and instruments of husbandry, and other goods and chattels which at any time thereafter should be in or about the said premises. The consideration paid was 1000*l.*, and the bill of sale was for 1500*l.*, being 500*l.* for interest and expenses.

The bill of sale was registered on the 28th Jan. 1878.

The original bill of sale was given in evidence, and a copy annexed to this case. A witness (Thomson, cashier of the bank) proved prisoner's signature to the bill of sale. Witness stated that the bill of sale was read over to prisoner, either by witness or by Cochrane, he could not remember which; he knew it was so read over because it was their general rule to do so. Witness said: "If a farmer wished to sell stock in the ordinary way of business, we should allow it, but not to strip the farm." Witness stated that actions were brought against several parties (amongst them

prosecutor) in respect of stock, &c., comprised in the bill of sale, and purchased by them of the prisoner without consent, and that judgment was given in favour of the holder of the bill of sale (Cochrane). Witness said: "I did not give prisoner leave to dispose of the stock" (meaning the stock mentioned in the indictment).

In the beginning of the month of March in the same year, Edwin Hockey, a butcher and dealer (residing some nine miles from prisoner's farm), saw prisoner at Yeovil market, and asked prisoner if he had anything for sale. He replied he had a few odd sheep. Hockey called at the prisoner's subsequently, and bought some sheep and cows, and paid for them. Prisoner told witness that he should have some cows and calves for sale after a time, and some couples (ewes and lambs), and he asked witness whether he could find a customer." Witness said, "I saw Collard (prosecutor) and told him what the prisoner told me." Witness went with the prosecutor to the prisoner's farm on the 20th March 1878, and he understood a deal was made. The next day he was present when prosecutor paid prisoner 863*l.* for the stock he had bought the previous day. Witness had known prisoner more than twenty years, and did not think there was anything curious about the transaction. Prosecutor was with prisoner on the farm about an hour making the deal. Witness considered 863*l.* was a fair price for the stock bought.

Henry Collard, the prosecutor (a farmer and dealer residing about nine miles from the prisoner's farm), said he went to the farm with Hockey. Prisoner was in a field and he went to him and with him looked at the sheep. Prisoner "showed some ewes [and lambs, and some odd sheep. Prisoner gave me a price for the sheep, then he showed me some yearling heifers in an orchard and some cows in a yard and in a field, and two colts. Prisoner gave me a price for the cows, colts, and sheep. The whole came to 863*l.* I did not know a word about a bill of sale. I bought it because I heard prisoner had it for sale. I should not have bought it had I heard of the bill of sale."

The following questions were put by counsel for the prosecutor, and objected to by counsel for prisoner:

Q. Whose stock did you believe it to be? A. Sampson's.

Q. Why? A. I believed it to be Sampson's because it was on his farm, and because I had known him for many years as a farmer.

Q. Why did you part with your money? A. Because I bought the stock and paid for it in the usual way of business.

The inventory of the stock was proved, and two of prisoner's former labourers (a carter and a shepherd) were called and gave evidence as to the stock on the farm, and that Hockey and prosecutor came to the farm and bought all of the stock. The carter said "he knew there was a bill of sale, it was common talk."

Counsel for prisoner submitted that upon the foregoing facts there was no case to go to the jury to sustain an indictment for false pretences. The summary of his reasons being: (1) Prisoner had power to sell with permission under the bill of sale. The bill of sale was given to Cochrane, the sole proprietor of the National Deposit Bank, and there was no sufficient evidence to show that

(a) The facts in Reg. v. Hazlewood were as follows: H. offered drapery stock to B. for a sum, stating it was all right and not incumbered, and B. paid the money and took possession. It was discovered that a third party held a bill of sale for double the sum paid, and he entered and seized the stock. H. being indicted for false pretences, it was held by Lord Coleridge, C.J., Pollock, B., and Lopes, J. (Denman and Manisty, JJ. dissenting), that it did not sufficiently appear that the money was parted with in consequence of the alleged false pretence, and that the attention of the jury had not been called to this, nor to the words used, nor to the question whether those words imported a false pretence as alleged.

CR. CAS. RES.] REG. v. THE COMMISSIONERS OF SEWERS FOR THE LEVELS OF FOBING. [CT. OF APP.

consent was not given. Cochrane had not been called. (2) No evidence of any false pretence. (3) No evidence that the pretence (if any) was false in the absence of Cochrane; and (4) No evidence that the prosecutor was induced to part with his money in consequence of anything done or said by prisoner; but, on the contrary, the evidence went to prove that prosecutor acted consistently with his own knowledge and belief in the transaction: (see *Reg. v. Hazlewood*, 48 J. P. 151.)

The Court declined to stop the case and left it to the jury.

In summing up I submitted all these points to the jury, and told them that there must be a real substantive pretence of an existing fact not necessarily in words; that it must be false that is negatived; that it must be the inducement to the prosecutor to part with his money, i.e., an essential part of the inducement; that I did not think the ordinary course of dealing between vendor and purchaser under such circumstances, i.e., a sale of farming stock, would be sufficient, but that something must be shown to have taken place beyond such ordinary dealings, and it did not appear to me there was any evidence to that effect. After some time the jury found the prisoner guilty, and added they found prisoner sold the stock with intent to defraud.

Having considerable doubt as to the sufficiency of the acts of the prisoner, as detailed in evidence, to constitute a false pretence, I agreed to reserve a case for the opinion of this court, and postponed passing sentence. Prisoner was allowed out on bail till the next Midsummer Quarter Sessions, when he was to come up, if called upon, for judgment.

The questions for the opinion of the court are: 1. Whether, upon the above facts, there was evidence of a false pretence sufficient to sustain an indictment for the offence? 2. Whether there was evidence to support the false pretences, or either of them, as laid in the indictment?

If either of these questions is answered in the negative the conviction to be quashed; otherwise to stand affirmed. JOHN FLOYER,

Chairman of the Dorset Quarter Sessions.

*E. P. Wiles* on behalf of the prisoner.—The transaction between the prisoner and the prosecutor was simply an ordinary business transaction. A mere sale without the statement or writing of any pretence is not a false pretence under the statute. Secondly, there was here no evidence to show that the prisoner was not legally entitled to sell; and, thirdly, there was no evidence that the prosecutor was induced to part with his money by reason of any false pretence. In *Reg. v. Meakin* (11 Cox C. C. 270), where the defendant induced the prosecutor to lend him money on a bill of sale of furniture and the joint and promissory note of the defendant and another person, by representing that the furniture was unincumbered, whereas the defendant had previously given a bill of sale of the same furniture to another person, although not to its full value, the defendant was held guilty of an indictable false pretence. But there the inducement was contained in a declaration made on oath which stated that the furniture was the defendant's, and that he had not charged or incumbered it. While in *Reg. v. Hazlewood* (48 J. P. 151), a

stronger case than the present, for there the defendant made a false statement, the court quashed the conviction. Here there was no statement nor representation of any kind made; there was nothing whatever beyond the actual selling of the goods. [Lord COLERIDGE.—Does not a man who sells me goods represent that he is the owner of the goods by the act of selling?] He might be selling with the consent of the owner, and there was nothing to show that the consent of the owner had not been obtained. [Lord COLERIDGE.—That was for the defendant to show.] I submit that *Reg. v. Hazlewood* is a similar and much stronger case than the present, and that the court is governed by it.

Castle, for the prosecution, was not called upon.

Lord COLERIDGE, C.J.—This matter is too clear. It is not necessary that a false pretence should be made by words or writing. It is sufficient if it be made by words, acts, or otherwise. I am of opinion that the pretence made by the defendant here by his acts was a false pretence within the meaning of the statute. It is laid down in the case of *Eichholz v. Bannister* (17 C. B. N. S. 723) by Erle, C.J. that: "In almost all the transactions of sale in common life, the seller by the very act of selling holds out to the buyer that he is the owner of the article he offers for sale. The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion, that, by offering an article for sale, the seller affirms that he has a title to sell, and that the buyer may enjoy that for which he parts with his money." Here the representation was clearly made in accordance with that doctrine, and was clearly false. I am, therefore, of opinion that the conviction must stand.

GROVE and FIELD, JJ., HUDDLESTON, B., and CAVE, J. concurred.

Conviction affirmed.

Solicitor for the prosecution, *S. Hobbs*, Wells.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Feb. 24 and 25, 1885.

(Before BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ.)

REG. on the prosecution of JOHN ABBOTT v. THE COMMISSIONERS OF SEWERS FOR THE LEVELS OF FOBING. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Sewers—Commission—Liability to repair sea wall—Damage caused by extraordinary tide—Evidence of liability—Presentments—Commissioners owning land in level—Interest—Invalidity of orders.*

*The prosecutor was the owner of land on the shore of the Thames within the jurisdiction of the Commissioners of Sewers for the Levels of Fobing. The land lay below the level of the river at high water, and was protected from inundation at*

(a) Reported by P. B. HUTCHINS Esq., Barrister-at-Law.

CT. OF APP.] REG. v. THE COMMISSIONERS OF SEWERS FOR THE LEVELS OF FOBHING. [CT. OF APP.]

every flood tide by ancient sea walls, the date of the construction of which was not known.

On the 18th Jan. 1881, there occurred an extraordinary storm and high tide, and the sea wall fronting the prosecutor's land was breached by the water from the river, which flowed through and over the walls of the level and submerged a large portion of the land.

Previously to the 18th Jan. 1881 the sea wall was in a good state of repair and sufficient to resist the flow of ordinary tides.

Immediately after the 18th Jan. 1881 the marsh bailiff, by direction of the clerk to the commissioners, gave notice to the prosecutor to repair the wall, which he did, and on the 15th Feb. 1881 and the 9th March 1882, at the general courts of sewers, the commissioners ordered the prosecutor to do certain further repairs to the sea wall, which were rendered necessary by the extraordinary tide of the 18th Jan. 1881. These orders, which were based on a presentment made many years previously, were complied with by the prosecutor.

The prosecutor applied for a writ of mandamus directed to the commissioners, commanding them to reimburse the expenses incurred by him in repairing the damage done to the sea wall by the storm of the 18th Jan. 1881, and all expenses incurred in complying with the orders of the commissioners, and to make rates and do all such acts as might be necessary for such reimbursement.

The prosecutor contended that he was not liable to repair damage caused to the wall by extraordinary weather or tides. The commissioners contended that his liability extended to all repairs, whether rendered necessary by ordinary or extraordinary weather or tides, and they endeavoured to prove this liability by certain presentments of juries and other documents found among the papers and books of the commissioners.

Held, that the burden of proof was on the commissioners to establish the extent of the prosecutor's liability, and that they had failed to prove that he was liable to make good all damage however caused; that the prosecutor was only liable to make good damage which could in some way be traced to his or his predecessors' default in keeping up the wall against ordinary floods, and that the damage to the wall mentioned in the case was not such as he was bound to repair.

Held also, that the prosecutor was entitled to a mandamus to be reimbursed the expense of repairing the wall under the direction of the marsh bailiff, and also the expense of repairing the wall under the orders of the commissioners, because, if those orders were not adjudications, they were no answer to the application for a mandamus; and, if they were adjudications, they ought to be set aside on the ground that some of the commissioners who made the orders, being themselves owners of land in the level, were disqualified on the ground of interest.

Judgment of Lord Coleridge, C.J. and Cave, J. varied.

THE defendants, who were the Commissioners of Sewers for the levels within the parishes of Fobbing and other places, appealed from two judgments. The first appeal was from the judgment of Lord Coleridge, C.J. and Cave, J. on a special case, directing a mandamus to issue to the

defendants, ordering them to make good to the prosecutor, Mr. Abbott, certain expenses incurred by him in repairing a sea wall, and to levy rates for that purpose.

The second appeal was from another judgment of the same court, granting a *certiorari* to bring up and quash two orders of the defendants, dated respectively the 15th Feb. 1881 and the 9th March 1882, on the ground that two of the commissioners who took part in the making of those orders were disqualified by reason of interest, being owners of land within the level.

The facts are shortly stated in the headnote, and more fully in the special case, which is set out in the report of the first judgment of the Divisional Court (51 L. T. Rep. N. S. 227).

*F. Meadows White, Q.C., Finlay, Q.C., and K. E. Digby* for the appellants.

*Charles, Q.C. and Channell* for the respondents.

The nature of the arguments used on the first appeal appears sufficiently from the judgments of the Divisional Court and of the Court of Appeal. The following cases and statutes were referred to:

*Hudson v. Tabor*, 36 L. T. Rep. N. S. 492; 2 Q. B. Div. 290;

*R. v. Keighley*, 10 Coke, 189 a;

*R. v. The Commissioners of Sewers for Somerset*, 8 T. R. 312;

*R. The Commissioners of Sewers for Essex*, 1 B. & C. 477;

*R. v. The Commissioners of Sewers for Pagham*, 8 B. & C. 355;

*Reg. v. Leigh*, 10 A. & E. 398;

*Reg. v. Warton*, 2 B. & S. 719; 31 L. J. 265, Q. B.;

*Reg. v. The Inhabitants of Greenhow*, 35 L. T. Rep. N. S. 363; 1 Q. B. Div. 703;

*The Nitro-Phosphate Company v. London and St. Katherine's Docks Company*, 37 L. T. Rep. N. S. 330; 39 L. T. Rep. N. S. 453; 9 Ch. Div. 508;

*Nugent v. Smith*, 34 L. T. Rep. N. S. 827; 1 C. P. Div. 423;

*Nicholls v. Marsland*, 35 L. T. Rep. N. S. 725; 2 Ex. Div. 1;

*Henley v. The Mayor of Lyme*, 5 Bing. 91; 3 B. & Ad. 77; 1 Bing. N. C. 223;

*The Attorney-General v. Tomline*, 42 L. T. Rep. N. S. 890; 14 Ch. Div. 58;

3 & 4 Will. 4, c. 23, ss. 13, 15, 47;

24 & 25 Vict. c. 133, ss. 33, 47.

*Finlay, Q.C. (F. Meadows White, Q.C. and K. E. Digby with him)*, for the defendants, in support of the second appeal.—The orders which it is sought to impeach are valid, and are binding on the prosecutor. The fact that two of the commissioners owned land in the level is no disqualification, but rather the contrary. If it had been intended that commissioners should not act under such circumstances it would have been expressly so provided, and there is nothing to this effect in any of the statutes. Their acting can be justified on the ground of necessity. He referred to

23 Hen. 8, c. 5, s. 3;

3 & 4 Will. 4, c. 23, s. 1;

24 & 25 Vict. c. 133, s. 33;

*Reg. v. The Commissioners for Cheltenham*, 1 Q. B. 467;

*Ashby v. White*, 1 Smith's L. C. 227, 6th ed.;

*Dimes v. The Proprietors of the Grand Junction Canal*, 3 H. of L. Cas. 759;

*Wildes v. Russell*, L. Rep. 1 C. P. 722;

*Thorpe v. Adams*, 23 L. T. Rep. N. S. 810; L. Rep. 6 C. P. 125.

*Channell (Charles, Q.C. with him)*, for the respondent, was stopped by the Court.

BRETT, M.R.—I think the best way of dealing with this case is to take the point raised by the second appeal first. It is necessary to consider the position of the two orders of the commissioners—that of the 15th Feb. 1881 and that of the 9th March 1882. As to these orders the appellants are in this dilemma: either the orders are not adjudications, and if so afford no answer to the application for a *mandamus*; or they are adjudications, and are bad on the ground that some of the commissioners were interested. As to the point raised by the first appeal, I agree with the judgment delivered by Lord Coleridge, C.J. in the court below, and I think that if an extraordinary flood takes place, and the frontagers are not liable to make good the damage which it causes, the commissioners are bound to levy a rate to meet the expense of repairing such damage. Here the arbitrator has found that there was an extraordinary flood. I am inclined to think that this must be taken to mean such a flood as a reasonable person could not anticipate. The question then is, whether the frontagers are bound to pay for the damage occasioned by such an extraordinary flood. Where there are commissioners of sewers and a level, and where there is evidence of prescription by which the frontagers are liable to repair the sea wall, is such liability only a liability to repair damage occasioned by any flood which is not extraordinary, or does it extend also to the case of damage occasioned by an extraordinary flood? The statement of the law in *R. v. Keighley* (10 Coke, 139a), shows how we ought to decide this question. It was there resolved, "That if one who is bound by prescription to repair a wall *contra fluvium maris*, and he keeps the wall in good repair, and of such height, and as sufficient as it was accustomed; and by the sudden and unusual increase of water, salt or fresh, the walls are broken, or the water overflows the walls; that in this case the Commissioners of Sewers ought to tax all such persons who hold any lands or tenements, or common of pasture, or profit of fishing, or have, or may have, any loss, damage, or disadvantage by any manner of means in the same places, according to the quantity of their lands, &c., for no fault in this case was in him who ought to repair it." That is to say, where there is a prescription, it lays on the frontager the obligation to repair against all floods which are not extraordinary, but where the flood is extraordinary the individual is not liable, but the repairs are to be done at the cost of the level. This view of the law is adopted in *R. v. The Commissioners of Sewers for Somerset* (8 T. R. 312). The case of *Reg. v. Leigh* (10 A. & E. 398) shows the view of the judges there to have been that it may be shown by evidence that the liability of the frontagers is greater than that above stated, for it may be shown that the frontagers are liable to repair damage caused by an extraordinary storm. The question, therefore, in the present case is, whether the prescription is only of the ordinary kind, or whether it has been proved that it goes beyond this, and includes liability to repair damage occasioned by an extraordinary storm. The case was argued by looking at the entries in the records of the commissioners, and considering the effect of the evidence afforded by those entries, and in my opinion that was the proper

way to argue it. I think the documents relating to what took place in 1791 afford no evidence on which we can properly act in this case. It is true that the affidavit sworn at that time by the clerk to the commissioners mentions an extraordinary high tide, but the mere use of the word extraordinary is not conclusive, for the value of that expression must depend on the man who used it; and if we look at what happened and what was done on that occasion, I think the proper inference is that there was not really an extraordinary high tide. The subsequent records afford no evidence, until we come to the year 1874. I think it may be taken on the finding of the arbitrator that there was then an extraordinary high tide, and on that occasion the frontagers paid the expenses of repairing and raising the walls. The question is, whether the court ought from this one instance to infer a prescription; the rule is, that except in very special cases one instance is not enough for this purpose. It seems to me therefore that there is not any evidence on which we ought to say that the Divisional Court was wrong in arriving at the conclusion that no larger liability is imposed on the frontagers than the liability to make good damage occasioned by an ordinary high tide or an ordinary storm. If that is so, the frontagers are not liable to pay for the damage occasioned by the storm of the 18th Jan. 1881. Who then is liable? Unless there is something to prevent it the whole level is, and a rate ought to be made by the commissioners to defray such liability. It is said that the prosecutor in doing these repairs was a mere volunteer; but the parties all thought at the time that the frontagers were bound to repair, and he did the repairs by the order or at the request of the commissioners. I think therefore that as to these repairs he cannot be looked upon as a volunteer. As to the amount included in the third order, as a fact I have no doubt that the sapping of the wall was the result of the storm. For these reasons I am of opinion that there ought to be a *mandamus* directing the commissioners to levy and pay over the whole amount. I wish to add one observation with reference to a passage in the judgment of the Divisional Court. The Court say: "We find as a matter of fact that the prosecutor is only liable to make good damage which can in some way or other be traced to his or his predecessors' negligence" (51 L. T. Rep. N. S. at page 234). I think the court must be taken to have meant default in keeping up the wall against ordinary floods, not negligence generally.

BAGGALLAY, L.J.—The question on the first appeal is, whether there is enough evidence to establish any liability on the part of the frontagers to repair the sea wall beyond the liability as established by the case of *R. v. Keighley* (10 Coke, 139a). It is alleged on the part of the appellants that there is here evidence of a greater liability. There is no evidence of the occurrence of an extraordinary high tide in 1791 except the statement in the affidavit of the gentleman who was then clerk to the commissioners, and we have no information as to whether there was any neglect on the part of the persons on whom the orders were made on that occasion. From 1791 to 1874 the entries do not carry the liability beyond cases in which there was negligence. In 1874 orders to raise and repair the wall were



[CT. OF APP.] LANCASHIRE, &C., TELEPHONIC EXCHANGE CO. v. OVERSEERS OF MANCHESTER. [CT. OF APP.]

made and carried out, but we cannot consider this single instance as sufficient to establish such a heavy liability. In 1881 it is found by the arbitrator that there was an extraordinary storm and high tide, and it appears from the evidence that four days before this storm the wall had been surveyed, and had been found fit to resist any ordinary high tide. I am therefore of opinion that the evidence to show a liability to make good damage caused by extraordinary storm and high tide fails. As to the other question, which is raised by the second appeal, the decision of the court below was in favour of the prosecutor as to the first sum expended, but against him as to the other two, on the ground that the orders of the commissioners were judicial decisions, by which, as long as they stood, the prosecutor was bound; but, if this is so, it tells against the commissioners with regard to the second appeal, for, if these orders were judicial decisions, they ought to be quashed on the ground that some of those who took part in them were interested. On these grounds I am of opinion that the order proposed by the Master of the Rolls is right, and that there ought to be a *mandamus* to levy the amount of the three sums.

LINDLEY, L.J.—I am of the same opinion. The two last orders are treated by the commissioners as being adjudications, but if they are so that is the very reason why they ought to be quashed, because the private interest of the owners of land in the level contended with their public duty as commissioners. The main question is as to the extent of the liability of Mr. Abbott. From the evidence it appears that he is bound to repair and keep up the sea wall; but how far does that liability extend? Mr. Meadows White argued that he was subject to a general liability, which was unlimited. I do not think this is so. The question turns on whether he is liable for damage occasioned by an extraordinary storm. As to that, the burden of proof is on the commissioners, as is shown by the case of *E. v. Reighley* (10 Coke, 139a). No doubt there is some evidence in support of the appellants' contention, but I think it is too vague to prevail. The strongest case is what occurred in 1874, but on that occasion the cost was small, and the orders were acquiesced in. We are asked to infer from that one instance, and from the fact that there is no evidence of the commissioners ever having repaired the wall, that the frontagers are liable for these repairs. But there is no evidence of the occurrence of any such extraordinary storm as that of the 18th Jan. 1881. Although there is some evidence in support of the appellants' contention, I think it is not sufficient.

*Judgment varied. Mandamus to issue for the whole amount.*

Solicitors for prosecutor, *Thomson, Son, and Brookes*.

Solicitors for defendants, *Paterson, Snow, Bloxam, and Co., for Gepp and Son, Chelmsford*.

Tuesday, Dec. 2, 1884.

(Before BRETT, M.R., and LINDLEY, L.J.)

LANCASHIRE AND CHESHIRE TELEPHONIC EXCHANGE COMPANY (apps.) v. OVERSEERS OF MANCHESTER (resps.). (a)

*Poor rate—Telephone wires, poles, and attachments—Occupation—Rateability.*

*A telephone company were the owners of certain overhead wires, which were supported by poles fixed in the ground, and by attachments to the roofs and chimneys of buildings. The consent of the owners and occupiers of the land and buildings was in every case first obtained in written agreements, by which the company undertook to pay an annual sum as an acknowledgement, to make good any damage that might be done to the property, and to remove the wires, attachments, and poles, upon notice to that effect. The only access to the wires and attachments on the buildings was through the interior of the buildings by the permission of the owners or occupiers, and then only during business hours, the company having no key or other way of obtaining admittance thereto. Similarly the only access to the poles was by the permission of the owners or occupiers of the land.*

*Held (affirming the judgment of Mathew and Day, J.J.) that the telephone company had such an "exclusive occupation" of those parts of the buildings to which the wires were attached, and of the land in which their poles were fixed, as would render them liable to be rated, and that consequently they were rateable in respect of their wires, attachments, and poles taken as one entire system.*

THIS was an appeal from a judgment of Mathew and Day, J.J. (reported 51 L. T. Rep. N. S. 160), upon a special case stated for the opinion of the court under 12 & 13 Vict. c. 45, s. 11.

The facts are fully stated in the report of the proceedings before the Queen's Bench Division (*ubi sup.*), where the material parts of the special case are set out.

Upon the facts there stated, the Queen's Bench Division held the appellants rateable.

The company appealed.

*Henn Collins, Q.C. (Webster Q.C. and Bradbury with him) for the appellant company.*—The appellants contend that they are not liable to be rated in respect of the overhead wires and their supports which are attached to the roofs and chimneys of buildings. They have no independent or exclusive occupation of the buildings or of these parts of them; their occupation is merely permissive. The Divisional Court followed the case of *The Electric Telegraph Company v. The Overseers of Salford* (11 Ex. 181), but that case is distinguishable, because there the company was held to occupy the land by means of their posts, whereas here the company has a mere licence during the pleasure of the owner or occupier of the building. *Watkins v. Milton-next-Gravesend* (18 L. T. Rep. N. S. 601; L. Rep. 3 Q. B. 350) is applicable to this case, for in that case the distinction between occupation and mere enjoyment was recognised. There is no distinction between the licence granted to the company in this case and the licence to use a bookstall upon a railway

(a) Reported by A. A. HOPKINS Esq. Barrister-at-Law.

platform in *Smith v. The Assessment Committee of Lambeth* (48 L. T. Rep. N. S. 57; 10 Q. B. Div. 327), or the licences granted in *Willing v. Assessment Committee of St. Pancras* (37 L. T. Rep. N. S. 126; 2 Q. B. Div. 581); *Reg. v. Morrish* (32 L. J. 245 M. C.). In the latter case the judgments laid stress on the fact that the refreshment seller was not allowed to be at his business at all times, and here there is nothing more than a licence to attach wires, and to maintain those wires the company is dependent upon the caprice of the occupier. [LINDLEY, L.J.—Is there not a fixture, and are you not in exclusive occupation of that fixture?] There can be no exclusive occupation of a fixture as such; only as evidencing an occupation of that in which the fixture inheres.

*Ambrose, Q.C.* and *Smyly* for the overseers.—If the appellants are rateable at all, they are rateable as for one entire system of communication. The two ends of the wire are fixed, the one end in the appellant's premises, the other end in those of the customer; the intervening wires occupy space and are rateable just as gas and water mains occupy land and are rateable. [He was stopped.]

*Henn Collins, Q.C.* in reply.

BRETT, M.R.—Considering the extreme fineness of the cases on points like this we cannot hope to express our opinion with any great degree of confidence. The real question is whether the company is rateable in respect of the apparatus affixed to houses and buildings, that apparatus consisting of spikes, saddles and brackets so fixed for the purpose of carrying the wires attached to them. Now these things are fixed to the brick-work, and they are kept in their places not merely by the screws and plates which so fix them, but also by the building to which they are affixed; that is, they are supported, not perhaps by the whole building, but by so much of it as is really necessary to support them, the building, of course, being itself supported by the land on which it is built. Therefore it seems to me that each one of these things is a thing which is fixed to the soil in order to support it where it is. If you take so much of the building as is necessary for their support, and so much of the soil as is necessary to support so much of the building as being all one, then it is plain that they occupy so much of the soil as is necessary for their support; therefore in that way they occupy a part of the soil. The right here given to the company is not quite a right to hang things on something which is fixed to the soil, but it is a right given by the owner or occupier of each house to affix things to that house in order that they may be supported by the house and by the ground on which the house stands. If that be so, then these things may be the subject-matter of occupation of the soil by the persons who are in occupation of them. Now who, in the present case, is in the occupation of them? The whole apparatus is the exclusive property of the telephone company, it is used solely for the benefit of the company, and every kind of use of it is the exclusive use of the company. Therefore, I think, the company is in the occupation of these things, and therefore the company is in the exclusive occupation of something which occupies land, and therefore in respect of that occupation of the land they are rateable. This brings me to what was present to the mind of Mellish, L.J., when he gave

judgment in *Cory v. Bristow* (33 L. T. Rep. N. S. 624; 1 C. P. Div. 54.) He says, "Having regard to the description of the mooring stone, and the manner in which it was fixed, I cannot avoid coming to the conclusion that it had become part of the realty." So here, I think, these things have become a part of the realty. He goes on, "The only remaining question, therefore, is whether the conservators or the plaintiffs are in the occupation of these moorings. Now it seems to me that the Court of Common Pleas have not sufficiently taken into consideration the fact that these mooring stones all along belonged to the plaintiffs. There is a great distinction in that respect between this case and cases such as those in which the question arose, as between a person who had had granted to him some right of user of the land, and the grantor who had reserved some right over it to himself, which of the two was the occupier for rating purposes; as, for instance, the case where the question was whether a party was in the position of a lodger merely, the landlord remaining the occupier, or in that of a tenant. Very nice distinctions have arisen in such cases, but there both parties have more or less a co-property in the house, or other real property in question. It is necessary in such a case to consider what degree of right each party may have. But here the conservators did not obtain any property in the mooring stones, anchors, or chains, and it was never intended that they should be applied in any way for the benefit of the conservators." So here it never was intended that any property in, or any right or power over any of these fixed things should ever belong to any of the occupiers of the houses, but it was intended that the whole profitable user of these things and the exclusive right of dealing with them should belong to the company, subject merely to certain convenient regulations. Under these circumstances, I think this case is like the case of the telegraph wires fixed to posts which are fixed in the ground: it has been held that they are in the occupation of the persons to whom they belong, for the same reason, namely, because they are solely the property of those persons and are used by them on their own account, and because the persons who have given the right to fix them in the soil have no right or power over them, except the power of giving notice to have them removed. Therefore, I come to the conclusion that this company is rateable, and that this appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. It is true that the cases run rather fine, but the distinction between an easement of support and the occupation of that which affords support is often very fine. Treating this company as grantees of an easement, it seems to me that they cannot enjoy it without occupying land, that is without occupying land in the same sense as many other persons who have been grantees of easements and have been held rateable. I think that though they may not occupy land in the ordinary sense, yet they do so by their wires and supports just as much as if their wires were carried by posts, as was the case in *Electric Telegraph Company v. Overseers of Salford* (*ubi sup.*). Therefore, I think that the company here is on the rateable side of the line, and I do not feel pressed by the case of *Smith v. Lambeth Assessment Committee* (*ubi sup.*), because there the authorities were trying to rate

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two people for the same thing, the railway company and Smith; but no one is rated in respect of this occupation. I cannot distinguish this case from the cases of *The Electric Telegraph Company v. Overseers of Salford* (ubi sup.), and *Cory v. Bristow* (ubi sup.).

*Appeal dismissed.*

Solicitors for appellants, *Pritchard, Englefield, and Co.*, for *Grundy, Kershaw, and Co.*, Manchester.

Solicitors for the respondents, *Johnson and Weatherall*, for *A. Lings*, Manchester.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

Thursday, March 12, 1885.

(Before MATHEW and SMITH, JJ.)

WEGUELIN (app.) v. WYATT (resp.). (a)

*Revenue—Inhabited house duty—Business premises—Caretaker a widow—Her son sleeping on premises for increased safety—Liability to duty—Customs and Inland Revenue Act 1878 (41 Vict. c. 15), s. 13, sub-sect. 2—Customs and Inland Revenue Act 1881 (44 Vict. c. 12), s. 24.*

*The appellant, the owner of a house used for business purposes only, employed a widow as caretaker of the premises, and it was a condition of her employment that her son, aged twenty-two, a clerk in the employ and payment of a firm of merchants carrying on business elsewhere, should sleep on the premises for increased safety.*

*Held, by the Queen's Bench Division (Mathew and Smith, JJ.), that the son not being a "servant or other person" within the terms of the exemption from duty allowed by sect. 13, sub-sect. 2, of 41 Vict. c. 41, as defined by sect. 24 of 44 Vict. c. 12, his sleeping on the premises deprived the appellant of the benefit of such exemption, and that the premises were therefore liable to assessment to the duty as an inhabited house.*

Case stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners for executing the Acts relating to the Inhabited House Duties for the City of London, for the opinion of the Queen's Bench Division of the High Court of Justice.

The appellant, by his agent, appealed at a meeting of the above-mentioned commissioners on the 29th May 1884 against an assessment to the Inhabited House Duties made by the respondent, the surveyor of taxes, as assessor of such duties, for the year ending 5th April 1884, of 1500*l.*, at 9*d.* in the pound upon, and being the value of, the premises No. 7, Austinfriars and 57½, Old Broad-street, in the City of London.

The premises, which consist of one house, contain three floors and the attics are let to, and occupied by, merchants and traders, and are used for business purposes only. No persons sleep on the premises at night other than the following, viz., Sarah Phillips, widow, who has been for many years, and is now, the caretaker of the premises; her son, William George Phillips, aged twenty-two, who is a clerk, at a salary of 80*l.* per annum, in the employ of a firm of merchants carrying on business elsewhere; a daughter, aged nineteen, and a servant. The caretaker, being a woman, it is a condition of her employment that the son shall

sleep on the premises for increased safety. The caretaker, with the above persons, occupies five attic rooms, and no rent is received by the appellant in respect of the said occupation.

The surveyor of taxes (the respondent) contended that the son, William George Phillips, being a clerk, his residence deprived the appellant of his claim to exemption, the said William George Phillips not being a "servant or other person" within the terms of the exemption allowed by sub-sect. 2 of sect. 13 of 41 Vict. c. 15, as defined by 44 Vict. c. 12, s. 24, and that the premises were liable to be assessed to the duties as inhabited houses.

The appellant contended to the contrary, and that the said William George Phillips having been, and being now, a member of the caretaker's family, his employment as a clerk did not render the premises liable to the duties.

The commissioners were of opinion that the appellant was chargeable with the duties, and confirmed the assessment.

The appellant, being dissatisfied with that determination as erroneous in point of law, required the commissioners to state and sign a case for the opinion of the High Court, which the commissioners accordingly did on the 16th Oct. last.

The question for the opinion of the court is, whether, under the circumstances herein set forth, the premises No. 7, Austinfriars, and 57½, Old Broad-street, constitute an inhabited house within the meaning of the Act, so as to be held liable to the payment of the inhabited house duty.

The sections of the statutes on which the question turned—viz., sect. 13, sub-sect. 2 of 41 Vict. c. 15, and sect. 24 of 44 Vict. c. 12—are fully stated in the judgment of Mathew, J.

*Black for the appellant.*—It is part of the mother's contract that her son should sleep on the premises for their better protection. The caretaker here is not the mother solely. The mother and son together constitute the caretaker, and neither of them is employed by the appellant in any other capacity. But for the necessity of the premises being taken care of, the mother would not be there at all. She is there by day also, doing many useful things which a man cannot do. [SMITH, J.—The statute does not say or mean "servants," nor yet "servant and another person."] Certainly not; but it may well be that a "servant" must be such a one as is needful and capable of doing what is requisite, and that this widow is not a servant of that description. [SMITH, J.—Is the son under any obligation, direct or indirect, to do more than sleep in the house? Probably not; neither is a caretaker as a general rule. [MATHEW, J.—Oh, yes; to take care.] So the son would do here if the necessity arose. [MATHEW, J.—He does not contract for that, nor receive any consideration for it.] The contract was made with the mother, and a term of the employment is the sleeping there at night of the son for increased protection. [MATHEW, J.—For her protection. How, then, can he be called a "caretaker?" To that extent he is engaged by the appellant for that purpose. There are two people, but only one caretaker. He is, if I may so, a moiety of a caretaker.

The Attorney-General (Sir H. James, Q.C.) with whom were the Solicitor-General (Sir F. Herschell, Q.C.) and A. V. Dicey for the respondent, *contra*, was not called upon to argue.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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MATHEW, J.—I am of opinion that the decision of the commissioners in this case is quite right. Looking at the two sections of the two Acts of Parliament which we have before us, there appears to me to be no room, under the circumstances of the case, for any doubt upon the subject. By the earlier statute—the Customs and Inland Revenue Act 1878 (41 Vict. c. 15), s. 13, sub-sect. 2—it is enacted that “Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said commissioners upon proof of the facts to their satisfaction; and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof.” Now, the expression “servant or other person” in that section clearly contemplates a single caretaker. The fact that the mother, the widow, is living in the house in question under that section would not render the house liable to the duty. Then comes the later Act—the Customs and Inland Revenue Act 1881 (44 Vict. c. 12)—and by the 24th section of that Act it is provided that “with reference to the exemption from the duties on inhabited houses given by sub-sect. 2 of sect. 13 of the Customs and Inland Revenue Act 1878, the term ‘servant’ shall be deemed to mean and include only a menial or domestic servant employed by the occupier; and the expression ‘other person’ shall be deemed to mean any person of a similar grade or description, not otherwise employed by the occupier, who shall be engaged by him to dwell in the house or tenement solely for the protection thereof.” Now, the paragraph in the case describing the position of William George Phillips, the son of the widow, the caretaker, is this: The house is occupied by “Sarah Phillips, widow, who has been for many years, and is now, the caretaker of the premises; her son, William George Phillips, aged twenty-two, who is a clerk, at a salary of 80*l.* per annum, in the employ of a firm of merchants carrying on business elsewhere; a daughter aged nineteen, and a servant. The caretaker being a woman, it is a condition of her employment that the son shall sleep on the premises for increased safety.” Mr. Black has argued that that means that the mother stipulated that while she was caretaker her son should also live or sleep in the house for her and its protection. But that is a condition of things not at all contemplated by either of the statutes in question, and I really do not see how by any ingenuity it can be tortured so as to come within the provisions of either of the two sections which I have read. The house, therefore, is an inhabited house within the Act of Parliament, and judgment must be given for the respondent.

SMITH, J.—I am also of the same opinion, and I wish to put the other alternative which my brother Mathew has not put. Assuming that the son did not sleep in the house at the request of his mother, but at the request of the owner of the premises, then the owner of the house would have two caretakers, the mother and the son. The statute, however, only says that there is to be one. This appeal, therefore, must be dismissed.

*Judgment for the respondent. Appeal dismissed with costs.*

Solicitors for the appellant, *Wordsworth, Blake, and Co.*

Solicitor for the respondent, *Solicitor of Inland Revenue.*

Wednesday, June 17, 1885.

(Before FIELD and MANISTY, JJ.)

MORRISON WOOD AND Co. (apps.) v. WEST HAM GAS COMPANY (resps.) (a).

*Gas—Laying pipe without consent of undertakers—Notice—Absence of fraud or waste—Conviction—10 & 11 Vict. c. 15, s. 18—34 & 35 Vict. c. 41, s. 15.*

*The appellants, on their own premises, substituted for part of a gas pipe belonging to the respondents a larger pipe for the purpose of increasing their supply. This was done without any fraud, waste, or misuse of the gas, but without the respondents' consent, although notice of intention to disconnect the pipe from the meter was duly given under sect. 15 of the Gasworks Clauses Act 1871. Upon summons a stipendiary magistrate convicted the appellants under sect. 18 of the Gasworks Clauses Act 1847.*

*Held, upon a case stated, that the appellants had within the meaning of that section caused to be laid a pipe to communicate with a pipe belonging to the undertakers without their consent; and that the magistrate rightly convicted them.*

THIS was an appeal by special case. The case for the opinion of the court was stated by the stipendiary magistrate for the district of West Ham, in the county of Essex, under the provisions of 42 & 43 Vict. c. 49, s. 33, upon an application in writing by the appellants, and its material parts were as follows:—

1. The appellants appeared on the 12th Dec. 1884 pursuant to a summons issued upon a certain information in writing of the West Ham Gas Company, by Edward Henry Thorman, their engineer duly authorised in that behalf, for that they, the said Morrison Wood and Co., on or about the 15th Nov. 1884, in the district of West Ham did unlawfully lay or caused to be laid a certain pipe to communicate with a certain other pipe for conveying gas to their works and premises known as the Abbey Steam Confectionery Works at Stratford, such other pipe then belonging to the West Ham Gas Company (they being the undertakers within the meaning of the Gas Works Clauses Act 1847) without their consent, and the said pipe did so remain for eighteen days thereafter contrary to the statute in such cases made and provided.

2. The said West Ham Gas Company was incorporated by 19 & 20 Vict. c. lix., which was extended and varied by 32 & 33 Vict. c. xxii. With the first mentioned Act, by sect. 2 thereof, is incorporated 10 & 11 Vict. c. 15 (The Gas Works Clauses Act 1847). The information set out in paragraph 1 is laid under the said 10 & 11 Vict. c. 15, s. 18.

3. The material part of the last-mentioned Act is in these words:

And with respect to waste or misuse of the gas or injury to the pipes and other works be it enacted as follows: Sect. 18. Every person who shall lay, or cause to be laid, any pipe to communicate with any pipe belonging to the undertakers without their consent, or shall

(a) Reported by F. A. CRALLEN, Esq., Barrister-at-Law.

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fraudulently injure any such meter as aforesaid, or who, in case the gas supplied by the undertakers is not ascertained by meter, shall use any burner other than such as has been provided or approved by the undertakers, or of larger dimensions than he has contracted to pay for, or shall keep the lights burning for a longer time than he has contracted to pay for, or who shall otherwise improperly use or burn such gas, or shall supply any other person with any part of the gas supplied to him by the undertakers, shall forfeit to the undertakers the sum of 5*l.* for every such offence, and also the sum of 40*s.* for every day such pipe shall so remain or such works or burners shall be so used or such excess be so committed or continued or such supply furnished. And the undertakers may take off the gas from the house and premises of the person so offending notwithstanding any contract which may have been previously entered into.

4. Upon the hearing of the information aforesaid the respondents, by their engineer, Edward Henry Thorman, appeared to support their charge laid in the said information. On the said information being read, and the appellants pleading not guilty, evidence was given by both parties, and the following are the conclusions of fact at which the magistrate arrived on the evidence:

(a.) The appellants, before the date of this information, were supplied with gas to their said premises by means of a pipe, the property of the respondents, which ran from a point outside to a meter inside the premises of the appellants.

(b.) The appellants on or about the 15th Nov. 1884 removed about ten feet, part of this pipe next to this meter, and connected the new end so made of this pipe with one end of a new pipe about seventeen feet in length, the other end of which was connected with a new meter supplied by the appellants. The effect of such connection was to establish communication between the respondents' pipe and the appellants' pipe, by means of which gas was conducted from the respondents' pipe through the appellants' new pipe to the said new meter. This connection and communication was made without the consent of the respondents.

(c.) It was not proved that the appellants had done more than is stated in the two preceding paragraphs, or committed any fraudulent or malicious act, and it was admitted and found that the appellants had not misused or wasted any gas or injured the pipes or other works of the respondents.

(d.) As a result of the appellants' said work the gas is properly measured through the meter.

5. It was contended by the solicitor for the respondents that the appellants were guilty of an offence under the said section in having as a fact laid or caused to be laid a pipe to communicate with a pipe belonging to the respondents without their consent, and that no fraud, malice, or improper use or waste of gas, or injury to any of the pipes or other works of the respondents was necessary to constitute an offence under the said section, and that the mere laying down a pipe communicating with any pipe belonging to the respondents without their consent was an offence.

6. It was contended by counsel on behalf of the appellants that sect. 18 of statute 10 & 11 Vict. c. 15, does not apply to a case where a person acting *bonâ fide* has laid or caused to be laid a pipe communicating with any pipe belonging to the respondents without their consent, but has not as a result thereof wasted or

misused the gas, or injured the pipe or other works belonging to the respondents.

7. It was further contended on behalf of the appellants that inasmuch as the twenty-four hours' notice in writing required to be given by the 24th section of 32 & 33 Vict. c. 22, had been given by the appellants to the respondents, and that the connection of the service pipe of the respondents, by means of the pipe at right angles (as shown on a plan produced) was necessary in consequence of a larger meter being used, the work done by them was nothing more than disconnecting and connecting the meter by which the respondents' gas was intended to be and had been registered within the provision of the said section; but the magistrate held as a fact that the works carried out by the appellants were not such works as are contemplated by the said 24th section, but were works included within the 18th section of 10 & 11 Vict. c. 15, as set forth in the information.

8. The magistrate being of opinion that the evidence brought the case within the operation of sect. 18 of 10 & 11 Vict. c. 15, convicted the appellants of the said offence, and adjudged them to forfeit and forthwith pay to the clerk of the court the sum of 2*l.*, and also to pay to the said gas company the sum of 1*l.* 13*s.* 6*d.* for costs.

9. The question of law upon which this case was stated for the opinion of the court therefore was whether, in order to bring the case within the operation of sect. 18 of 10 & 11 Vict. c. 15, upon the facts hereinbefore stated, the appellants must have been proved to have wasted or misused the gas supplied by the respondents, or injured their pipes or other works as a fact, in order to sustain any conviction and order.

10. If the court should be of opinion that the said conviction and order was legally and properly made, and the appellants were liable as aforesaid, then the said order and conviction was to stand; but if the court should be of opinion otherwise, then the said information was to be dismissed, with 1*l.* 13*s.* 6*d.* costs against the respondents.

H. Kisch, on behalf of the appellants, submitted that upon the proper construction of sect. 18 of the statute 10 & 11 Vict. c. 15, the appellants had been wrongly convicted. The appellants had required an increased supply of gas, and had taken it upon themselves to alter the position of and to enlarge their meter and the pipes communicating therewith. The mere fact of having so acted was not enough to render the appellants liable to the penalty under the section, unless it was proved that there had also been a waste or misuse of gas, or some injury or fraud committed by the appellants in so acting. This was a penal section, and it must be read together with its prefatory words, "and with respect to waste or misuse of the gas or injury to the pipes or other works;" and the marginal note is, "Penalty for fraudulently using the gas of the undertakers." It was further submitted that the appellants had acted with the consent of the company, as the notice had been given to the company within meaning of sect. 15 of the Gas Works Clauses Amendment Act (34 & 35 Vict. c. 41), which is as follows: "No consumer shall connect any meter with any pipe through which gas is supplied by

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the undertakers to such meter, or disconnect any such meter from any such pipe, unless he shall have given to the undertakers not less than twenty-four hours' notice in writing of his intention so to do; and if any person acts in contravention of this section he shall be liable for each offence to a penalty not exceeding forty shillings."

*Douglas Walker* appeared for the company, but was not called upon.

The COURT (Field and Manisty, JJ.) held that the enactment had been contravened in its terms. The sole point was whether the fact of the appellants having acted as they did, without the consent of the company, rendered them liable under the section, and in their opinion it did. The object of the section was to prevent waste or misuse of gas, and the means adopted for this was to make the consent of the company necessary before any such alterations as had been here effected could be made. Therefore, although there had been no waste or misuse of gas, and no fraud or injury, the appellants were liable, as they had acted without the company's consent.

*Conviction affirmed, with costs.*

Solicitors for the appellants, *Van Sandau, Cumming, and Armitage.*

Solicitors for the respondents, *Hillearys and Co.*

*Saturday, Dec. 13, 1884.*

(Before GROVE and HAWKINS, JJ.)

BLASHILL v. CHAMBERS. (a)

*Metropolis Management and Building Acts—Foundations—Site—Bye-laws of Metropolitan Board of Works—Removal of matter below level of bottom of foundations—41 & 42 Vict. c. 32, ss. 14-16.*

*Sect. 16 of the Metropolis Management and Building Acts Amendment Act 1878 empowers the Metropolitan Board of Works to make bye-laws in relation to "the foundations of houses, buildings, and other erections to be constructed after the passing of this Act, and the mode in which, and the materials with which such foundations and sites shall be made, formed, excavated, filled up, prepared, and completed for securing stability, the prevention of fires and for purposes of health," and in pursuance of such power, the board made the following bye-law: "No house, building, or other erection shall be erected upon any site or portion of any site which shall have been filled up or covered with any material impregnated or mixed with any faecal, animal, or vegetable matter, or which shall have been filled up or covered with dust, or slop, or other refuse, or in or upon which any such matter or refuse shall have been deposited, unless and until such matter or refuse shall have been properly removed by excavations or otherwise from such site."*

*By sect. 14 the term "site" is defined to mean "the whole space to be occupied by such house, building, or other erection below the level of the bottom of the foundations and the level of the base of the walls."*

*Held, that the definition of the word "site" in the Act governs the meaning to be put upon that word in the bye-law, and that consequently the board had*

*no authority to direct the removal of faecal, animal, or vegetable matter in soil below the level of the foundations.*

THIS was a case stated by one of the metropolitan police magistrates upon two complaints preferred by the appellant, the district surveyor of the district of Bethnal Green, South Bow, against the respondent.

One complaint charged that the respondent, on the 13th March 1884, at Peel-grove, in the parish of Bethnal Green, unlawfully committed breaches of bye-law No. 1 made by the Metropolitan Board of Works under the provisions of the Metropolis Management and Building Acts Amendment Act 1878, by commencing to build on a site and foundations which had been filled up with materials impregnated with animal matter, to wit, some number unknown of dead human bodies, without the said animal matter having been first properly removed.

The other complaint charged that the respondent unlawfully committed breaches of the provisions of the 17th section of the above-mentioned Act by not pulling down and removing, after notice to pull down the same, a house, building, or erection which he, as builder, had begun to construct upon a site and foundation which had not been prepared in accordance with the bye-laws made under the Act.

The respondent, a builder, had commenced to build houses upon a piece of ground in a road called Peel-grove, which he held with other land under a building agreement with the owner. This piece of ground formed part of an old private unconsecrated cemetery which was closed by an Order in Council in the year 1855. (As to building on disused burial grounds, see now the Disused Burial Ground Act 1884 (47 & 48 Vict. c. 72). After the Order in Council all the gravestones were removed, and the cemetery chapel, which stood on the site of the roadway of Peel-grove, was pulled down, and the surface of the ground was raised by depositing thereon builder's rubbish to a depth varying from one to four feet.

In the early part of 1883 the respondent gave notice to the appellant, as district surveyor, of his intention to build upon the piece of ground, and prior to the 8th May 1883 the respondent had commenced to make excavations in the builder's rubbish on the ground for the purpose of laying the foundation of the intended buildings. The appellant, having inspected the excavations on the 8th May 1883, wrote to the respondent as follows:

In reply to your inquiries made when I saw you upon the ground, I beg to say that I shall require you to remove any objectionable matter (as laid down in the bye-laws) that may be met with down to the bottom of your foundations. If you interfere with bodies in making your foundations, I shall have to take proceedings, and I presume the parish will do the same.

The bye-laws referred to in the letter and in the summons are bye-laws made pursuant to the 16th section of the Metropolis Management and Building Acts Amendment Act 1878. The 14th section of the Act, which is the first section contained in part 2, is as follows:

In this part of this Act the term "foundations" shall mean the space immediately beneath the footings of a wall. The term "sites," in relation to a house, building, or other erection, shall mean the whole space to be occupied by such house, building, or other erection, between the level of the bottom of the foundations and

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.



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the level of the base of the wall. (By the Metropolitan Building Act 1855, sect. 3, "the base of the wall" shall mean the course immediately above the footings.)

The 16th section is as follows :

The board may from time to time make, alter, vary, amend, and repeal such bye-laws as they may think expedient with respect to the following matters ; (that is to say), 1. The foundations of houses, buildings, and other erections, and the sites of houses, buildings, and other erections to be constructed after the passing of this Act, and the mode in which and the materials with which such foundations and sites shall be made, formed, excavated, filled up, prepared, and completed for securing stability, the prevention of fires, and for purposes of health.

The bye-law No. 1 is as follows :

No house, building, or other erection shall be erected upon any site or portion of any site which shall have been filled up or covered with any material impregnated or mixed with any faecal, animal, or vegetable matter, or which shall have been filled up or covered with dust, or slop, or other refuse, or in or upon which any such matter or refuse shall have been deposited, unless and until such matter or refuse shall have been properly removed by excavations or otherwise from such site. Any holes caused by such excavation must, if not used for a tenement or cellar, be filled in with hard brick or dry rubbish. The site of every house or building shall be covered with a layer of good concrete at least six inches thick, and smoothed on the upper surface, unless the site thereof be gravel, sand, or natural virgin soil.

The foundations of the walls of every house or building shall be formed of a bed of good concrete, not less than nine inches thick, and projecting at least four inches on each side of the lowest course of footings of such walls. If the site be upon a natural bed of gravel, concrete will not be required.

The respondent, in preparing the foundations for the intended buildings, formed foundations in the space immediately beneath the footings of the walls of a bed of good concrete eighteen inches thick, and projecting at least four inches on each side of the lowest course of footings of such walls, and covered the whole space to be occupied by the buildings, between the level of the bottom of the bed of eighteen inches of concrete and the level of the base of the walls, with a layer of good concrete twelve inches thick. The bottom of the last-mentioned layer of concrete was six inches above the bottom of the bed of eighteen inches of concrete. The site of the intended buildings was covered, and the foundations of the buildings were formed, in accordance with the provisions of the second and third paragraphs of the bye-law, if the words "site" and "foundations" are to be construed in the bye-law as having the meanings assigned to those words by the 14th section of the Act. The excavations for the foundations and site of the intended buildings were made, and the bed and layers of concrete were laid in the builders' rubbish, which had been deposited on the surface of the cemetery, as before mentioned, and no portion of the soil which had formed part of the cemetery was moved or disturbed.

It was proved that the natural decay of human bodies might lead to subsidence, so as to form fissures in the concrete, no matter how thick it was, and to the emanation of noxious gases.

It was contended, on behalf of the appellant, that the meaning of "site" and "foundations" was the natural virgin soil of the earth, and that the taking away of the natural virgin soil to the bottom of the graves, and filling the cavity with dead bodies, made the site and foundations lower down to the extent of the depth of the graves than it was before.

It was contended, on behalf of the respondent, that the meaning of "site" and "foundations" in the bye-laws was the meaning placed thereon by the 14th section of 41 and 42 Vict. c. 32, and that if a more extended meaning were given to the words, then the bye-laws must be regarded as *ultra vires*. It was further contended by the respondent that ground in which dead human bodies had been buried was not to be regarded as a site filled up or covered with material impregnated or mixed with any faecal, animal, or vegetable matter, within the meaning of the words of the bye-laws.

The magistrate decided that the meaning of the words "site" and "foundations" in the bye-law could not be extended beyond that given by the 14th section of the Act; and that the foundations and site had been prepared in accordance with the bye-laws under the Act. He was further of opinion that the first paragraph of the bye-law above set out was intended to meet an entirely different state of things, and was not applicable to the present case, because he considered that human bodies buried in coffins could not be said to be "materials impregnated with animal matter." He accordingly dismissed the summons.

The question for the opinion of the court was, whether, on the facts as above stated, the magistrate was right in dismissing the summons.

Sir H. Giffard, Q.C. and Bealey for the appellant.

Gainsford Bruce, Q.C. and W. Graham for the respondent.

Grove, J.—In this case, which is no doubt one of considerable importance, I have come to the conclusion that the respondent is entitled to the judgment of the court. Now the decision of the question mainly, if not entirely, must be founded upon the construction of the 14th and 16th sections of the Metropolis Management and Building Act Amendment Act 1878, and upon certain bye-laws made under the Act. The object of the Act is, of course, to provide good buildings which shall be secure in themselves, which shall be free from nuisances, and, speaking generally, free from anything which would be injurious to health. The ultimate object of the Act, so far as the question for our consideration is concerned, is sanitary, but of course there are other matters, such as stability and the prevention of fires. However, those two last have nothing to do with the point we have before us, and the object of the Act, so far as we are concerned in this inquiry, is that part of it which is enacted, to use the words of the Act, for the purpose of health or for sanitary purposes. Now Sir Hardinge Giffard has argued that we must give effect to that object. I quite agree to that. But we must not read into the provisions of the Act words to meet some difficulty which the Act does not seem to have contemplated, and as to which it creates no provision. In sect. 14 it is enacted that the term "foundations" shall mean "the space immediately beneath the footings of a wall"—that is, the lowest part to which any part of the house reaches. We then come to the term "site," which is the more material matter as applied to this case. "The term site in relation to a house, building, or other erection, shall mean the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations and the level of the base of the



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walls." I take it the bottom of the foundations means the lowest part which the foundations touch or rest upon. So reading it, what is "the site" interpreted to mean? Not the spaces, not the superficial area of the ground, not the *locale* as the term "site" is ordinarily used where a house is to be built. You may say a house is to be built on Cooper's Hill; or you might convertibly say Cooper's Hill is the site of the house. But the use of the word "site" there is far more extended than in this Act, and would be in that case merely the general *locale* chosen upon which the house was to be built. Now it seems to me clear that that is not the meaning of the word "site" here. The word or term "site" means what the Act says it means, viz., the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations and the level of the base of the walls." I read, therefore, the word "site" as meaning that space which will necessarily be taken up when the house and walls come to be built. I think that is confirmed by further portions of the Act, because the 16th section is conclusive as showing that the word "site" does not mean merely the general *locale* on which the house is to be built, but something which can be "made, formed, and excavated." That being so, I now go to the bye-law, the interpretation of which is in question in this case. The first bye-law upon which the question depends is this: "No house, building, or other erection, shall be erected upon any site or portion of any site which shall have been filled up or covered with any material impregnated or mixed with any fæcal, animal, or vegetable matter." Now, when that was first read, I thought "site" was used there in the wide sense of the ground upon which the house was built; but it appears to me that it can be reasonably construed as in sect. 14. I do not say that there may not be words in bye-laws which are so obviously used in a different sense to the same words in the Act that the court may properly, reading them with the context, put a different construction upon them; but *primâ facie* I should say that the proper mode of construction is to apply the same interpretation to terms used in a bye-law which is applied to the same terms in the Act under the powers of which the bye-law is framed. The words of the bye-law are moreover fully in accordance with such a construction, for the words are, "No house, building, or other erection shall be erected upon any site or portion of any site which shall have been filled up or covered with any material impregnated or mixed with any fæcal, animal, or vegetable matter, or which shall have been filled up or covered with dust, or slop, or other refuse, or in or upon which any such matter or refuse shall have been deposited, unless and until such matter or refuse shall have been properly removed by excavation or otherwise from such site." Now, is not the sensible construction of that bye-law, that the word "site" there, or "portion of a site," means the space which is to be occupied by the house? It would still be space, whether filled up with air or with solid matter; but the bye-law provides, if it has been filled up or covered with any fæcal, animal, or vegetable matter, that such matter must not be left lying in or on that space, but must be carefully removed by excava-

tion or otherwise—that is to say, if it is solid matter which requires excavation, it must be removed by excavation, so that none is left on any portion of the site, that is, on any portion of the space to be occupied by the house. Now let us read paragraph 2: "The site of every house or building shall be covered with a layer of good concrete." What does "site" mean there? Clearly not the mere situation upon which the house is to be built. The site there must be equivalent to the house, because it is "the site of every house;" that is, the site upon or into which the house is to be built is to be covered with a layer of good concrete "at least six inches thick, and smoothed on the upper surface, unless the site thereof be gravel, sand, or natural virgin soil." Therefore "site" there must be interpreted not as a mere *locale*, as I have said, but to be the very place in which the house and its foundations are to be placed. Then again, in paragraph 3 it is stated: "The foundations of the walls of every house or building shall be formed of a bed of good concrete not less than nine inches thick, and projecting at least four inches on each side of the lowest course of footings of such walls. If the site be upon a natural bed of gravel, concrete will not be required." The object is clearly to give a solid bed for the foundations to rest upon, and which will prevent the house giving way when it is put upon the earth which has to support it. Concrete, when it hardens and becomes solid matter, will give a solid foundation, and will obviously give stability to the house. It will also have an effect upon health, so far as it prevents any infiltration. But the second bye-law has a most material bearing both upon stability and, here more particularly, upon health, because it provides "that the site shall be covered," and there I read the whole site co-extensive with the house, "with a layer of good concrete at least six inches thick." This concrete is not for the purpose of bearing weight like the nine inches of concrete under the bricks. It may possibly add to the stability of the building, but it is mainly, if not entirely, to prevent emanations or other matters coming from the lower ground, and so to protect the health of the persons inhabiting the houses by having an impermeable stratum six inches thick between them and the ground beneath. Now that seems to me to be the reasonable construction of the Act, and all that which the bye-laws here prescribe has been in the present case done, and the learned magistrate who decided this, decided that the Act had been complied with, and I think he was right. Then there arises this difficulty. The ground in question formed an old cemetery, and coffins and bodies to the depth of some eighteen or twenty feet, and coming not very far from the surface of the soil, had been buried there up to about 1849. Now the board assert the right to have the whole of that excavated and cleared, because it consists of animal matter within the meaning of this Act. I think it does consist of animal matter within the meaning of this Act, because I think it is the sort of refuse animal matter which, had it existed within the space of the site of the houses, would have been required to be cleared away. But we are asked to say that the board had the right to insist upon the parties excavating for the houses to any depth which contains animal or vegetable matter. Now, does what they con-

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tend for come within the words of the Act? Construing them as I have construed them, and limiting the term "site" to the space occupied by the house and its walls, the contention fails. Then it may be asked, is it not a rational construction to say that the bye-law is to be read in a different sense from the Act? I am inclined to think that, if the bye-law were to be so read, it would be bad; because, if the Act confines "site" to a limited space, then a bye-law which extends the word "site," and gives power of compulsory legislation over that site beyond and above that which is comprehended by the Act, would be, as I should be inclined to think, bad. I construe the bye-law, if I can, *ut res magis valeat quam pereat*, and certainly the bye-law can be quite sensibly construed giving to the word "site" the same definition as contained in the Act. It may be very true, as suggested, and as I am inclined to think, that when this Act was framed those who framed it had not in their minds a burial ground. Burial grounds form so very small a part of the whole area of London that they possibly did not think of them. But although that may have been so, I think that the Act and bye-law under it, properly read, deal only with the space from the lowest part of the foundations and upwards from that point to the surface of the soil. Therefore upon the whole I am of opinion that the proper construction of this Act and bye-law is as contended by the respondents, and that the respondent is entitled to our judgment.

HAWKINS, J.—I am also of opinion that the magistrate was right, and that his appeal ought to be dismissed. The complaint which was made against the defendant Chambers, the builder, is this, that he unlawfully committed "breaches of the bye-laws made by the Metropolitan Board of Works under the provisions of the Metropolitan Management and Building Acts Amendment Act 1878; that is to say, by commencing to build on a site and foundations at the south-west corner of the Peel-grove Burial Ground which had been filled up with materials impregnated with animal matter, to wit, a number of dead human bodies, without the said animal matter having first been properly removed." Now, as regards the facts, before I turn to the Act of Parliament and the bye-laws, the case seems to be this. This old burial ground, which was not a consecrated ground, had been in use for many years before the year 1849, when it ceased to be used, and there is no doubt that a great number of bodies had been buried in it, and that they were buried at various depths ranging from twenty to twenty-five feet below the surface, and that some bodies were buried within four or five feet from the surface of the ground. It ceased to be used in point of fact in the year 1845, but by an Order in Council made in the year 1855 it was directed that this burial ground should be closed, and from that time to the present no further burials have taken place in it. Between the body which was nearest to the surface and the surface of the ground itself there were, as found in the case, some four or five feet. It was said that some of the coffins were buried within that distance of the surface with four or five feet of earth over them. After the ground had been disused and the Order in Council had been made, the owners of the ground raised the surface by depositing over the surface of the ground builder's

rubbish to a depth varying from one to four feet. So that the depth of the builder's rubbish over the surface of the ground was from one to four feet, and the depth of earth between the surface of the ground and the nearest coffin was three to four feet. That was the condition of the ground. Then Mr. Chambers proposed to build upon this ground, and received on the 8th May 1883 a notice from the Board of Works represented by the appellant, in these terms: "Old Burial Ground, Peel-grove. In reply to your inquiries made when I saw you upon the ground, I beg to say that I shall require you to remove any objectionable matter (as laid down in the bye-laws) that may be met with down to the bottom of your foundations. If you interfere with bodies in making your foundations I shall have to take proceedings, and I presume the parish will do the same. I shall call at the ground at ten to-morrow (Wednesday) morning, to see how you are going on." Being about to build over the old burial ground he is told to clear away—that they should expect to have any objectionable matter, as laid down in the bye-laws, removed, but that if in doing so he came upon any bodies he would be proceeded against for that. Therefore the notice to him virtually is, that he shall not remove anything from the burial ground without subjecting himself to the penalties against a person who improperly and unlawfully interferes with dead bodies which have been buried. That is practically what it amounts to. He went on with his building, and he built, as he contends, in accordance strictly with the provisions of the Act of Parliament as read in conjunction with the bye-laws, and the magistrate has found as a matter of fact that, if the construction which was placed by the respondent and by himself upon the bye-laws which were framed by the Metropolitan Board under the powers of the Act to which we have so often referred is correct, there had been no infringement of the bye-laws, but that the foundations and the site had been framed and formed in the manner provided by the bye-laws, which were made and were enforceable under the Act of Parliament. As a matter of fact, therefore, we have no right to disturb the magistrate's judgment on that matter, and it may be taken for granted that, if his construction of the bye-law is right, then as a matter of fact the builder is to be exonerated from the penalty which has been sought to be inflicted upon him. Now the Act under which these bye-laws are framed was passed in the year 1878. It is an Act to amend the Metropolitan Management Act 1855, the Metropolitan Building Act, 1855 and the Acts amending the same respectively. I must say, in reading this Act, it does occur to me, as it has occurred to my brother Grove, that in all probability the Legislature never contemplated the use of old burial grounds when they were framing this particular Act, and I think it equally probable that the Metropolitan Board of Works, when they came to frame their bye-laws, lost sight altogether of the fact that there were a great many old disused burial grounds in London which were the property of private individuals, and which might therefore be devoted to building purposes. They certainly have made, in my opinion, no provision for building over such ground—that is to say, no such provision as might have been expected if they had contem-

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plated buildings or houses being erected over these disused places. It can be ascertained from the preamble of the Act exactly what it was that the Legislature contemplated in conferring the powers they did upon the Metropolitan Board of Works. The recital is, "Whereas it is expedient to make provisions with respect to the making, filling up, and preparation of the foundations and sites of houses and buildings to be erected within the metropolis, and with respect to the quality of the substances to be used in the formation or construction of the sites, foundations, and walls of such houses and buildings with a view to the stability of the same, the prevention of fires, and for purposes of health." I take that really to be a recital in substance amounting to this—that it is expedient to make provisions, as far as they can be reasonably made, so as to insure stability in buildings which shall be hereafter erected; secondly, so as to avoid danger from fires; and thirdly, so that the buildings themselves shall be not injurious to health, but on the contrary conducive to health, in accordance with the regulations which I am going to refer to. Sect. 16 gives the Metropolitan Board of Works power to make bye-laws, and as I take it, that means to make bye-laws for the purpose of carrying out as far as practicable the objects which the Legislature had in view, and it gives them the power in these terms: "The board may from time to time make, alter, vary, amend, and repeal such bye-laws as they may think expedient with respect to the following matters." Then it says, "First, the foundations of houses . . . and the sites of houses and other erections to be constructed after the passing of this Act and the mode in which and the materials with which such foundations and sites shall be made, formed, excavated, filled up, prepared and completed for securing stability, the prevention of fires, and for the purposes of health." Now with respect to what is it that the board may make bye-laws? It is with respect to the sites of houses, with respect to the foundations of houses, with respect to the mode in which and the materials with which such foundations and sites shall be made, formed, excavated, filled up, prepared and completed for the purpose of securing the matters which I have just referred to—that is to say, stability, prevention of fires, and purposes of health. Now I think, before one goes to the bye-laws, one must ask what was intended by the Legislature when they spoke of "sites" and "foundations" and of conferring power upon the Metropolitan Board of Works to make bye-laws with respect to sites and foundations? It seems as though the Legislature had determined that there should be no question at all upon this part of the case, because, before giving power to make bye-laws, they state in express terms what they mean in using the term "foundations and sites." The Act says, "In this part of this Act the term 'foundations' shall mean the space immediately beneath the footing of a wall." Without criticising the precise language in which this interpretation clause is framed, it seems to me that the real true construction of it is this—that the term "foundations" means that which is the resting place or support of the footings of the walls; that is to say, the foundations upon which the footings of the walls are to rest when the building

is constructed and erected; and the foundations are matters which are clearly within the cognisance and jurisdiction of the Metropolitan Board of Works. They are matters upon which the Metropolitan Board of Works have power to legislate by their bye-laws. There is no question at all as to the meaning of "the footings of the walls," nor as to the meaning of "the base of the walls" when we come to look, as we must look, at the Metropolitan Building Act which was passed in the year 1855, where I find, "The base of the wall shall mean the course immediately above the footings." Then when I turn to the first schedule of the Act I find the footings of the wall are defined thus: "The projection of the bottom of the footing of every wall, on each side of the wall, shall be at least equal to one-half of the thickness of the wall at its base and the diminution of the footing of every wall shall be formed in regular offsets; and the height from the bottom of such footing to the base of the wall shall be at the least equal to one-half of the thickness of the wall at its base." So that it prescribes here how the footings shall be constructed and the depth of them. Therefore there is no mistake at all as to what the Act of Parliament meant in 1855. But I should think there is equally little doubt as to what the bye-laws intended. I may observe, with reference to the word "foundations," that though the board have power to prescribe and dictate as to the mode in which and the materials with which the foundations shall be composed, this bye-law says nothing whatever as to the foundations, except that beneath the last course of the footings there shall be a layer of concrete of a depth of nine inches. Now, when you come to look at the case and to the facts which are found in it, the construction of the foundations has been not merely within the strict requirements of the bye-law, but even better foundations than the bye-law requires have been put in. Now, let me go to the site. With reference to this I hardly go to the same extent which Grove, J. has suggested, viz., that the site must be construed to be the whole surface of the ground which was intended to be used for the building; that is to say, the whole floor space of the site and the space occupied by the external wall. It is not necessary to determine it, but I should be rather inclined to think that the site was confined to that portion of the house over which the inhabitants were to dwell. But let us see what the Act and bye-laws have said with regard to the site: "The term site in relation to a house or building or other erection shall mean the whole space to be occupied by such house, &c. between the level of the bottom of the foundation, that is, the bottom of the bed of concrete which is to form the foundation for the wall or for the footings of the wall, and the level of the base of the walls." That is to say, the site is to consist of the whole space between the lowest level of the base of concrete forming the foundation of the walls and the level of the base of the walls which is the top of the footings. Thus if the footings happen to be, say, a foot in depth, and there are nine inches of concrete, according to the bye-laws, there will be one foot and nine inches of space between the one level and the other, and that site must be made, constructed, and filled up with such

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materials and in the mode which the Board of Works are entitled to prescribe. Now the board having power to make provisions with regard to sites, is it not reasonable to suppose that, in making the bye-laws and using the word site, they are making regulations with regard to those sites respecting which they are empowered to make regulations? Or is it to be supposed that they are exceeding their authority and making rules and bye-laws respecting sites which have not been in contemplation by the Act, and as to which they had no power to make bye-laws? It strikes me that it is reasonable to say that they intended to use the powers conferred upon them, and the powers conferred upon them are limited by the interpretation clause. Now, construing the word "site" in that way, what is there then prescribed with regard to it? It is to be of a depth which is very ascertainable, a depth which is equal to the distance between the lowest level of the foundation upon which the footings of the wall rest and the base of the wall which is at the top of those footings. That space which forms the site is to be covered; by which I understand the top surface of it is to be formed of six inches of concrete, and from every portion of the site any material impregnated with faecal, animal, or vegetable matter must be removed. Then what is the fact? The magistrate has found that a six inches layer of concrete has been laid down, and he has found also, as a matter of fact, or, if it is not directly found, it is implied in the very language of the case, that no part of the remaining portion of the site, that is, between the lower level of the concrete which covers the site and the level of the base of the foundations, consists of any material which is impregnated either with faecal or animal or vegetable matter. In short he has found that, if the bye-law is to be construed in the way in which I think it ought to be construed, the respondent has done everything that the bye-laws require him to do. I am of opinion, therefore, for the reasons I have stated, that the magistrate was right in coming to the conclusion that these bye-laws had not been infringed, and I think this appeal ought to fail.

*Judgment for the respondent.*

Solicitor for the respondent, *R. Ward.*

Solicitors for the appellant, *Collyer-Bristow and Co.*

Name of Voter, &c.	Place of Abode.	Nature of Qualification.	Name and Situation of Qualifying Property.
Hoar, William .....	34, Prospect-place, Cowick-street	Dwelling-houses in succession	44, Oxford-street, and 34, Prospect place, Cowick-street.

The appellant duly objected to the name of the respondent being retained on the said list upon the ground (*inter alia*) that the respondent had not been in occupation of the premises as described therein for the period and at the time required by law to give him a vote.

The following facts were proved:—

The respondent had occupied during the whole of the qualifying period three houses in immediate succession, namely, Nos. 44, Oxford-street, and 31 and 34 Prospect-place, Cowick-street, and his occupation of those three houses, and not of the two houses only which are specified on the list, gave him a complete qualification of the nature specified in the third column of the list. The overseer well knew that the respondent had

*Thursday, Dec 18, 1884.*

(Before Lord COLERIDGE, C.J., STEPHEN and CAVE, JJ.)

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*Registration of voters—Parliamentary—Revision of lists—Revising barrister's power of amendment—Description of qualification—Houses in succession—Omission of one of three houses occupied successively—The Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28, sub-sects. 1, 12, 13.*

*In a list of voters submitted to a revising barrister for revision the nature of a voter's qualification appeared in the third column as "dwelling-houses in succession," and the description thereof in the fourth column as "44, Oxford-street, and 34, Prospect-place, Cowick-street." The voter had in fact occupied during the whole of the qualifying period three houses in immediate succession, viz. 44, Oxford-street, and 31 and 34, Prospect-place, Cowick-street, but the overseer by mistake omitted to specify the intermediate house, and the part of the qualifying property which appeared was insufficient to give a vote. The revising barrister having amended the fourth column by striking out the numbers "44" and "34:—"*

*Held, on case stated, by Stephen and Cave, JJ. (Lord Coleridge, C.J. dissenting), that the revising barrister was at liberty under the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28, to amend the description of the qualification in the fourth column, but that he ought to have amended it by inserting the name of the house omitted, and that the Court ought so to amend it.*

THIS was a case stated for the opinion of the court by the revising barrister for the city of Exeter, in which Brutton John Ford was the appellant and William Hoar the respondent.

The case was, so far as material, as follows:—

At a court held by the barrister appointed to revise the list of voters for the said city, on the 15th Sept. 1884 the respondent's name appeared on Form E. for the parish of Saint Thomas the Apostle of the list of voters as the occupier of dwelling-houses in succession, and the entry and description on the said list was as follows:—

occupied the house, 31, Prospect-place, Cowick-street, between his occupation of 44, Oxford-street and his present house, but he accidentally and by mistake omitted to specify the intermediate house, 31, Prospect-place, in the description of the qualifying property, and the part only of the qualifying property as it appeared on the list was insufficient to give the vote.

Upon proof of the above facts the revising barrister was asked on behalf of the respondent to amend the fourth column of the list by striking out the figures 44 and 34 which stood before Oxford-street and Prospect-place respectively, and to retain the name of the respondent in

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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respect of his qualification, which consisted of his occupation of the three houses as stated above.

It was contended by the appellant that the revising barrister had no power to make that amendment, as by so doing he would be making the qualification of the voter (the respondent) to consist of an occupation of three houses in succession instead of two houses only as specified on the list.

The revising barrister decided that he had the power, under the 28th section of the Parliamentary and Municipal Registration Act 1878, to make the amendment as requested, and struck out the figures 44 and 34 on the fourth column of the list and received proof of the successive occupation by the respondent of the said three houses, being of opinion that by so doing he was not altering the nature of the qualification inserted on the list nor the situation of the qualifying property, but merely correcting an omission accidentally and by mistake made by the overseer in making out the list, and he retained the name of the respondent on the list of voters for the said city.

If the court should be of opinion that his decision was wrong, the register was to be amended by striking out the name of the said William Hoar from the said list.

*Bompas*, Q.C. for the appellant.—The powers of amendment to be exercised by the revising barrister in revising the list of voters are strictly defined by the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), which on this point re-enacted with but slight alteration the provisions of 6 & 7 Vict. c. 18, s. 40 (a), and

(a) 6 & 7 Vict. c. 18, s. 40, is, so far as material, as follows:

40. And be it enacted that the revising barrister shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, and also the name of every person who shall be proved to him to be dead; and wherever the Christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted in any case where the same is by this Act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall, in the judgment of the revising barrister, be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list: Provided always, that whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same.

The Parliamentary and Municipal Registrations Act 1878 (41 & 42 Vict. c. 26), ss. 24 and 28, sub-sects. 1, 6, 12, and 13, are as follows:

24. Any person who is entered on any list of voters for a parliamentary borough or any burgh list, subject to revision under this Act, for a municipal borough, and whose name or place of abode, or the nature of whose qualification, or the name or situation of whose qualifying property is not correctly stated in such list, or in respect of whom there is any other error or omission in

the various sub-sections of sect. 28 of the Act of 1878 give the revising barrister no power to make such an amendment as that now appealed against. The 13th sub-section distinctly enacts that no evidence shall be given of any other qualification than that which is described in the list or claim, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same, whereas here the purpose of the revising barrister in striking out the numbers 44 and 34 from the description of the qualification as it appears in the list, viz., 44, Oxford-street, and 34, Prospect-place, Cowick-street, was to enable the voter to qualify in respect of three houses, viz., 44, Oxford-street, and 31 and 34, Prospect-place, notwithstanding that one of the houses was

the said list, may, whether he has received a notice of objection or not, if he thinks fit, make and subscribe a declaration in the form in that behalf in the schedule to this Act, or as near thereto as the circumstances will admit, before any justice of the peace or any commissioner or other person authorised to administer oaths in the Supreme Court of Judicature. The declaration shall be duly dated, and shall, on or before the 12th day of September, be sent to the town clerk, who forthwith shall indorse on the declaration a memorandum signed or initialed by him, stating the date when he received it, and naming the declarant, and the list to which the declaration refers, and shall deliver all such declarations to the revising barrister at his first court. If the declaration is sent as aforesaid and in due time (of which the said indorsement shall be *prima facie* proof), the revising barrister shall receive the declaration as evidence of the facts declared to, and that without proof of the signature of the declarant, or of the justice, commissioner, or person before whom the declaration purports to have been subscribed, unless he has good reason to doubt the genuineness of any signature thereto.

28. A revising barrister shall, with respect to the list of voters for a parliamentary borough, and the burgh list for a municipal borough which he is appointed to revise, perform the duties and have the powers following: (1.) He shall correct any mistake which is proved to him to have been made in any list. (6.) The revising barrister shall expunge the name of every person, whether objected to or not, whose name or place of abode, or the nature of whose qualification, or the name or situation of whose qualifying property, if the qualification is in respect of property, or any other particulars respecting whom by law required to be stated in the list, is or are either wholly omitted, or, in the judgment of the revising barrister, insufficiently described for the purpose of being identified, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of the revising barrister before he shall have completed the revising of the list in which the omission or insufficient description occurs, and in case such matter or matters shall be so supplied, he shall then and there insert the same in such list. (12.) Where the matter stated in a list or claim, or proved to the revising barrister in relation to any alleged right to be on any list, is in the judgment of the revising barrister insufficient in law to constitute a qualification of the nature or description stated or claimed, but sufficient in law to constitute a qualification of some other nature or description, the revising barrister, if the name is entered in a list for which such true qualification in law is appropriate, shall correct such entry by inserting such qualification accordingly, and in any other case shall insert the name with such qualification in the appropriate list, and shall expunge it from the other list, if any, in which it is entered. (13.) Except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same.

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omitted in the description of the qualification in the list. It was clearly, therefore, a change in the description of the qualification forbidden by sub-sect. 13. The cases on the point are chiefly under the earlier Act of 1843, but the only difference is that, at the beginning of sub-sect. 13 of the 28th section of the Act of 1878, the words "except as herein provided" are substituted for the words "provided always" in sect. 40 of the earlier Act. In the case of *Bartlett v. Gibbs* (5 M. & G. 81) it was decided as long ago as 1843 that a party whose qualification consists in the occupation of several premises in immediate succession ought to be registered in respect of all such premises, and that if a party so qualified is registered only in respect of the premises in his occupation at the time of making out the list of voters, it is such a misdescription as the revising barrister has no power to correct under 6 & 7 Vict. c. 18, s. 40. This case is still in point and governs the present. Then, under the new Act, it was decided in *Porrett v. Lord* (42 L. T. Rep. N. S. 28; 5 C. P. Div. 65) that, where the appellant's qualification being described on a list of voters as a "house," "8, Birley-place," he made and sent in a declaration for amending misdescription under 41 & 42 Vict. c. 26, s. 24, schedule, Form M., stating that the correct description was "houses in succession," "8 and 9, Birley-place," the revising barrister was right in expunging the appellant's name from the list, for there had been an alteration in the nature of the qualification, and to substitute "houses in succession" for "house," would be such a change in the description of the qualifying property as was not authorised by sect. 28. [CAVE, J.—The change necessary there was in the third column of the list, the nature of the qualification requiring alteration from "house" to "houses in succession." Here the third column is correctly stated, and you desire the court to say that the alteration made in the fourth column is not the correction of a mistake under sect. 28, sub-sect. 1, but a change in the description of the qualification within the meaning of sect. 28, sub-sect. 13. In *Bartlett v. Gibbs* also a change in the nature of the qualification was required. Can either of the cases cited be said to be an authority governing the present?] It is submitted that they are; but there are other cases which even more resemble the present. In *Onions v. Bowdler* (5 C. B. 65; 17 L. J. 70, C. P.) the qualification of the appellant was described in the third column as "house in succession," and in the fourth the property was stated to be situate in "Butcher-row," and it appeared that the qualification in truth consisted of the successive occupations by the party of two houses, one in Butcher-row, the other in Coleham in the same borough; and the revising barrister having declined to amend the description by adding "s" to the word "house" in the third column, and inserting "Coleham" in the fourth, the Court held that the proposed amendment was not one which it was competent for him to make. In that case Wilde, C.J. expounds the policy of the Act when he says: "When the statute gave the right to vote in respect of different premises occupied in immediate succession, it became equally important to give the same facility of inquiry with respect to each of the premises so occupied;" and again: "It is material to see whether the proposed amendment consists in the correction of something already stated in the list, but stated

imperfectly, or in the introduction of matter that is altogether new. It seems to me that it is of the latter description, and that the addition of a totally distinct and independent matter to eke out an insufficient statement of qualification is not within the purview of the Act." Both these observations of the learned Lord Chief Justice apply to the present case, since the revising barrister, in making the amendment, virtually, by striking out the numbers, added new matter, viz., "31, Prospect-place," with respect to which no facility of inquiry had been given. Again, in *Burton v. Gery* (5 C. B. 7) it was decided that one who was on the register as entitled to vote for a county in respect of an occupation of land above 50l. a year, but who ceased to occupy the same land, and entered upon the occupation of other land within the twelve months then next preceding the 31st July, did not "retain the same qualification as described in such register" within the meaning of 6 & 7 Vict. c. 18, s. 4, although the description in the register was general and sufficiently large to embrace either occupation, and that he ought to have sent in a new claim in respect of such substituted occupation. As to the first sub-section of sect. 28 it was intended to meet an entirely different class of circumstances. That sub-section comes into operation in such cases as *Adams v. Bostock* (45 L. T. Rep. N. S. 443; 8 Q. B. Div. 259), *James v. Howarth* (5 C. P. Div. 225), and *Picard v. Sayer* (41 L. T. Rep. N. S. 509; 5 C. P. Div. 235). In *Adams v. Bostock* an objector described himself in the notice of objection as "in the list of parliamentary voters for the parish of H.," but omitted to insert his place of abode. He was a solicitor practising at H., was clerk to the magistrates and coroner, and had resided at H. all his life. It was admitted that the insertion of the words "of H." would have sufficiently described the objector's place of abode, and the revising barrister found as a fact that no one had been misled by the omission, and it was held that under the circumstances the omission was a mistake within the meaning of 41 & 42 Vict. c. 26, s. 28, sub-sect. 1, which the revising barrister had power to amend. In *James v. Howarth* also it was held that the omission to state that the objector was on one of the "parliamentary" lists was a mistake which the revising barrister had power to amend and ought to have amended under sect. 28, sub-sect. 1. Apart, however, from the cases, it is clear from the very words of the 12th and 13th sub-sections of sect. 28, that it was not the intention of the Legislature that the revising barrister should have power to deal with or alter the "matter stated in any list or claim to constitute a qualification," except in the cases specially provided for in the 12th sub-section, for the 13th sub-section proceeds at once to say that, "except as herein provided the revising barrister shall not be at liberty to change the description of the qualification." Taking the two sub-sections together, if the misdescription comes within sub-sect. 12, the revising barrister can amend it; if not, he has by sub-sect. 13 no power to amend. [CAVE, J.—That interpretation would give no meaning to sect. 24. He has clearly power to amend in accordance with declarations made under that section, although such amendment is not mentioned in sub-sect. 12.] Next, if the revising barrister had power to amend at all, he ought to have amended by adding "31,



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Prospect-place," instead of striking out the numbers. Where houses are numbered, the revising barrister ought to strike out the name unless the number is added, so that now that the numbers have been struck out the entry in the list is still bad. [Lord COLERIDGE, C.J.—The court is unanimously of opinion that the particular amendment made was wrong, but there are cases in which the court has made alterations which the revising barrister ought to have made.] If the decision of the revising barrister is wrong, the register is, according to the case, to be amended by striking out the name. [Lord COLERIDGE, C.J.—The court would not allow that to defeat its action.]

*Rose* for the respondent.—[Lord COLERIDGE, C.J.—In *Bartlett v. Gibbs* (5 M. & G. 81) it was held that the omission of one of several premises in respect of the occupation of which in immediate succession a claimant's qualification consisted, was fatal. How do you distinguish the present from that case?] The respondent relies upon the change in the phraseology of the later statute and on the principles of amendment laid down in the recent cases. Moreover, in *Bartlett v. Gibbs* an amendment was necessary of the nature of the qualification in the third column, which was stated as "house," whereas here it is only the description of the qualifying property which requires amendment, the nature of the qualification, viz., "houses in succession," being rightly stated. The validity of this distinction appears from the case of *Flounders v. Donner* (15 L. J. 81, C. P.) where a party whose qualification was houses in succession was on the list of voters for a borough, but the list omitted to mention the number of the first house which he had occupied, and the Court said that, if the number had been supplied before the barrister had completed the revision of the list, he ought to have added the number and retained the voter on the list. [He was stopped by the Court.]

CAVE, J.—I am of opinion that this appeal ought to be dismissed, because I think that the case is within the plain language of the Act with which we have to deal. This Act was passed in 1878 for the purpose of amending the law relating to the registration of voters in parliamentary boroughs and the enrolment of burgesses in municipal boroughs, and relating to certain rights of voting and proceedings before and appeals from revising barristers, and it undoubtedly does in some parts correct decisions arrived at in registration cases on other sections of the old Act. The 28th section is in these words: "A revising barrister shall, with respect to the list of voters for a parliamentary borough and the burgess lists for a municipal borough which he is appointed to revise, perform the duties and have the powers following: (1) He shall correct any mistake which is proved to him to have been made in any list." This first sub-section says, therefore, in express terms that "he shall correct any mistake which is proved to him to have been made." It seems to me that there clearly was a mistake made in this list, and therefore he was bound to correct it, unless in some other part of the statute the duty imposed on him by this sub-section is cut down. We are referred by the learned counsel for the appellants for this purpose to the 13th sub-section of the same section, which is in these terms: "Ex-

cept as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same." Now I would observe, in the first place, that the sub-section begins with the words "except as herein provided," and I take it that these words refer to the whole of the section, and that their meaning is, that the revising barrister is not to change the description of the qualification as it appears in the list, save only for the purpose of more clearly and accurately defining the same, except in the cases provided for by the other sub-sections of the section. If this is the meaning of the section, it leaves the first sub-section standing in exactly the same way as before, and full meaning and effect must be given to its provisions. It was, however, argued that those words referred only to the sub-section immediately preceding, viz., the 12th sub-section, and that consequently the effect of the 12th and 13th sub-sections is, that the revising barrister can only change the description of the qualification where the matter stated is insufficient in law to constitute a qualification of the nature or description claimed, but sufficient in law to constitute a qualification of some other nature or description, and that, except where this is the case, he cannot change the description of the qualification except for the purpose of more clearly and accurately defining the same. But, in the first place, that does not seem to me to be the true meaning of the words employed; and secondly, I am entirely unable to reconcile this construction of the two sub-sections with the plain meaning of the 24th section of the Act. The 24th section is in these words: "Any person who is entered on any list of voters for a parliamentary borough, or any burgess list, subject to revision under this Act, for a municipal borough, and whose name or place of abode, or the nature of whose qualification, or the name or situation of whose qualifying property is not correctly stated in such list, or in respect of whom there is any other error or omission in the said list, may, whether he has received a notice of objection or not, if he thinks fit, make and subscribe a declaration in the form in that behalf in the schedule to this Act, or as near thereto as the circumstances will admit, before any justice of the peace, or any commissioner or other person authorised to administer oaths in the Supreme Court of Judicature," and this declaration, the section goes on to provide, is to be sent to the revising barrister, who shall receive the declaration as evidence of the facts declared to, and that without proof of the signature of the declarant, or of the justice, commissioner, or person before whom the declaration purports to have been subscribed, unless he has good reason to doubt the genuineness of any signature thereto. Now the facts here clearly come within the words of this section. In this case the name and situation of the respondent's qualifying property was not correctly stated, the words "31, Prospect-place," being left out. The respondent was therefore entitled under this section, if he should think fit, to make and subscribe a declaration which the revising barrister was bound to receive as evidence. But, unless the



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revising barrister had power to make an alteration in the list, so that the name and situation of the qualifying property might be correctly stated in the list, what would be the use of putting the voter to the expense of making a declaration which by sect. 28 would be valueless? Sect. 24 therefore, to my mind, clearly shows that it was the intention of the Legislature that the revising barrister should have, under sub-sect. 1 of sect. 28, the power to make such alterations as are required in this case, and that the Legislature was anxious to facilitate the making of such alterations without putting the voter to the necessity and expense of going before the revising barrister, and proving upon his oath in the ordinary way that a mistake had been made. If the matter rested there I should have thought it plain, and the only difficulty that presents itself to my mind arises from the case of *Bartlett v. Gibbs* (5 M. & G. 81), which was decided under the Act previously in force. This is a decision which from the high reputation of the court which decided it ought to be treated with the utmost respect, but I think that the Act under which it was decided differs in a substantial way from the present Act, so as to make that case inapplicable to the present. Sect. 40 of the Act of 1843 (6 & 7 Vict. c. 18) provides that "the revising barrister shall correct any mistake which shall be proved to him to have been made in any list and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, and also the name of every person who shall be proved to him to be dead; and whenever the Christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted in any case where the same is by this Act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall, in the judgment of the revising barrister, be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the name in such list;" and then comes the proviso, which, as I read it, must be a proviso on the whole section, that "whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." If that proviso is a proviso on the whole of the section—and, as I read it, it is—then, even with regard to the mistakes of the overseers in making up the lists, the revising barrister could not correct them if their correction involved a change in the description of the qualification, except indeed for the purpose of more clearly and accurately defining the same. When, however, we come to the Act of 1878 we find that sub-sect. 13 of sect. 28, so far from being a proviso on the

whole of the section, expressly excepts the whole of the rest of the section, including of course sub-sect. 1 along with it, from its operation. There is also in the Act of 1878 another additional feature nowhere to be found in the Act of 1843. I allude to the provisions of sect. 24, providing for the making of a declaration in cases where the nature of the qualification, or the name or situation of the qualifying property, is not correctly stated in the list. This section clearly involves the existence in the revising barrister of power to amend such mistakes, and the words of sub-sect. 13, "except as herein provided," are not therefore solely confined to the powers of amendment conferred by sub-sect. 12, nor the powers of amendment of the revising barrister to the cases in which it is necessary to make amendments under that sub-section. I do not see that sub-sect. 12 necessarily applies to mistakes on the part of the overseer at all. It may, I think, apply to cases where the voter himself, in endeavouring to describe his qualification, puts it down as one thing whereas in fact it is something else. Such a case as that would, I imagine, come under sub-sect. 12, since there would be a mistake in law, and yet not on the part of the overseer. For these reasons I think that the case of *Bartlett v. Gibbs* does not apply to this section of the Act of 1878, with which we are now dealing, and that the decision of the revising barrister is correct. I do not, however, agree with his view in striking out the numbers, and I think that his proper course would have been to have inserted the words "31, Prospect-place," and, as the result of our decision is that the revising barrister was entitled to make and ought to have made this amendment, I am of opinion that this amendment must be made and the appeal dismissed.

STEPHEN, J.—I am of the same opinion.

LORD COLERIDGE, C. J.—I have entertained and continue to entertain considerable doubt as to this matter. If I had arrived at a clear conclusion which necessarily conflicted with a former decision of the Court of Common Pleas, and I were of opinion that the decision of the Court of Common Pleas was clearly wrong, it would, I think, be my duty to disregard that decision and give judgment in accordance with my opinion. That is a course which the court has taken before where an error has been committed, and it is in my opinion the proper course. But, in cases where our decision is not conclusive, it certainly appears to me, and more especially in registration cases, that the object to be aimed at is, that all the cases should be decided in the same way, in order that the decisions may be well known and unambiguous. It appears to me, therefore, that it is highly important to adhere, if possible, to former decisions, and, that being so, for my part I am unable to distinguish this case from the case of *Bartlett v. Gibbs*. In that case, as I understand it, it was held that, where the qualification in respect of which a claim is made was the occupation of two houses in immediate succession, the description must appear in the fourth column, in which is set forth, not the nature of the qualification, but a description of the qualification itself, that is, of the qualifying property. That decision is, I think, clear that, where more than one house is occupied, the names and situation of both must appear in

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the description. But what is true of two houses must be true of more than two, and if the case of *Bartlett v. Gibbs* is correct, that it is necessary where there are two houses that both must appear in the fourth column in order that the qualification may be correctly described, then it must necessarily be the case also that, where the claim is in respect of the occupation of three houses, then all three ought to appear. In this case it is admitted that the qualification is in respect of the occupation of three houses, and it is also admitted that one of the three does not appear in the description in the fourth column of the names and situations of the qualifying property. Clearly, therefore, there is a mistake in the description of the qualification, and the question is whether it can be corrected. I admit that the opinion which I have formed is one which I regret to have formed, and dislike. The mistake is a mistake which was made, not by the voter, but by the overseer. No doubt the voter might have found it out and corrected it by searching the list, but one's sense of justice is offended by feeling that every voter who trusts to the overseers and does not look at the list should lose his vote. Still a court composed of four judges of very high authority indeed decided in *Bartlett v. Gibbs* that it was so. Can this be the correct view? In that case the mistake must have been the mistake of the overseer, whether intentionally or not; but it was decided that, under the Act of 1843, the mistake could not be rectified by amendment. Now, with very slight exceptions, putting out of sight for a moment the 24th section of the later Act, the 28th section of the Act of 1878 is identical with the corresponding provisions of the Act of 1843; in fact, the duty imposed on the revising barrister is imposed in the very same words, and the limitation of his powers also are in the same words. But it is said—and I am very far from saying that there is not a great deal in it, although I myself do not see the force of it—that the case under the earlier Act does not apply, for, as I understand the argument, two reasons: first, because under the earlier statute the words are, "provided always that whether any person shall be objected to or not" the barrister shall not be at liberty to change the description of the qualification as it appears in the list, whereas in the present statute they are, "except as herein provided, and whether any person is objected to or not," he shall not be at liberty to change it. There may be more difficulty in this than I see at present, but it certainly seems to me that, both limitations occurring after the imposition of the absolute duty, the effect of both is exactly the same. Both sections surely mean that the duty is absolute except in certain cases, and it seems to me, therefore, that the case decided under the earlier statute is strictly in point. That, I think, is the first objection. I do not, however, forget that there is a second objection founded upon the 24th section and the 12th sub-section of the 28th section of the later Act, neither of which are to be found in the earlier Act of 1843. But it appears to me that both these provisions are intended to have a limited operation only, the 12th sub-section of the 28th section giving a mode of correcting mistakes where matter is stated in a claim insufficient in the opinion of the revising barrister to constitute in law a qualification

of the description claimed, but sufficient to constitute a qualification of some other description, while the 24th section, I think, deals with cases within the 12th sub-section and is limited to such cases. After, therefore, examining these various sections, I come back once more to the proposition that I am unable to see any difference in substance between the later and the earlier enactment, and I think that the case of *Bartlett v. Gibbs* applies to the present case, and that the revising barrister was wrong in making this amendment. I need not say that I pronounce my judgment in this case with very great hesitation, but if *Bartlett v. Gibbs* applies, as in my opinion it does, no one can, I think, doubt that that decision ought to be followed by us in the present case. The appeal must be dismissed with costs, but, as the court is not unanimous, there will be leave to appeal.

*Appeal dismissed with costs.*

Solicitors for the appellant, *J. E. Fox and Co.*  
Solicitor for respondent, *J. Walker Friend.*

Thursday, Dec. 18, 1884.

(Before Lord COLERIDGE, C.J., STEPHEN and CAVE, JJ.)

BLOSSE (app.) v. WHEATLEY (resp.). (a)

*Registration of voters—Parliamentary—Revision of lists—Revising barrister's power of amendment—Mistake in nature of qualification—Mistake in description of qualification—The Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28.*

*In a list of voters submitted to a revising barrister for revision, the nature of the voter's qualification was, by the overseer's mistake, stated in the third column to be "offices, successive occupation," and the name and situation thereof in the fourth column as "High-street and Charles-street." The voter had, in fact, occupied, during the whole of the qualifying year, one only of the specified offices, and would have had by reason thereof a sufficient qualification had it been so described on the list.*

*Held, that the revising barrister had power under the 28th section of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), to correct the mistake.*

THIS was a case stated for the opinion of the court by the revising barrister for the borough of Cardiff, in which Harry Francis Lynch Blossse and five other persons were the appellants, and Joseph Larke Wheatley the respondent.

The case was, so far as material, as follows:—

At a court held before one of the barristers appointed to revise the list of voters for the borough of Cardiff, on the 25th Sept. 1884, for the revision of the lists of voters for the said borough, Evan Thomas, of 57, Scott-street, on the list of parliamentary voters for the parish of St. Mary, in the said borough, and also on the list of burgesses for the said last-mentioned parish, duly objected to the name of Harry Francis Lynch Blossse being retained in the parliamentary and municipal list of voters (division 1) for the parish of St. John the Baptist, west ward, in the said borough.

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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The facts of the case, as proved before the revising barrister, were as follows:—

The name of the said Harry Francis Lynch Blossse appeared in the said list as under:

No.	Name of Voters in Full, Surname being First.	Place of Abode.	Nature of Qualification.	Name and Situation of Qualifying Property.
48	Blosse, Harry Francis Lynch.	Gabalva House, Cathedral-road.	Offices, Successive Occupation.	High-street and Charles-street.

It was proved that during the whole of the qualifying year the said Harry Francis Lynch Blossse had occupied one only of the said specified offices, namely, that in High-street, and would have had, by reason of such occupation, a good and sufficient qualification had it been so described on the said list.

It was further proved that the misdescription occurred solely through the overseers of the said parish erroneously believing that the said Harry Francis Lynch Blossse had occupied an office in Charles-street during the latter part of the qualifying year, and that he had not continued in uninterrupted occupation in High-street (as the fact was) during the whole of the said period. Acting on this erroneous impression they, by the said mistake, so described the qualifying property as it appeared on the said list.

The said Harry Francis Lynch Blossse had not sent in any declaration for correcting misdescriptions under 41 & 42 Vict. c. 26, s. 24, nor had he made any claim to have his name inserted in the said list in respect of his occupation during the whole of the qualifying year of the said office in High-street only.

The revising barrister was thereupon asked to amend the description in the third and fourth columns by striking out the words "successive occupation" in the third column, and also by striking out the words "and Charles-street" in the fourth column.

The revising barrister was of opinion that to make the required amendments would be a change in the description of the qualification which he was not at liberty to make, and he therefore held the objection fatal and declined to amend. The name was accordingly expunged by him from the said list of voters.

The said Harry Francis Lynch Blossse, having thereupon before the rising of the court delivered to the revising barrister a notice in writing that he was desirous to appeal against his decision, the revising barrister stated the above case accordingly for the opinion of Her Majesty's High Court of Justice, Queen's Bench Division.

The names of five other persons all in the like manner duly objected to by the said Evan Thomas, were also expunged by the revising barrister upon the same grounds from the lists of voters, parliamentary and municipal, division 1., for the several parishes of St. John the Baptist, Roath, and Canton, in the said borough of Cardiff, the said persons having, in fact, occupied one dwelling-house only (that is to say the first) of those named in the fourth column of the several lists during the whole of the qualifying year.

As their cases depended upon the same points of law and state of facts, and the revising barrister's decision in each case having been appealed against, and due notice of the intention so to do having been given, the revising barrister was of

opinion that the appeals against his decision ought to be consolidated.

If the court should be of opinion that his decision was right, the said lists of voters were to remain as revised by him. If the court should be of opinion that his decision was wrong, then the names of the appellant Harry Francis Lynch Blossse, and of the said several other persons named in the schedule, were to be restored to the said several respective lists of voters with or without amendment as the court should think fit.

*McConnell* for the appellant.—The revising barrister had power under the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28 (a) to make this amendment. This was a mistake which was proved to the revising barrister to have been made in a list, and there is nothing in the Act to prevent him from correcting it in accordance with the express terms of the 1st sub-section of the 28th section of the Act. [Lord COLERIDGE, C.J.—As far as I see at present, this case is governed by the decision which the court has just given (*Ford v. Hoar*, *vide sup.*, the preceding case). That case is of course now binding upon me, and I could not differ from the decision of the court therein.]

*Brynmor Jones* for the respondent.—This case is distinguishable from the case which has just been decided. [Lord COLERIDGE, C.J.—Does it not come within the express words of the 12th sub-section of sect. 28? The matter stated was sufficient in law to constitute a qualification of some other nature, and the revising barrister corrected the entry by inserting the proper qualification.] The correction involved a change in the description of the qualifying property which is forbidden by the 13th sub-section. This case is really the exact

(a) The Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28, is, so far as material:

28. A revising barrister shall, with respect to the lists of voters for a parliamentary borough and the Burgess lists for a municipal borough which he is appointed to revise, perform the duties and have the powers following: (1.) He shall correct any mistake which is proved to him to have been made in any list. (2.) Where the matter stated in a list or claim, or proved to the revising barrister in relation to any alleged right to be on any list, is in the judgment of the revising barrister insufficient in law to constitute a qualification of the nature or description stated or claimed, but sufficient in law to constitute a qualification of some other nature or description, the revising barrister, if the name is entered in a list for which such true qualification in law is appropriate, shall correct such entry by inserting such qualification accordingly, and in any other case shall insert the name with such qualification in the appropriate list, and shall expunge it from the other list, if any, in which it is entered. (3.) Except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same.

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converse of the case of *Porrett v. Lord* (42 L.T. Rep. N. S. 28; 5 C. P. Div. 65), and is governed by it. In that case the appellant's qualification being described on a list of voters as a "house," "8, Birley-place," he made and sent in a declaration for amending misdescription under the 24th section of the Act, that the correct description was "houses in succession," "8, Birley-place, and 9, Birley-place," and it was held that the revising barrister was right in expunging the appellant's name from the list, for there had been an alteration in the nature of the qualification, and to substitute "houses in succession" for "house" would be such a change in the description of the qualifying property as was not authorised by sect. 28 of the Act. [Lord COLERIDGE, C.J.—But might not "houses in succession" cover "house," although "house" would not cover "houses in succession?"] The 12th sub-section cannot apply, because the matter stated was not "insufficient in law to constitute a qualification of the nature or description claimed." That sub-section only applies to clerical errors where the property is rightly described, and then by mistake the wrong qualification is put down to it. Here, although the overseer made a mistake, he intended to put down the qualification as "houses in succession," and put down a description of the qualifying property sufficient to constitute this qualification. The case therefore is not within the 12th sub-section, and that being so, the 13th sub-section forbids the revising barrister to make the change.

Lord COLERIDGE, C.J.—I have no difficulty in this case. It appears to me to come distinctly within the provisions of the 12th sub-section of the 28th section of the Act of 1878, and after the elaborate discussion in the last case (*Ford v. Hoar*), I think it is scarcely necessary to say more. I am of opinion that the revising barrister had the power to make this amendment, and ought to have made it.

STEPHEN, J.—I am of the same opinion.

CAVE, J.—I am of the same opinion.

*Appeal allowed with costs.*

Solicitor for the appellant, *Gosling and Co.*, agents for *H. F. L. Bloose*, Cardiff.

Solicitor for the respondent, *J. L. Wheatley*, Cardiff.

March 2 and 4, 1885.

(Before Lord COLERIDGE, C.J. and SMITH, J.)

SNOW (app.) v. HILL (resp.). (a)

*Betting—Place kept or used for betting—Moving about in inclosed field—Betting Houses Act (16 & 17 Vict. c. 119).*

*An inclosed field was let to a committee for the purpose of holding certain dog races, to which the public were admitted on payment of an entrance fee. The appellant attended the meeting, and moved about in the field and made bets with various persons present.*

*Held, that the appellant could not be convicted under the 16 & 17 Vict. c. 119, sects. 1 and 3, of having "used a place for the purpose of betting with persons resorting thereto."*

CASE stated under 20 & 21 Vict. c. 43 by the stipendiary magistrate of the borough of Stoke-upon-Trent.

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

The appellant was on the 19th Aug. 1884 committed on an information laid by the respondent, a superintendent of police, charging that the appellant "being a person using a certain place, to wit, a field situated at West Brompton, in the parish of Wolstanton, in the county of Stafford, unlawfully did use the said place for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to certain dog races, contrary to the provisions of the statute 16 & 17 Vict. c. 119."

The following facts were proved :

On the 7th July 1884 dog races for prizes, open for public competition after entries made by the owners of the dogs, were held in an inclosed field about five acres in extent, in the parish of Wolstanton, which field had on a former occasion been used for a similar purpose. The ground had been let for hire for the purposes of the race meeting to a committee, who carried out the arrangements for the racing and the admission of the persons who resorted to the ground.

The public were admitted to one portion of the field (which was divided by a rope from that part of the field on which the races were run) on payment of an entrance fee of 6d. each to the gatekeeper appointed by the committee.

The public had access also to another portion of the field, also divided by a rope from that part of the field on which the races were run, and forming one side of such field, of the length of about 100 yards, and about seven yards in depth, on payment of an entrance fee of 1s. each to the gatekeeper.

A great number of persons (many hundreds) were present at the race meeting, within both the reserved portions of the field, the appellant being in the latter.

The appellant was seen to receive from and pay money to persons with whom he had been heard to make bets. He had no particular location on the reserved space, but during the afternoon freely moved about in the reserved ground. He carried no umbrella; had no box, stool, or satchel, or any distinctive mark, and did not exhibit his name.

The magistrate was of opinion that the ground as above described on which the appellant acted in the manner above stated was a "place" within the meaning of the 16 & 17 Vict. c. 119. He was also of opinion that the case was governed by *Eastwood v. Miller* (30 L. T. Rep. N. S. 716; L. Rep. 9 Q. B. 440), and he accordingly convicted the appellant in the penalty of 20l. and costs.

By sect. 1 of 16 & 17 Vict. c. 119, it is provided :

No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, or keeper, or person as aforesaid, as or for the consideration of any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid.

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By sect. 3:

Any person who being the owner or occupier of any house, office, room, or place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, or any person who being the owner or occupier of any house, room, office, or other place, shall knowingly or wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them, or any person having the care or management of, or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes as aforesaid or either of them, shall on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty not exceeding 100*l.* as shall be adjudged by such justices.

*John Rose* for the appellant.—Under this statute two classes of cases have come before the courts, viz. (1) those against the owners or occupiers of racecourses and betting houses; and (2) those against persons for using or frequenting such racecourses or other places for the purpose of betting. The magistrate has confused the two classes and has convicted the appellant upon the authority of *Eastwood v. Miller* (30 L. T. Rep. N. S. 716; L. Rep. 9 Q. B. 440), which was a decision relating to the occupier of grounds kept and used for the purpose of betting. The appellant did not open, keep, or use the field for the purpose of betting with persons resorting thereto, and therefore the conviction was wrong. The cases relating to owners or occupiers—viz., *Eastwood v. Miller* (sup.), *Haigh v. The Corporation of Sheffield* (31 L. T. Rep. N. S. 536), and *Reg. v. Cook* (51 L. T. Rep. N. S. 21; 13 Q. B. Div. 381)—do not apply. [Lord COLERIDGE, C.J.—How do you get over the words in the 3rd section “or other place or person using the same.”] Those words must be read as “person using the same as owner or occupier.” The appellant did not keep or use this field for the purpose of betting, within the meaning of the Act. In *Galloway v. Maries* (45 L. T. Rep. N. S. 763; 8 Q. B. Div. 276) the respondent stood upon a small wooden box at a race meeting and remained there during the meeting making bets with different persons; and in *Shaw v. Morley* (19 L. T. Rep. N. S. 15; L. Rep. 3 Ex. 137) the appellant, at Doncaster races, made bets with different persons from a wooden structure which had been erected for the use of betting men. Both were held to come within the meaning of “place” as defined by the 16 & 17 Vict. c. 119, s. 3. So also in *Bows v. Fenwick* (30 L. T. Rep. N. S. 524; L. Rep. 9 Q. B. 339) the appellant took up his position at a race meeting under a large umbrella which he fixed in the ground by means of a spike, and it was held this was a “place” within the same section. He cited also

*Doggett v. Cattarns*, 12 L. T. Rep. N. S. 355; 19 C. B. N. S. 765.

There was no “place” kept or used by the appellant, as the case states he freely moved about in the reserved ground.

The respondent did not appear.

*Cur. adv. vult.*

*March 4.*—SMITH, J.—This case was argued before Lord Coleridge and myself, and I have now to deliver the judgment of the court. The question for our determination is whether, under the circumstances set out in the case, the appellant could or could not have been convicted under the 16 & 17 Vict. c. 119, ss. 1, 3. He was con-

victed by the magistrates upon the authority of *Eastwood v. Miller* (sup.). We are of opinion that the conviction must be quashed. The Act was passed for the purpose of preventing persons from keeping betting houses and other places, and for the purpose of betting with persons resorting thereto. In order to constitute an offence under the statute it must be proved that the house or other place is occupied or kept by the person charged, and occupied or kept for that purpose. This is clear from the language of the first section, which runs: “No house, office, room, or other place, shall be opened, kept, or used, for the purpose of the owner, occupier, or keeper thereof, or any person using the same . . . betting with persons resorting thereto.” The Act does not make it an offence for persons to resort to such places; it is aimed at the owner or occupier who seeks them for the purposes mentioned. In *Shaw v. Morley* (sup.) the appellant made bets from a wooden structure erected during the races at Doncaster; it was held that he occupied an “office or place” within the meaning of the statute. So also in *Bows v. Fenwick* (sup.) a large umbrella stuck into the ground, under which the appellant stood and made bets, was held a “place;” and in *Galloway v. Maries* (sup.) a wooden box placed on the ground was held a “place.” In the present case the appellant cannot be said to have kept or used a “place,” as he simply walked about in different parts of the field making bets with the other persons who were attending the meeting. We think that the learned magistrate has taken an erroneous view of the decision of the court in *Eastwood v. Miller* (sup.). The facts in that case show clearly that the person convicted was the owner or occupier of ground which he kept or used for the purpose of betting. We are therefore of opinion that this conviction must be quashed.

*Appeal allowed.*

Solicitors for the appellant, *Purkis and Co.*, for *A. B. D. Sword*, Hanley.

*Tuesday, May 12, 1885.*

(Before POLLOCK, B. and DAY, J.)

BILLINGTON v. CYPLES. (a)

*Bastardy*—Order on putative father obtained by guardians—No application by mother for order on putative father within a year of the birth of the child—No payment by putative father to mother for support within such period—Right of mother to order more than twelve months after birth of child—35 & 36 Vict. c. 65, s. 3—36 Vict. c. 9, s. 5.

*Payment by putative father of a bastard child of money, in pursuance of an order obtained under 36 Vict. c. 9, s. 5 by the guardians of the parish or union in which the mother becomes chargeable, is not such a payment under 35 & 36 Vict. c. 65, s. 3, as entitles the mother to make an application on her own behalf for an order against the father more than twelve months after the birth of the child.*

*On the 3rd Aug. 1883 the respondent, an inmate of the workhouse of the parish of S., gave birth to a bastard child. On the 26th July 1884, while she was*

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

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still an inmate of the S. workhouse with her child, the guardians of the said parish applied for a bastardy summons against the appellant as the putative father of the child, and on 11th Aug. 1884 an order was made against the appellant adjudging him to pay a weekly sum towards the relief of the child. On the 1st Sept. 1884 the appellant paid two several sums to the guardians under the said order, but at no other time made any payment, either to the guardians or to the respondent. Subsequently the respondent discharged herself and her child from the workhouse, so that the child became no longer chargeable to the parish. On the 8th Dec. 1884 the respondent applied for a bastardy summons against the appellant. The summons was heard on the 22nd Dec., and the appellant appeared and contended that the order could not be made as the respondent was too late in her application. The magistrate, however, held that the order obtained by the guardians was practically an order obtained by the mother, and made the order in her favour, but stated a case for the opinion of the Superior Court.

*Held, on the argument of the case, that the magistrate had no jurisdiction to make the order, as the order obtained by the guardians could not be treated as though obtained by the mother, whose application on her own behalf was not made until more than twelve months after the birth of the child, and was consequently out of time.*

THIS was a case stated by the stipendiary magistrate for the borough of Stoke-upon-Trent, under 20 & 21 Vict. c. 43. The material facts of the case are as follows:—

At a petty session of the peace holden at Hanley, in the county of Stafford, on the 22nd Dec. 1884, before the stipendiary magistrate, an application for an order of affiliation made by Sarah Cyples (the respondent), against Richard Billington (the appellant), whom she alleged to be the putative father of a bastard female child, was heard, and the following facts were proved:

The respondent, who was a married woman deserted by her husband, became an inmate of the workhouse of the parish of Stoke-upon-Trent, in the county of Stafford, and while so chargeable was, on the 3rd Aug. 1883, delivered of a female child, which she caused to be registered as the child of her husband.

On the 26th July 1884, while the respondent was still an inmate of the workhouse with her said infant child, and within twelve months from the birth of the said child, the guardians of the said parish of Stoke-upon-Trent, at the instance and request of the said respondent, applied to two justices of the peace for the county of Stafford for a summons to be served upon the appellant under the provisions of the Bastardy Amendment Act 1873, s. 5, and thereupon the said appellant was duly summoned to appear at a petty session holden at Hanley aforesaid on the 4th Aug. 1884, on which day the hearing of the said summons was duly adjourned until the 11th Aug. 1884, on which last-named day an order was made by the stipendiary magistrate and one John Ridgway, justices of the peace for the said county, adjudging the appellant to be the putative father of the said child, and ordering him to pay the sum of three shillings weekly towards the relief of the

said child, and the sum of 39s., the costs incurred in obtaining the said order.

On the 1st Sept. 1884 the appellant paid to the said guardians two several sums of money—namely, 2l. 8s., the amount of the costs incurred in obtaining the last-mentioned order, and for three weeks' maintenance of the said child, and 1l. 7s. 6d. for witnesses' allowance upon the adjournment. The appellant never at any time made any other payment in respect of the said child, either to the said guardians or to the said respondent.

Subsequently to the making of the last-mentioned order, the respondent left the said workhouse with the said infant child, who thereupon ceased to be chargeable to the said parish.

No application had been made personally by the respondent to the justices to obtain an order against the appellant until she made an application to the stipendiary magistrate on the 8th Dec. 1884.

In pursuance of the last-mentioned application, the stipendiary magistrate issued his summons to the said Richard Billington, returnable on the 22nd Dec. 1884.

Upon the hearing of the last-mentioned summons, the respondent was examined on oath, and she proved that the appellant was the father of the said bastard child, and the order of the 11th Aug. 1884 was produced before the magistrate. The respondent admitted that she had never received any money from the appellant at any time, and that the statement to that effect in the application made by her on the 8th Dec. 1884 was incorrect, it being explained that the payment made by the appellant to the said guardians on the 1st Sept. 1884, hereinbefore mentioned, was the payment referred to by the respondent.

The appellant appeared on the hearing of the last-mentioned summons personally and by counsel, but no evidence was given or tendered by him or on his behalf to impeach the validity of the said order of the 11th Aug. 1884.

It was contended by the appellant's counsel that the Court of Petty Sessions had no power to make the order applied for, inasmuch as the application by the guardians on the 26th July 1884, although made within twelve months from the birth of the child, could not be relied upon as an application by the mother, and that, as the only payment made by the appellant, on the 1st Sept. 1884, was not within twelve months from the birth of the said child, the respondent was not entitled to make an application on the 8th Dec. 1884, that being also more than twelve months from the birth of the said child.

The stipendiary magistrate was of opinion that the order of the 11th Aug. 1884, having been made at the request of the said respondent while she and the child were inmates of the workhouse, on an application by the guardians, and preferred within twelve months from the birth of the said child, and as the respondent was examined on oath and gave evidence in support of that application, and as the statute under which the said order of the 11th Aug. 1884 was made, provided that such an order should be *primâ facie* evidence that the man upon whom the order was made was the father of the child, and as no evidence to impeach it had been given, he was empowered to make, and accordingly did make, the order now appealed against.

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The question for the opinion of the court was whether the magistrate was correct in point of law in his determination as above.

By 35 & 36 Vict. c. 65, s. 3:

Any single woman who may be with child, or who may be delivered of a bastard child after the passing of this Act, may either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child, had within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts.

By 36 Vict. c. 9, s. 5:

When a bastard child becomes chargeable to a union or parish, the guardians may apply to two justices having jurisdiction in the union or parish in petty sessions, and thereupon such parties may summon the man alleged to be the father of the child to appear before any two justices having the like jurisdiction, to show cause why an order should not be made upon him to contribute towards the relief of the child; and upon his appearance . . . the justices in such petty sessions shall hear the evidence of the mother, and such other evidence as she or the said guardians may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child, and they may proceed to make an order upon such putative father to pay to the guardians, or one of their officers, such sum, weekly, or otherwise, towards the relief of the child during such time as the child shall continue, or afterwards be chargeable, as shall appear to them to be proper; and any payment so ordered to be made shall be recoverable by the relieving officer, or other officer appointed to receive it, in the manner provided by the said recited Act for the recovery of payments under an order obtained by the mother. Provided as follows:

1. That no payments shall be recoverable under such order except in respect of the time during which the child is actually in receipt of relief.

2. That an order under this section shall not be made, and if made, shall cease, except for the recovery of arrears, when the mother of the child has obtained an order under the said recited Act or this Act.

*Hansell* for the appellant.—This order of the magistrate was wrong, and he had no jurisdiction to make it. The question here is whether when the guardians of a parish or union in which the mother of a bastard child has become chargeable have obtained an order against the putative father under 36 Vict. c. 9, s. 5, the mother herself can apply for and obtain an order against the father, though no money has been paid by him to the mother for the support of the child during the twelve months previous to the application. The child was born on the 3rd Aug. 1883, and the guardians made an application to the magistrate on the 2nd July 1884 for a summons against the putative father, and the order on that summons was made on the 11th Aug. 1884. The father

paid money under that order to the guardians, but not to the mother. The mother, who had discharged herself from the workhouse, made an application for a summons against the father on the 8th Dec. 1884, and obtained the order in question. The mother did not obtain the order within twelve months of the birth of the child, and the father had not paid her any money for its support within the preceding twelve months. The case finds that the mother did request the guardians to apply for the order, and the magistrate has treated the order as that of the mother, in which he was wrong. Sect. 5 of 36 Vict. c. 9, is quite distinct from sect. 3 of 35 & 36 Vict. c. 65. The latter section contemplates that the mother should make the application after the guardians have obtained their order, and when she obtains her order that of the guardians ceases to have any force. The woman may discharge herself at any time, and the guardians can get the order only so long as the child is chargeable. I submit that the order was made out of time, and that therefore the magistrate had no jurisdiction to make it.

No counsel appeared for the respondent.

*POLLOCK, B.*—I think Mr. Hansell is right in his argument, and he has cleared up the only doubt that was in my mind. That doubt was the same as that felt by the magistrate, namely, that of inconvenience arising from the fact of the woman being in the union during the currency of the guardians' order. The order obtained by the guardians cannot be treated as the order of the mother. The mother was out of time in making her application, and the magistrate had no jurisdiction to make the order, which must go back to the magistrate with the expression of our opinion.

*DAY, J.*—I am of the same opinion.

*Order set aside.*

Solicitors for the appellant, *Howard and Shelton*, for *F. R. Hales*, Hanley.

Friday, May 8, 1885.

(Before *POLLOCK, B.* and *DAY, J.*)

*WEEKES* (app.) v. *KING* (resp.). (a)

*Public Health Act 1875* (38 & 39 Vict. c. 55), s. 91—*Chimney sending forth black smoke*—Furnace constructed to consume smoke.

By the 7th sub-section of the 91st section of the *Public Health Act 1875* (38 & 39 Vict. c. 55) any fireplace or furnace which does not, so far as practicable, consume the smoke arising from the combustible used therein, and which is used for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufacturing or trade process whatsoever; and any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance, shall be deemed to be a nuisance liable to be dealt with summarily in manner provided by this Act: provided that where a person is summoned before any court in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace, the court shall hold that no nuisance is created

(a) Reported by *J. SMITH, Esq.*, Barrister-at-Law.



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*within the meaning of this Act, and dismiss the complaint if it is satisfied that such fireplace or furnace is constructed in such manner as to consume as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof.*

*An information was laid against the proprietor of a brewery, for that black smoke was from time to time sent forth from the chimney of his brewery in such quantities as to be a nuisance, and he was convicted and fined thereon.*

*Held, on case stated, that the proviso applied only to the first part of the sub-section, and not to the latter part making it an offence to send forth black smoke in such a quantity as to be a nuisance, and that the defendant was not entitled to call evidence as to the construction of the furnace.*

THIS was a case stated for the opinion of the court by the justices for the borough of Brighton, upon certain questions of law arising upon the hearing of an information preferred against the appellant, as proprietor of the Brighton Brewery, by the respondent, as chief sanitary inspector of the said borough, under the latter part of the 7th sub-section of the 91st section of the Public Health Act 1875 (38 & 39 Vict. c. 55), for that black smoke was from time to time sent forth from the chimney of the said brewery in such quantities as to be a nuisance, on the hearing of which the justices gave their decision against the appellant, and, subject to a case to be stated, convicted him of the offence charged, and imposed a fine in respect thereof.

The following were the material facts, as stated in the case, proved at the hearing:—

That the appellant was the occupier of the premises known as the Brighton Brewery in Osborne-street, Hove.

That prior to the 30th Sept. 1884 black smoke was seen issuing from the chimney of the said brewery in such quantities as to be a nuisance, whereupon the said respondent, as such chief sanitary inspector as aforesaid, caused notice as required by the statute to be served on the appellant, requiring him to abate such nuisance.

That, notwithstanding such notice, on the 30th Sept. 1884 black smoke issued from the chimney of the said brewery at certain intervals during the day, and in such quantities as to be a nuisance.

It was further proved that the said chimney belonged to the said brewery, and was not the chimney of a private dwelling-house.

It was contended by the appellant that he was protected by the 2nd proviso at the end of the 91st section of the Public Health Act 1875 (38 & 39 Vict. c. 55), and the appellant's stoker proved that in his opinion the appellant used the best coal for furnaces, but that when he made up the fire black smoke was necessarily sent forth for five or ten minutes.

Evidence was also tendered on behalf of the appellant to prove the construction of the furnace.

The justices being of opinion that the 2nd proviso at the end of the 91st section of the Public Health Act 1875 applied only to the first nuisance defined by the 7th sub-section of the 91st section, while the summons before them was in respect of the nuisance defined by the second

paragraph of such section, refused to receive evidence as to the construction of the furnace, and gave their decision against the appellant.

The questions of law upon which the case was stated for the opinion of the court were therefore:

1. Whether the 2nd proviso at the end of the 91st section of the Public Health Act 1875 applied to the offence charged against the appellant?

2. Whether the justices should have received evidence to show the construction of the fireplace or furnace?

If the court should be of opinion that the construction placed by the justices on the 2nd proviso was correct, then the said order was to stand; but if the court should be of opinion otherwise, then it was desired that the case should be remitted to them to hear the appellant's witnesses.

The 91st section of the Public Health Act 1875 (36 & 39 Vict. c. 55) is, so far as material, as follows:—

91. For the purposes of this Act . . . . .

7. Any fireplace or furnace which does not as far as practicable consume the smoke arising from the combustible used therein, and which is used for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufacturing or trade process whatsoever, and any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance, shall be deemed nuisances liable to be dealt with summarily in manner provided by this Act. Provided . . . . .

Secondly. That where a person is summoned before any court in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace, the court shall hold that no nuisance is created within the meaning of this Act, and dismiss the complaint if it is satisfied that such fireplace or furnace is constructed in such manner as to consume as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof.

*Poland* for the appellant.—The second proviso at the end of the section applies to the whole of the 7th sub-section, and the justices ought to have heard the appellant's evidence as to the construction of the furnace, and, if satisfied therewith, to have dismissed the information. If the justices are right in the construction placed by them on the section, then any chimney of a manufactory sending forth black smoke comes within the section, and it is no defence that it is being used in carrying on a trade or manufacture. The anomaly would therefore arise that, if a furnace is constructed to consume as far as possible, having regard to the nature of the manufacture, the smoke arising therefrom, it may send forth any amount of sulphurous smoke, so long as it is not black, but however scientifically it is constructed it must not be allowed to send forth even the small quantity of the less injurious black smoke necessary to start the fires. [POLLOCK, B.—Are there not two things mentioned in the section: first, the sending forth of black smoke in such quantity as to be a nuisance; and secondly, the sending forth of any kind of smoke to a greater extent than necessary?] The section was intended, while protecting the public on the one hand, to give manufacturers the amount of licence necessary to enable them to carry on their business, and it was not the intention of the Legislature, according to the proper construction of this proviso,

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to make the sending forth of any kind of smoke an offence against the Act if the best precautions are taken in the construction and management of the furnace to prevent it from being a nuisance. [POLLOCK, B.—In that case, would not the paragraph dealing with the sending forth of black smoke be surplusage?] No. It would apply in cases other than those of trades or manufactures; e.g., greenhouses, stables, or bathhouses, where inferior fuel is frequently used.

Hollams, for the respondent, was not called upon.

POLLOCK, B.—I am of opinion that this appeal must be dismissed. I entertain no doubt that the order of the justices is right, and ought to stand. By the 7th sub-section of the 91st section of the Public Health Act 1875 two distinct offences are, in my opinion, contemplated and legislated upon. I will deal with the last in order first, and I find that it is provided that any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance is to be the subject of a penalty. That, to my mind, is a clear and distinct offence. Then the other offence is the having any fireplace or furnace which does not as far as practicable consume the smoke arising from the combustible used therein, and which is used for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufacturing or trade process whatsoever. The smoke mentioned in this paragraph may be more or less injurious than the black smoke mentioned in the following paragraph, but however that may be, the Legislature provides with respect to it that it is to be reduced to a minimum. When the sub-section is once read in this manner it is clear that the second proviso at the end of the section refers to the first paragraph of the sub-section and not to the second. The appellant, therefore, cannot, I think, avail himself of this proviso to protect himself against the charge which is brought against him, and the justices were, in my opinion, quite right in refusing to receive evidence of the construction of the furnace.

DAY, J.—I also entertain no doubt in this case, and I think that the order of the justices must stand.

Solicitors for the appellant, *Clarke and Calkin*, for *Clarke and Howlett*, Brighton.

Solicitor for the respondent, *Harwood*, for *Fitzhugh, Woolley, and Barnes*, Brighton.

## HOUSE OF LORDS.

Feb. 24 and 26, 1885.

(Before the LORD CHANCELLOR (Selborne), Lords WATSON, BRAMWELL, and FITZGERALD.)

SPACKMAN v. PLUMSTEAD BOARD OF WORKS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Metropolis Management Amendment Act 1862* (25 & 26 Vict. c. 102), s. 75—"General line of buildings"—Effect of certificate of superintending architect.

On the hearing of a summons before a magistrate

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

under the *Metropolis Management Amendment Act 1862*, s. 75, for an offence alleged to have been committed by erecting a building, without the consent of the Metropolitan Board of Works, beyond the general line of buildings in the street, the certificate of the superintending architect of the board, fixing such general line of buildings, is conclusive, and the magistrate is not entitled to judge for himself whether such line is in fact the true one.

Judgment of the Court of Appeal affirmed.

*Simpson v. Smith* (L. Rep. 6 C. P. 87; 24 L. T. Rep. N. S. 100) overruled.

THIS was an appeal from a judgment of the Court of Appeal (Bowen and Fry, L.JJ., Brett, M.R. dissenting), reported in 51 L. T. Rep. N. S. 757, and 13 Q. B. Div. 878) affirming a judgment of the Queen's Bench Division (Lord Coleridge, C.J., Stephen and Mathew, JJ.), reported in 50 L. T. Rep. N. S. 690, upon a case stated by a metropolitan police magistrate.

The facts, which are set out fully in the reports in the courts below, were, shortly, as follows:—

Spackman was the owner of a house at Lee which stood back from the road, and he began to build, without the consent of the Metropolitan Board of Works, on the forecourt of the house, thus bringing it up to the road. The matter was brought before the superintending architect of the board, and he "decided," under sect. 75 of the *Metropolis Management Amendment Act 1862* (25 & 26 Vict. c. 102), what was "the general line of buildings" at the place, and that the appellant's building came beyond it, and made a certificate accordingly. A summons was then taken out before a justice of the peace, as required by the section, alleging an offence on the part of Spackman, but the magistrate (Mr. Marsham), after hearing evidence and viewing the place, decided that the line certified by the architect was not the true line, and dismissed the summons.

A case was stated for the opinion of the Queen's Bench Division, on the point as to whether the magistrate was bound by the architect's certificate as conclusive, and the court held that he ought to have convicted, and that decision was affirmed, as above-mentioned.

The section of the Act is set out in full in the report in the court below.

A. Charles, Q.C., Channell, and McCall appeared for the appellant, and contended that the question turned entirely on the construction of sect. 75 of the Act 25 & 26 Vict. c. 102, which repealed sect. 143 of the Act of 1855 (18 & 19 Vict. c. 120). Under that section, which was intended to protect the builder's interest by requiring the certificate of the architect and the order of a magistrate before buildings could be demolished, proceedings were to be taken by the vestry; but by 45 Vict. c. 14, sect. 10, the power is extended to the board itself. There is nothing in the section to oblige the architect to go and see the place before giving his certificate, which, we contend, was only intended to guide the board as to whether they should institute proceedings or not. The authorities on the point are conflicting. In 1864 there was a decision of the Court of Common Pleas in favour of the appellant's contention (*St. George's, Hanover-square, v. Sparrow*, 16 C. B. N. S. 209; 10 L. T. Rep. N. S. 504); in 1867 the Court of

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Queen's Bench took the opposite view (*Bowman v. St. Pancras*, L. Rep. 2 Q. B. 528). In *Wandsworth Board of Works v. Hall* (L. Rep. 4 C. P. 85; 19 L. T. Rep. N. S. 641) it was not necessary to decide the point, but the dicta of the judges are in the appellant's favour; and in 1871 the Court of Common Pleas adhered to their former opinion in the case of *Simpson v. Smith* (L. Rep. 6 C. P. 87; 24 L. T. Rep. N. S. 100). See also *Paddington v. Snow* (45 L. T. Rep. N. S. 475). The contention on the other side is that the builder is absolutely bound, whatever the decision of the architect or the board may be, and that the certificate cannot be reconsidered, even if, as we say was the case here, the line was drawn upon imperfect data; but it cannot be supposed that the Legislature intended to give judicial functions in such a matter to a person who is, in fact, the servant of one of the parties to the litigation. The language of sect. 9 of the Act of 1882 (45 Vict. c. 14) shows that they intended to adopt the law as laid down in *Simpson v. Smith* (*ubi sup.*).

*Willis*, Q.C. and *Lawson Walton* (the *Solicitor-General*, Sir F. Herschell, Q.C., with them), for the respondents, argued that if the appellant's argument was correct, it led to the absurd result that, if the architect and the magistrate differed, the latter could only order the demolition of the building as far as the architect's line, which, in the case supposed, he would have decided was not the true line. The architect must decide after a public hearing of the parties, or his finding might be quashed:

*Cooper v. Wandsworth Board of Works*, 14 C. B. N. S. 180; 8 L. T. Rep. N. S. 278.

This provision secures uniformity and fairness for all parties, and the argument on the ground of hardship fails. The architect has only to determine a technical question of fact. They also referred to *Tear v. Freebody* (4 C. B. N. S. 228).

*Charles*, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships gave judgment as follows:—

THE LORD CHANCELLOR (Selborne).—My Lords: Your Lordships have thought it desirable to hear this case through all the arguments, having regard to the state of authority upon the matter. Very eminent judges have differed in opinion upon this question. I do not count them upon one side or upon the other, because of the maxim *Ponderantur et non numerantur*. But it was thrown out in the course of the argument for the appellant that your Lordships ought to reverse the judgment of the Court of Appeal and of the Queen's Bench Division, merely because the state of the authorities was as the learned counsel for the appellant have represented. A more hopeless suggestion I never remember to have heard. The state of authority is this, that the Court of Common Pleas on more than one occasion expressed an opinion favourable to the view now submitted by the appellant, and adhered to that opinion though a contrary opinion was expressed unanimously by three judges in the Court of Queen's Bench. They adhered to that opinion not without the intimation of an opposite view by one of their most distinguished members. In that state of authority the matter came before the courts in this case, and there were two judgments, both in favour of the respondents, one of

them the judgment of the Divisional Court, which was unanimous, and the other of them a judgment of two judges to one in the Court of Appeal. For the appellant, in that state of authority, to say that your Lordships have any other duty to perform than to decide as well as you can the question of law upon the merits, which really turns altogether upon the construction of the statute of 1862, is, as I said before, a very hopeless contention. I will now look, as I think your Lordships must, to the words of that statute, and see what, according to the ordinary principles of construction, is their reasonable and natural meaning. I will not, in the first instance, refer to the earlier Act of 1855, though when I come to consider some of the reasons which have been given on the appellant's part I may have occasion to do so. Clause 75 of the Act of 1862 may be divided into what I may call four parts. The first contains the words of prohibition, which constitute an offence; the second contains the words providing for a complaint founded on that offence, which is to be made to a justice of the peace; the third relates to the manner in which the justice of the peace is to proceed; and the fourth to the order which he is to make. Now, the words which constitute the offence are, as I conceive, those which begin thus: "That no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate," and which end with the words, "such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being." Those words which your Lordships have to construe enter into the constitution, I will not say of the offence, because the offence is, of course, the act done by the offender, but the constitution of the prohibition on which the offence is to be founded; and if the prohibited thing is done, the offence, *primâ facie*, is committed. The word "decided" has a very plain, intelligible, and natural meaning unless displaced. In the first place, it goes to the definition of the circumstances which are to exist before an offence can be committed; secondly, "decided" implies that there is matter which may admit of difference which may require determination. *Primâ facie*, that would mean determination to bind those who are to be affected by it. And if the Legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, *primâ facie*—especially when it goes, as here, to the constitution of the case provided for—that would be binding. What I have said upon that subject may, I think, be usefully illustrated by a class of cases different in this respect, that they depend upon contract and not upon statute, but which may very well be applied to illustrate the operation of such words in a statute, bearing in mind that a statute of this kind made in the public interest, and not without a fair and equitable view of the right of all parties, is something higher than contract, and, *primâ facie*, there is no reason whatever why we may not proceed upon and adopt the same principles which the law will apply to contracts. In *Scott v. Avery* (5 H. of L. C. 811) the question had to be considered upon the

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general rule of law that people could not by contract oust the jurisdiction of courts of justice, on which had been founded a series of decisions, independent, of course, of recent statutes, as to the extent to which the courts would or would not enforce agreements to refer questions capable of litigation in the courts to arbitration. The court had to determine whether that principle was applicable to a case in which it was part of the contract itself that the right of action, so to say, before it could arise was to be ascertained by the decision of arbitrators; that is to say, the right itself, the constitution of the right, was not to be perfect and absolute under the contract until arbitrators had decided something. The court held that that was perfectly good, and that, until in that case such a decision had been made, no right upon which an action could be founded arose. And Lord Campbell, in the course of his judgment in this House, referred to a case specifically of a different kind, which, however, he thought to be identical in principle, namely, the case of *Brown v. Overbury* (11 Ex. 715), which "was an action on a horse race. The winner, who had contributed to the sweepstakes, said that his horse had won, and brought an action against the stakeholder to recover the stakes. But it was a condition of the race that if any dispute arose the stewards should decide. He first attempted to say that the stewards had decided; but it turned out that the stewards had not decided, for they differed in opinion. Then he attempted to show that his horse had won. But the judge held that he could not go into that; that even if the horse could clearly be shown to have won, the action had not accrued till the arbitrators, the stewards, had determined; and so the plaintiff was nonsuited. The case was brought before the Court of Exchequer, and the judges of that court unanimously concurred in the ruling of the judge at Nisi Prius." It seems to me that it is plainly to be inferred from the language of the statute that before the offence can be made the subject of any controversy, and in order to determine whether an offence has been committed or not, this material question, "What is the general line of buildings?" is to be decided by the superintending architect. There must be a general line of buildings, otherwise there can be no transgression of the prohibition against building at more than a certain distance from that line. As that general line of buildings may, under certain circumstances, admit of controversy, the Legislature thought it necessary to say how it should be settled and decided, and it accordingly has said so; and if there were no more than that, I should say that the general line of buildings mentioned in this section is, and is nothing else than, a general line decided in case of controversy or difference between the person who wants to build and the Metropolitan Board, by the architect of the Metropolitan Board. Then the section proceeds to enact that "in case any building, structure, or erection be erected, or be begun to be erected or raised without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district" (a later Act has added the Metropolitan Board), "to cause to be made complaint thereof before a justice of the peace." What is the subject of the

complaint? In the case in which the consent previously mentioned is necessary (for that, although not expressed with the fullness with which it might have been expressed, is unavoidably to be inferred from the words of reference) the complaint is made not as to there being or not being a certain line, but of building without the requisite consent. Of course, if no line of buildings has been laid down, the complaint will fail, because the words requiring consent cannot be applied to the case; but if the line has been laid down then with reference to that line a certain consent is necessary, and the whole complaint is of building without the requisite consent. Then the justice is to issue a summons requiring the party to appear and answer the complaint; and then "if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, he shall make an order." Now on those words and on those alone, "if the said complaint shall be proved to the satisfaction of the justice," the argument is founded that the justice is to consider for himself what line ought to be laid down as the general line of buildings in the place, street, or row, and if he does not agree with the line laid down by the architect he is to act upon his own view. The thing which he is to consider is that here has been a building without consent or in violation of the terms on which consent may have been given. No doubt, in order to make that out, a good many things must be proved before him; and one thing to be proved before him is, as Fry, L.J. points out, that the architect of the Metropolitan Board of Works has decided the general line of buildings. If that has not been done, no doubt the complaint will be dismissed, but if it has been done, then that part of the circumstances which under the prohibitory portion of the clause are necessary to make out the case of the complainant is proved, and there is not a single word to say that the justice is to go into the question. That being proved, and it being also proved that the prescribed distance from that line has been exceeded, and that there has been no consent, or that the terms of the consent have not been adhered to, it is not to be inferred that, everything which is necessary to show a prohibition of the act being proved, he is to go into something more for which no authority or jurisdiction is expressly given. But if it were necessary we have more, because the fourth part of the clause, which relates to the order to be made by the justice is this: Upon this proof he "shall make an order in writing on such owner or occupier, builder, or person directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid." The only words which fix the line at all are those words "such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being." So that it is plain upon the face of it that the justice is to proceed on that line "so fixed as aforesaid," fixed by the architect; and, as I understand the reasoning of the learned judges who have taken the view that the magistrate may himself go into the question of what line ought to be fixed, it appears to me to result in something very strange, in what I may describe as the theory of two lines,

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both to be considered by the justice in the discharge of his duty, namely, one his own line and the other the architect's line. If we were to regard one line, and not both of them, at least a consistent interpretation would be given. Only one line is spoken of in the clause, "the said general line so fixed as aforesaid;" and as I read the opinions by which the judges in the Court of Common Pleas have endeavoured to reconcile their view with the words of the statute; and to obviate, as it seems to me, the very just criticisms made upon them by Cockburn, L.C.J. and the other judges of the Court of Queen's Bench in *Bouman v. St. Pancras* (L. Rep. 2 Q. B. 528), they say that they do read the words, "the said general line so fixed as aforesaid" as referring to the architect's line, and that they hold that if the architect's line is in advance of the justice's line, then the justice can only order the buildings to be demolished down to the architect's line, though the real excess of the prescribed distance from what the justice holds to be the true line may be still greater—that he is bound to stop there. But supposing, on the other hand, that the justice's line is in advance of the architect's line what is he to do? The case is one of some excess, which, according to the general policy of the statute, ought to be abated. The justice is bound by the architect's line; he cannot order a demolition except with reference to the architect's line; but if his own line is in advance, the appellant's counsel say that he is to dismiss the summons. Then it appears to me that matters come to a regular deadlock. The statute nowhere says that what a justice upon such a summons may have determined is to bind the architect; and when the statute says that the architect is to decide the line of building, it appears to me to impose upon him a duty to decide it to the best of his judgment, independently and impartially. Accordingly, it is suggested by the appellant, that if the summons is dismissed under the circumstances which I have stated on this theory of a double line, the matter is to go back, and the architect is to reconsider his decision. But supposing that the architect adheres to his decision, and repeats it in the same or in another case, then the same process is to be repeated. The matter goes to the justice, who is absolutely bound, as to any order which he is to make by the architect's line, and can only make it with reference to the architect's line; and therefore I say if the justice and the architect do not agree, the object of preventing undue encroachment upon the frontage, which is an object evidently thought important by the Legislature, beneficial to the public, beneficial to the adjoining owners, and at all events proper to be provided for, becomes entirely defeated. The learned counsel have argued the case extremely well, as might have been expected. I think it was Mr. Channell who particularly insisted upon the argument from silence as to how the architect was to proceed. It appears to me that that argument is of no greater weight under such a clause in such a statute than it would have been under such an agreement as that which I have read, which was in question in the case of *Brown v. Overbury* (*ubi sup.*), where it was a condition that if a dispute arose the stewards should decide. No doubt in the absence of special provisions, as to how the person who is to decide is to proceed,

the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him, and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially, and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice. But it appears to me to be perfectly consistent with reason, that the statute may have intentionally omitted to provide for form, because this is a matter not of a kind requiring form, not of a kind requiring litigation at all, but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him. When that is done, from the nature of the questions, and the nature of the case, no further proceeding as to summoning the parties, or as to doing anything of that kind which a judge may have to do, is necessary. Therefore, this argument as to silence does not appear to me to be one of any real weight, and I adopt, without repeating them, the observations upon it which are made by Fry, L.J. But the great respect which I feel for those who have taken a different view makes it necessary that I should advert to some considerations which have weighed with the learned judges who have adopted the appellant's view. The first reason for taking that course is that which is several times repeated by Brett, M.R., namely, that the construction which would make the architect's decision of this matter final would work manifest and gross injustice. I am not at all able to follow the grounds on which that conclusion is arrived at. Why should it be unjust? If for public interests it is desirable to prevent one man from doing what may be injurious, perhaps by unduly contracting the public space, to the health or the light of his neighbours, or at all events, injurious to his immediate neighbours by interfering with the amenity of their residences and the external beauty and appearance of a line of buildings in a public street, why should it be unjust that the Legislature should have enacted a reasonable and definite way of deciding that question without litigation? Is it not right? But then it is said that it is unreasonable that the architect of the Metropolitan Board of Works should be selected for those purposes, because he is their servant and is supposed to be under their influence. I do not follow that argument either. Who are the Metropolitan Board of Works? They are a very important public body established by the Legislature for the general superintendence of public interests, and the aggregate or several aggregates of private interests which ought to be regarded in matters relating to the metropolitan district. They are perfectly disinterested, and it is to be presumed, as *prima facie* it should be of all public functionaries, that they can be trusted with the powers and the duties which have been confided to them. Why should it be supposed that such a board would exercise undue pressure or influence

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for any sinister purpose, or otherwise than is consistent with impartial conduct, upon the architect, even if he ought to be denominated their servant, and as entirely under their influences for the purpose of leading him to do something which is unfair or wrong? I do not see it; I do not believe it. I think that there is no ground for any such suspicion or surmise. Nor does it appear to me to be quite free from fallacy to describe the architect as that sort of servant who *primâ facie* may be thought to be under undue pressure or influence from his employers or superiors. He is a statutory officer, whom the makers of the same statute which constitutes the Metropolitan Board of Works and gives their powers think is a proper officer to take part in the execution of those powers. He must be a man of intelligence and a man of position. All the presumption is against the idea that when upon himself, and not upon his employers, a duty is imposed by the Legislature, he would discharge that duty partially, for the purpose of pleasing his employers, even if there were more ground than in this case there possibly can be for suggesting any motive in the employers which would lead them not properly to discharge their duty. I cannot, therefore, look upon that argument as one of any weight. Then there is the question whether anything turns upon this matter being determined after the building is erected. I do not think that any consideration, for the present purpose, arises out of that. The Legislature has not said either that the decision must be made before the building is erected, or that the decision must be made after the building is erected. It is clear, therefore, upon the words of the Legislature, that it may be made before or after; and if the person who builds may be put at some disadvantage, and may incur some risk, supposing the decision not to be made until after the building is erected, whose fault is that? I submit that it is entirely his own. He knows that he is building in a street, place, or row of houses within the meaning of this clause, of which he must be taken to have had notice. He knows that if he builds beyond the prescribed distance of the general line he will be liable to certain consequences, unless he gets the consent of the Metropolitan Board; and he knows that he will be bound by the general line when decided or fixed in the manner which the statute prescribes. If he chooses to be safe, what has he to do? Simply to ascertain what that general line is before he builds; and the statute points out to him how that is to be done. He is to get the decision, and it is to be presumed that he will apply to the proper authority for it. If it is decided afterwards, and decided in a manner consistent with justice, and he has to pull his building down, whom has he to blame but himself? If the architect is to determine what he is or is not to demolish when the building is erected, by the appellant's construction of the statute he endeavours to escape from that consequence. He is in that plight. When the nature of the subject is regarded, there is a considerable preponderance of reason in favour of a decision of the matter by such an authority as the architect, rather than by the particular justice of the peace before whom any particular complaint may be brought. In the first place, let us consider the nature of the fact to be determined. Brett, M.R. has spoken

of it as if it must be that the statute assumes that there is a general line in fact. With certain qualifications I see no reason to differ from that. But that general line, in certain circumstances, may be one which the facts existing independently of any judgment are not enough to determine. Nothing can better illustrate it than the very difference which in this case has existed between the magistrate and the architect. What is that difference? What is the extent of the area in the road, the street, or the line of buildings, which is to be taken into account, and from which, measuring in a certain way, the matter is to be determined? The architect in this case has practically treated the row of continuous, or nearly continuous buildings, as all that he ought to consider for this purpose. The magistrate has been led to extend his consideration much further right and left; and why he should stop at the particular points at which he does stop does not very clearly appear; certainly not, I think, from anything which is already determined *in rerum naturâ*. So that as to the extent of the space along which a line is to be laid down there is a judgment. With regard to the line itself within that space, if there is a row of houses along the whole of that space built in a regular mathematical line as to which each person can have no doubt, the fact is already determined, and there is no room for a judgment. But if the buildings within that space are irregular, if one house projects beyond another, or one block of houses projects beyond others, or if there is anything breaking the line, then in the nature of the case there is need of a judgment. And what better judgment than that of the architect of the board—an expert in matters of this description—can be conceived? It is *à priori* so plain as to alter what otherwise would be the proper construction of the statute, that a justice of the peace is a better and more competent judge of these matters than an architect? Supposing that the Act of 1855 had simply permitted this within a certain distance of a regular line of houses, and had not said how that line was to be ascertained, and had authorised the vestry or the district board to pull down any buildings erected beyond that line—in other words erected beyond what they judged to be that line—and then, supposing that the propriety of their action was questioned, an action of trespass would be brought against them, and a jury would have to determine, after the buildings had been erected and after they had been pulled down, whether they had or had not exercised a reasonable judgment upon these questions as to which I have already said that they are proper and fit to be considered by the architect. The Legislature thought that that was not a satisfactory state of the law, and they altered it in the Act of 1862. First, they took the cognisance of the matter from a jury altogether; and, secondly, they provided for the decision and the fixing of the line. And now we are asked to make that decision subject to the review of any justice of the peace; and if he does not agree with the architect the line is to be unfixed and an essential change is to be made in the matter. Let us see what are the comparative conveniences and inconveniences of the one construction and of the other. I have already pointed out that if the architect is to be the tribunal the justice can do nothing except



keep to the architect's line; and if he dismisses the summons the architect cannot be compelled to go against his own judgment. If the justice is to determine the matter, then you may have a varying judgment. Mr. Marsham thought that he ought to go a considerable distance to the right and left, and to take in the stables and the chapel. An exactly similar question might come before another justice as to another case within those limits, and he might say, "I cannot at all agree with that view. I am not bound by Mr. Marsham's decision. I think that the line is different." He might agree with the line of the architect. So that you have a case in which the very nature of the matter points to uniformity, and in which unity of judgment is desirable; you have the one construction providing for that unity, as far as may be, by committing the decision to a man in the position of the architect of the Metropolitan Board of Works, a competent skilled person, who is to decide in every such case; whereas, in the other case, many complaints may be made before as many justices of the peace as the questions raised, and there is no provision for securing uniformity at all. Then there is another point. If the matter is to depend upon the justice, the builder and the board cannot go before the justice until the building has been erected, and you have the same inconvenience which arose under the Act of 1855; whereas, if the architect is to decide, the two parties may settle any question before the architect before any expense has been incurred or anything has been done. These considerations appear to me to show not only that there is no injustice, but that there is no unreasonableness in the construction of the clause which has been adopted by the majority of the learned judges below; and if I were to trust my own opinion, I should say that there is a considerable preponderance in favour of that construction. It seems to me to be collected from the true interpretation of the words which the Legislature have used, and the judges from whose decision this appeal is brought that it was right. For these reasons, I propose to your Lordships to affirm the order appealed from, and to dismiss the appeal, with costs.

LORD WATSON.—My Lords: I have listened very attentively to the arguments at the bar, with deference to those eminent judges of the Common Pleas with whom the arguments of various kinds found acceptance, but I cannot say that upon consideration they have raised in my mind any doubt that the judgment under appeal is right. The 75th sect. of the Act of 1862 gives to the owner of land abutting upon a street or road, as I read that section, an absolute right to build within two limits varying according to circumstances. If the building line be at a distance of more than fifty feet from the highway, then he has a right to build up to that fifty feet, irrespective of any building line existing. If, on the other hand, the general line of buildings in the street be at a distance of less than fifty feet from the highway, that general line is the limit of his approach towards the highway. Within these two limits his right is absolute. The one of fifty feet is a hard-and-fast line drawn by the Legislature; the other, the general building line, may or may not be in existence. It may be a very obvious fact; it may, in some localities, and

under certain circumstances, be a fact requiring to be decided by a man of skill upon consideration of these circumstances, and accordingly the Legislature, with a view to that particular line being indeterminate in the sense which I have expressed, have prescribed that it shall be decided by the superintending architect of the Metropolitan Board of Works. The first part of the statute, which involves that licence to owners to build up to these lines, also contains (and that is the substantive part of the enactment) words of prohibition—it prohibits building between one or other of these lines, as the case may be, and the highway, without the consent of the Metropolitan Board. I need not deal with the case of the building line being more than fifty feet from the highway, but will confine myself to the case before the House, where, on the admission of both the parties, the building line is not beyond that limit, and therefore forms the extreme verge of the appellant's absolute right. Confining myself to a prohibition which applies to such a case as that, the plain words of enactment contained in the section appear to me to run thus: That it shall not be lawful to build, without the consent of the Metropolitan Board of Works, beyond the general line of buildings to be decided by the superintending architect of the board. That is the prohibition, referring to a particular line, and that the line to be decided by the architect of the Metropolitan Board of Works. Now, the clause proceeds to declare what the offence is, to be tried by a magistrate, and to confer power upon the magistrate to try the offence; and upon its being proved to give the appropriate remedy. Well, the offence in respect of which a complaint may be presented is building without such consent; that is to say, building without the consent upon that portion where it is prohibited, namely, the space intervening between the line decided by the architect of the Metropolitan Board of Works and the highway; and that is the complaint which the magistrate is to try. If he is satisfied that that is proved in all its parts, and that buildings have been erected upon that area beyond that line and without consent, then he is empowered to order demolition of the buildings in so far as they may be beyond the line "fixed as aforesaid." That I take to be the line fixed by the architect of the Metropolitan Board of Works, excess beyond which line is prohibited, and declared to be matter of complaint to be tried before the magistrate. I listened to the arguments in the expectation of being directed to some words of doubtful import, and susceptible of a double meaning. So far as I can judge, the words which are cited have one meaning and one only, and upon these leading words, which enact the prohibition, which constitute the offence, and which direct the remedy, there is no ambiguity whatever. They have a plain and ordinary meaning, to which effect has been given by the courts below in this case, and, as far as I can see, they have no secondary meaning such as that suggested. That which is suggested is that in the language of the clause which confers upon the magistrate jurisdiction to try the complaint you can find expressions which may be amplified so as to override those other words enacting prohibition, defining the complaint, and giving the remedy. And what are these words? "If at the time and place appointed in such summons the said complaint



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shall be proved to the satisfaction of the justice." Now it is said that you may read these words as signifying that the justice is to retry everything which has been decided before. But a more singular suggestion in the construction of a clause in an Act of Parliament I never heard. That is a relative provision. You must refer back to the preceding words of enactment. You must go back to the prior part of this clause for the purpose of finding out what the complaint is which he is to try, and you cannot, by putting an ingenious construction upon that language, and enlarging it, use that expression so as to qualify and override these previous plain words of enactment from which this provision of reference takes its meaning. Therefore, I think this is not a case in which upon considerations of hardship you should let in and put upon the plain language of the clause a meaning which is not the primary meaning of the words used by the Legislature. I doubt, even if a case of hardship should exist—as some of the learned judges in questions similar to this have supposed it to exist—whether it could be seriously entertained for the purpose of refusing to give the proper meaning to the words of the clause; but, as far as I am concerned, I am perfectly satisfied in my own mind that no such injustice necessarily exists. That one tribunal is preferable to another is no reason whatever for discarding the words of the statute, and when the courts are of opinion that the Legislature has chosen the worst of the two tribunals, it is an opinion which I can only say does not exist in my own mind. I am by no means satisfied that a decision by a gentleman in the position of the superintending architect of the Metropolitan Board of Works is likely to be less favourable to the interests of all parties concerned, or is less likely to attain the ends of justice than a series of decisions by a number of district magistrates. I agree with all the observations which have been made by the Lord Chancellor upon this part of the case, and I have no hesitation in concurring in the motion made by his Lordship.

Lord BRAMWELL.—My Lords: I adopt the judgment of Mathew, J., and, with one exception, I will add nothing to it. He says: "The effect of the decision of the Common Pleas appears to me to be to strike out of this section the very significant words, 'the general line of buildings so fixed as aforesaid.' With deference to the very great judges who pronounced the decision in the Common Pleas," and I add to the Master of the Rolls, "I consider that there is no ground whatever for discarding those words. I think that those words were inserted advisedly for excellent reasons, and that we must give effect to them."

Lord FITZGERALD concurred.

*Order appealed from affirmed; and appeal dismissed with costs.*

Solicitors for appellant, *Saw and Son.*

Solicitor for respondents, *George Whale.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

Thursday, Dec. 11, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

REG. on the prosecution of THE GUARDIANS OF THE POOR OF THE MERTHYR TYDVIL UNION v. THE GUARDIANS OF THE POOR OF THE STEPNEY UNION. (a)

*Poor law—Settlement by residence—Pauper a sailor—39 & 40 Vict. c. 61, s. 34.*

*A pauper, who was born in the appellant union, from 1876 up to the time of his application for relief was a sailor in the merchant navy, serving on board different ships and on different voyages. Between the different voyages he always returned to his mother's house in the respondent union, remaining there on an average for four or five weeks in each year. In 1881 he also obtained jobs on shore which lasted about three months, during which time he came to his mother's house in the respondent union, from Saturday to Monday in each week. When away he invariably left some of his clothes and other belongings at her house, and also brought to her a portion of his earnings as a contribution towards the expenses of the house, but he had no separate bedroom or bed there. In 1858 the pauper became afflicted with blindness, returned to his mother's house, and then sought parish relief. The justices made an order that he was settled in the appellant union, and directed that he should be removed there.*

*Held (affirming the judgment of the Queen's Bench Division), that the justices were right in holding that the pauper had not a residence, and therefore had not acquired a settlement in the respondent union, and had not become irremovable from there, and that he was settled in the appellant union.*

THIS was an appeal from a judgment of Stephen and Mathew, JJ. (reported 50 L. T. Rep. N. S. 822), affirming an order of the Glamorganshire Quarter Sessions by which, subject to a case stated, a pauper had been adjudged to be settled in and had been ordered to be removed to the appellant union, the Stepney Union.

The facts are fully stated in the report in the court below, where the case stated is set out at length, and for the purposes of this report it is only necessary to refer to the facts stated in the head note, and to add that the Queen's Bench Division affirmed the order of the justices.

The Stepney Union appealed.

*B. F. Williams* for the appellant union.—The question is, whether the pauper had resided in the respondent union in such a manner as to acquire a settlement therein under 39 & 40 Vict. c. 61, s. 34. Here the facts show that whenever he was in England he resided at his mother's house, and that he contributed to the household expenses; he evidently intended to make her house his home, and had the intention of returning thither; if so, the fact that he was not much there does not prevent that place being his residence:

*Reg. v. Brighton*, 4 E. & B. 236.

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

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He also cited

*Reg. v. St. Leonard's, Shoreditch*, 13 L. T. Rep. N. S. 278; L. Rep. 6 Q. B. 21;  
*Reg. v. Abingdon*, 22 L. T. Rep. N. S. 603; L. Rep. 5 Q. B. 408.

*W. Evans*, for the respondent union, was not called on to argue.

BRETT, M.R.—I agree with the judgments in the court below, and it seems to me that the case presents no difficulty whatever. I must, however, protest against the way in which this case has been stated for the opinion of the court. The justices ought to have drawn the inferences from the facts, and then referred the question of law to the court; but in this case they state certain facts and ask the court to draw therefrom inferences of fact. I shall deal with it in this way: I shall assume that the justices found that the pauper never was resident in the parish of Aberdare, can we then say that that is wrong in law? Or, if I do that which the justices ought to have done, and attempt to draw inferences from the facts, can we then say that the pauper resided at all in the parish of Aberdare? Now the history of this man is given at some length in the case: he appears to have lived with his mother before he took to a seafaring life, and to have come back from time to time and lived with his mother between his voyages, and it also appears that when he thus returned and visited his mother he gave her some of his money. Can we say from these facts that he ever resided in the parish of Aberdare? Many cases have been cited, and some abstruse questions have been raised upon the point of constructive residence, but this question is really one of fact, and I do not see that any cases can be of much use in assisting us to solve it. Had the pauper, in fact, any residence in this parish? In my opinion the facts show plainly that he had none. His calling rendered him a nomad; he was resident in no parish in England, but when he came home he visited his mother in her house, she kept the house and paid the expenses, and anything that he gave her was a pure gift on his part; therefore I think that neither for one year, nor for any part of a year, was this man resident in this parish. The case of *Reg. v. St. Leonard's, Shoreditch*, was cited to show that a person may reside in a parish where, in fact, he has no house or habitation; but that case was decided upon the ground that the pauper in question had never ceased to reside in the parish. The judgment of Blackburn, J. shows that the *animus revertendi* was not the ground of the decision, but that the pauper had never ceased to reside in the parish, and that that was the basis of the judgment of the court. In this case, as I have pointed out, the man had no residence at all, he only visited his mother; and therefore, I think, he never obtained a settlement in the Merthyr Tydvil Union.

COTTON, L.J.—I am of the same opinion. I think the word "residing," as used in 39 & 40 Vict. c. 61, s. 34, means that a person is in the place as his residence, and is not satisfied by a person being in a place merely as a visitor. I think it is plain that this pauper was never in the parish of Aberdare as a resident, but always as a visitor. As regards the case of *Reg. v. St. Leonard's, Shoreditch*, I just wish to point out that Cockburn, L.C.J. does not base his decision

upon a continuance of constructive residence, but upon the fact that the pauper never left the parish: "I say," he says, "the pauper never left the parish," and Blackburn, J. emphasises this view of that case in a remark during the argument of *Reg. v. Glossop* (13 L. T. Rep. N. S. 672; L. Rep. 1 Q. B. 227).

LINDLEY, L.J.—I am of the same opinion. I think the question is one of fact, and upon the facts I think this pauper resided nowhere, and certainly not in this parish of Aberdare.

*Appeal dismissed.*

Solicitor for appellants, *W. H. Sweepstone*.

Solicitors for respondents, *J. H. Wrentmore* for James and Co., Merthyr Tydvil.

Monday, May 4, 1885.

(Before Lord COLERIDGE, C.J., Sir JAMES HANNEN, and LINDLEY, L.J.)

REG. v. WHITFIELD AND ANOTHER. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Lunatic—Examination of, by justices—Order sending to asylum—16 & 17 Vict. c. 97, s. 68.*

An information that one H. (not a pauper) was deemed to be a lunatic was laid before two justices who instructed a medical man to go and see him. Upon a medical certificate that H. was of unsound mind being given, he was arrested and conveyed in a carriage to the justices. The justices had not ordered him to be arrested or brought to them. They had long known H., but on this occasion they only saw him in the carriage, and only a few words passed between them. They signed the usual order for his reception into the asylum and he was accordingly removed.

Held, by Grove, J. and Huddleston, B., that this was not an "examination" within the meaning of sect. 68 of 16 & 17 Vict. c. 97, and that the order of the justices was therefore invalid.

Held by Sir James Hannen and Lindley, L.J., reversing the above decision (Lord Coleridge, C.J. dissenting) that the statute does not require the examination by justices to be made in a judicial manner, by giving notice to the alleged lunatic of the charge against him, and taking evidence on oath in his presence, and giving him an opportunity of explaining his conduct or producing evidence, and does not require the examination by the justices to be made in the presence of the medical man, and that the examination which had been made was a real one within the meaning of the statute, and therefore the justices had jurisdiction, and their order was valid.

THIS was a rule for a *certiorari* to remove into the High Court an order of justices, directing a lunatic not a pauper to be conveyed to the county lunatic asylum at Hayward's Heath.

The affidavits on which the rule was obtained set forth as follows:—

The applicant, Mr. Charles Hillman, was sixty-seven years of age, had been all his life resident at Lewes, and possessed of ample means of support. He was sitting down one day in his own house to eat his dinner when he was told that "a

(a) Reported by DUNLOP HILL and P. B. HUTCHINS, Esqrs., Barristers-at-Law.

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person of the name of Tucker" wanted to see him. He said he was about to eat his dinner and did not want to see "Mr. Tucker." Thereupon he was told that "Mr. Tucker," who turned out to be a constable, wanted to see him, and that if the door was not opened it would be broken open. It was not opened, and it was broken open, and Tucker entered and seized Mr. Hillman and conveyed him to the Sussex Pauper Lunatic Asylum at Hayward's Heath. He was so taken under an order signed by two magistrates—Mr. G. Whitfield, a county magistrate, and Mr. Thorne, the mayor of Lewes, also a magistrate; and on a certificate given by Dr. Crosskey, a medical man in the town, and by one Shelley, the relieving officer of the union. The document was on a printed form, and it was in these terms, purporting to be issued under the Lunacy Act, 16 & 17 Vict. c. 97:

Order for the reception of a pauper patient. Schedule B., No. 1, sect. 7. We, George Whitfield and Joseph Thorne, Esqs., the undersigned, having called to our assistance a surgeon, and having personally examined Charles Hillman, who is not a pauper, and being satisfied that the said Charles Hillman is a person of unsound mind and not under proper care and control, and a proper person to be taken charge of and detained under care and treatment, hereby direct you to receive the said Charles Hillman as a patient into your asylum. Subjoined is a statement respecting the said Charles Hillman. George Whitfield, magistrate for Sussex, J. Thorne, magistrate for Lewes. Dated the 24th Nov. 1884. To Dr. S. W. D. Williams, medical superintendent of the Sussex Lunatic Asylum, Hayward's Heath.

Statement (printed form.) (If any particulars in this statement be not known, to be so stated.) Name of patient?—Charles Hillman. Sex and age?—Male; 67. Married?—Single. Condition of life?—Gentleman. Religious persuasion?—Church of England. Previous place of abode?—Friars-walk. Whether first attack?—Yes. Age on first attack?—67. When and where previously, and cure?—Nowhere. Duration of existing attack?—About a week. Supposed cause?—Hereditary. Whether subject to epilepsy?—No. Whether suicidal? No. Whether dangerous to others?—No. Parish or union to which the lunatic is chargeable?—Lewes Union. Name of nearest known relative?—Cousin: Robert Hillman, Esq., 104, High-street, Lewes.

"I certify that, to the best of my knowledge, the above particulars are correctly stated.—Francis Shelley, relieving officer."

(Medical certificate.)—I, the undersigned, Walter Francis Crosskey, being a doctor of medicine of the University of Glasgow, and being in actual practice as a surgeon, hereby certify that I, on the 24th Nov. 1884, at the Fitzroy Library, Lewes, personally examined Charles Hillman, of Friars-walk, and that he is a person of unsound mind, and a proper person to be taken charge of and detained under care and treatment, and that I have formed this opinion upon the following grounds, viz. (1) Facts indicating insanity observed by myself:—His general appearance and hurried and confused manner of talking indicates insanity. He rambles from one subject to another, and says that there is a conspiracy against him of a political character; that the chief attendant of St. Luke's Hospital has been to Lewes, and has some plot against him; that there is an Irish plot going on against him. (2) Other facts, if any, indicating insanity communicated to me by others. He has been in a very excited condition in the public street, talking loudly and throwing his arms about; communicated to me by James Tucker, police-constable, Lewes.—W. F. CROSSKEY."

Upon this document Mr. Hillman was seized by Tucker while in his own house, and taken to the Sussex Lunatic Asylum; whence he was in a few days taken to St. Luke's Hospital, where, however, he was at once examined by the commissioners and by a medical man, and was forthwith discharged as not being a lunatic at all.

Upon this, being desirous of bringing actions against those under whose order he had thus been seized and incarcerated, and with the view of setting aside the order itself, he now applied for a writ of *certiorari* to bring it before the court, on the following grounds: The statute provides that the magistrate may issue an order under their hands and seals to have the alleged lunatic brought before them, and then to call to their assistance some medical man, and then if they find, upon their examination of such person or other proof, that such person is a lunatic not capable of taking care of himself and not under proper care, they may make an order to remove him and place him under proper care. And in support of his application and to show that these conditions had not been observed, but entirely disregarded, his affidavit stated that on the morning of the 24th Nov. he left his house to take a walk, and then went to a private reading-room at the library, and that after he got there Dr. Crosskey accosted him and spoke to him, but in no way examined him and made no inquiries of him so as to be enabled to form any opinion on the state of his mind, and did not see him again on that or any other occasion; and that he then went into the public library, and that he saw through the glass door the two magistrates go into the private reading-room, and that they had no interview with him, but only looked at him through the glass door.

On showing cause against the rule the affidavit set forth the facts in substance as follows:

A policeman named Tucker had, from conversation with Mr. Hillman, conceived the idea that he was insane, and went to the house-keeper of the house where he lived, who became alarmed, and also to a cousin of Mr. Hillman's, telling him that he feared he should have to "take him" for his own safety. On this the cousin suggested that men should be put into the house to watch him, and Tucker accordingly put two men into the house, which appeared to have irritated Hillman, especially as they assumed to restrict his liberty and prevent his walking out; on which he became angry and said no one should conquer him in his own house, and he insisted on going out; and, further, he became more irritated and spoke to various persons with some degree of excitement. On the 23rd Nov. he went to the relieving officer and asked him, "Can you certify me to be insane?" To which the officer replied, "I have never seen anything to make me think you insane." More conversation ensued, and other persons were spoken to, and Tucker went again to the cousin, who declined to interfere, but left the officer to act on his own responsibility. On the next day, the 24th, the policeman went to the relieving officer, who laid an information before the magistrates that Hillman was deemed to be a lunatic, not stating any facts to show that he was so, or that it was necessary or proper that he should be at once placed under control. Upon this the magistrates resolved to act, and, without resorting to Mr. Hillman's medical attendant, they persuaded a medical man in the town, Mr. Crosskey, to go and see him; and he went and saw him at the Fitzroy Reading Rooms, where he was in the private reading room. According to the affidavit of Mr. Hillman, the medical man made no examination of him such as could enable him to ascertain his

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state of mind, but merely spoke to him in a casual way, and then went out again almost immediately, which was confirmed by another witness, and though Dr. Crosskey stated in his affidavit that he was with Mr. Hillman at least twenty minutes, he was merely talking with him, or rather, inducing him to talk; and he did not say that he had made any medical examination of him, or that he even felt his pulse, but he came, he said, to the conclusion that he was of unsound mind because he appeared to talk incoherently, &c. When he left, Mr. Hillman went into the public library, which is at the back of the reading room, and separated from it by a glass door, and shortly afterwards the two magistrates came into the private reading room and looked at him through the glass door, but did not come in to speak to him, and he went away to his own house. Not long afterwards Tucker, the police-constable, went there with a carriage and an assistant and demanded admittance, and not being admitted broke open the door, and told Mr. Hillman he must come with them to Hayward's Heath Asylum. They took him in the carriage past the library, where the magistrates were waiting, and being informed, they stated in their affidavits, that he was in a carriage near them, they went out and saw him, the carriage being stopped for the purpose, and Tucker and his assistant being in it with Mr. Hillman. Up to this time they had made no examination of him and had signed no order for his removal, and what now ensued was their "personal examination" of him under the statute. They offered, they said, to shake hands with him, and asked him how he was. To one of them he did not reply, and to the other he spoke angrily and excitedly, and, as they said, incoherently; and they thereupon satisfied themselves that he was of unsound mind, and proceeded, after consultation with Dr. Crosskey, to sign the order for his removal to the county asylum, and he was accordingly removed there. They both swore that they had not authorised Tucker to break open the door or to tell Mr. Hillman that he was to be removed to the asylum, and that before the carriage came up they were not aware that he had done so; and Tucker swore that he had acted in the matter not as a police officer but in a private capacity, and on his own belief and impressions, formed from his own observations and information. No fact was stated in the affidavits indicating any danger either to the man himself or to others, and the magistrates in their order stated that he was not dangerous. In a few days after Mr. Hillman was removed to St. Luke's the medical officer found he was not a lunatic and at once discharged him. He now applied to have the order of the magistrates set aside, as made without jurisdiction or "in excess of jurisdiction," on the ground that the magistrates had no jurisdiction in such a case at all, and that their own order showed this, and was bad on the face of it, showing no grounds on which it was necessary or proper that the applicant should be put under control, and that there had been no "personal examination" such as the statute requires before an order for removal can be made, so that the order was illegal and invalid.

Sir F. Herschell (S.-G.), Grantham, Q.C., and Gore showed cause.

Sir H. Giffard, Q.C., and Crump in support of the rule.

*Cur. adv. vult.*

GROVE, J.—This case is one of considerable importance, not only to the applicant, but to the public, with reference to the mode in which alleged lunatics can be confined under the orders of magistrates. The question arose upon the terms of the 68th section of the Pauper Lunatics Act, 16 & 17 Vict. c. 97, and the facts were shortly these. A gentleman of the name of Hillman was "deemed" by a certain officer, who afterwards laid an information before the magistrates, to be insane, and they determined upon the information laid before them to examine him under that enactment. At least, they were informed—apparently not upon oath—that he was alleged to be a lunatic, and that he was in a public library. They went there with a medical man, having been called upon to do so by the clerk to the magistrates, and they intended at that time and place to make the examination, but found that Hillman had left. They then consulted Dr. Crosskey, and were informed that Hillman had gone to his own residence (to get something to eat), and soon afterwards they were informed (as they say in their affidavits) that he was in a carriage close by, and they went to the carriage and had a short conversation with him—one said four or five minutes, another three or four, and it is clear that it was very short. After that conversation with him he was taken off to the county lunatic asylum, and they then made their order for his removal to the asylum, appending the certificate of the medical man. The question before us is whether a *certiorari* should be granted to bring that order before us to be quashed on the ground that there was no such examination as the statute required, and that the magistrates had no jurisdiction to make the order. The question before us is whether they had jurisdiction, and that involves the question whether the requisites of the statute were complied with, and chiefly whether there had been such an examination as was contemplated by the statute. The question is important as regards the public and the administration of the law with respect to persons deemed to be lunatics. It is not contended that the magistrates were actuated by any improper motive, and there is nothing in the affidavits to show that there was malice, even in a legal sense, or anything approaching to improper motive on the part of the magistrates. They had, they said, known him long, and had no personal feeling against him, and they said they were only acting in the discharge of their duty to the best of their ability. And I believe them, and I think that they did not act from any sinister or improper motive, and that they thought they were acting in the discharge of their duty; and so I acquit them of anything morally wrong in the matter. But what we have to inquire is whether they complied with the requirements of the statute, and whether the "examination" at the door of the carriage in which he was being taken away and in which he had been brought from his home—whether the short conversation which then took place was such an "examination" as is required by the statute; and I have come to the conclusion—I own not without regret (as the magistrates had done nothing morally wrong, but thought they were doing their duty)—I have come to the conclusion that it was not so; and it is most important for the public interests that the

requisites provided by the statute for the purpose of protecting persons alleged to be lunatics should be observed. The enactment on which the question depends is very carefully worded, and shows the intention of its framers as to the way in which it is to be carried out. One branch of it applies to lunatics "wandering at large," and as to whom, as there may be immediate danger to themselves or others, the proceeding may be more summary. But the next branch of it relates to persons "deemed to be lunatics," and not to be under proper care and control; and as to these the enactment is carefully guarded as to what is to be done before the alleged lunatic can be taken away. Now in the present case the person was not brought before the magistrates in the ordinary sense, though in a sense he might be said to have been so, as the carriage was stopped and they went up to the door to see him. But they saw him there, certainly, under circumstances which would not tend to give the examination a fair judicial character as regarded the alleged lunatic. It was said that he was not actually in custody, and that the policeman who had taken him was not acting as such. But any man in his position would be led to suppose that he was in custody, as the policeman and another man were in the carriage with him, and the relieving officer was on the box. These were circumstances under which he was hardly likely to conduct himself with the calmness and good judgment which would be desirable under such an examination, and a man of quick temper and irritable disposition would probably be in a very unusual state of feeling, and that is a matter not unfit to be borne in mind in considering whether there was such an examination as required by the Act. Every part of the enactment is important; for it is obvious that the power, if not carefully guarded, may be a very dangerous power to place in the hands of magistrates, and therefore very careful provisions are prescribed. The terms of the enactment in its second branch are that, upon information on oath that any person deemed to be a lunatic is not under proper care or control, the justice shall either himself visit the party and make an inquiry into the matter, or, by order under his hand and seal, may direct some physician or doctor to make such inquiry, and "report in writing; and in case upon such inquiry or report it shall appear that the person is a lunatic and is not under proper care and control, then the justice, by order under his hand, shall require the officer to bring him before two justices of the county." The difference is very marked between the language of this branch of the enactment and the other, and before the person is brought before the two magistrates there is to be a preliminary inquiry and then he is to be brought before them, and then there are other provisions carefully providing what the further examination is to be, and it is enacted that the justices before whom the person is brought shall—calling to their assistance a medical man—examine the person and make such inquiry as they think necessary; and if on such examination or other proof they are satisfied that he is a lunatic and is not under proper care or control, and that he is a proper person to be detained under care and treatment, then they may make the order "for the removal of the person to an asylum."

Now here is an enactment, a carefully framed enactment, and there are forms provided in the schedule to the Act in accordance with it. Now what does that enactment fairly mean? Can anyone fairly read it without seeing that it is intended that after the preliminary proceedings have been taken the alleged lunatic is to be brought before them, and that they are to have the assistance of the medical man, so that (in that sense) the examination is to be the joint examination of the magistrates and the medical man? And there are grave reasons why it should be so, as these inquiries may often, especially in cases of females, involve medical questions—for instance, as to hysteria and its causes in the particular case, or other peculiar complaints arising from physical causes, and which may possibly be merely temporary and not involve insanity; and there is a provision in the Act as to a power to send the person either to an asylum or a hospital, on which the opinion of the medical man may be important; and though there is a provision as to cases where the inquiry is held at some other place than the place of the sittings of the magistrates the procedure is to be the same. It is also provided that the magistrates may, if they think it necessary, take "other proof," that is, such as the law regards as proof, and then if, upon such examination or on other proof, they are satisfied, then they have power to make the order of removal. And it is to be observed that "other proof" means legal proof, and that it does not mean the mere personal knowledge of the magistrates, for though that may be satisfactory to them, it may not be so to the public, and would not be evidence capable of being preserved and considered. Therefore the words "satisfied on their examination or on other proof" do not mean that they may act only on their own knowledge or belief, for that would not be legal proof or "proof" in a legal sense, for its value would depend on the honesty or good sense of the particular magistrates, and is not equivalent to "proof." Looking, therefore, at the broad scope and object of the Act, can it fairly be said that the enactment was satisfied by what took place in the present case—that is, by the magistrates merely seeing the party while he was being conveyed to the asylum—probably in a close carriage—and having a very short conversation with him through the carriage door or window? That was no examination within the meaning of the statute, if it were so it might lead to the most flagrant abuse (though I am far from saying that there was anything of the kind in this case), and it might lead to the most formidable consequences if it were so. It is true that the medical man in this case had previously seen the person and given a certificate, but can it be said that this was a compliance with the terms of the enactment? One of the magistrates himself says: "We went to the carriage and personally examined him there. There were with him in the carriage Tucker (the policeman) and another gentleman. We asked him how he was; he made no reply. Mr. Thorpe then shook hands with him, and said, 'How are you?' He made no direct reply. He said, 'The statements I made will be proved, whether they are true or not; and it will be proved whether I am insane.' He went on talking all the time; the chief subject of his conversation was some I O U's of which I had no cognisance; he also referred to insanity being hereditary in his family;

he made no protest against being considered insane." Now, I do not say that magistrates may not judge by a man's words and manner; but certainly these do not appear to be necessarily the answers of an insane man. He says, "It will be proved whether the statements I made are true or not, and whether I am insane or not." And then the allusion to its being said that there was insanity in his family is not quite what one would expect from a person who was insane. If the magistrates had jurisdiction, then, no doubt, though the evidence might not be satisfactory to others, they might still have their jurisdiction to make the order. But these things are material to show whether there was an examination such as the statute required. It was not a case in which immediate action was necessary, for they themselves certified that the person was not suicidal and was not dangerous to others, so that no particular haste was required, and they had to determine not only whether he was a lunatic but whether he required to be "detained under care and treatment." And can it be said that there had been such an examination as was required by the Act? I am of opinion that there had not been such an examination as was required by the statute, and, therefore, however much I may regret the result, that the provisions of the statute had not been carried out, and that, therefore, the order was invalid.

HUNDELOX, B.—I am of the same opinion. It is absolutely necessary that where the Legislature by certain provisions has protected the liberty of the subject, these provisions should be strictly observed and carried out. The whole subject of the Lunacy Laws must, within a reasonable time, be reconsidered, and part of it has recently been brought before the notice of the public. It has been found that by a statement made by anybody, accompanied with the certificates of two medical men, the only guarantee for whose reliability is that they have passed their examination and are in practice, a person may be taken and immured in an asylum without any opportunity of answer or defence, and without the ordinary test of open evidence and cross-examination. And, again, there is a power in our criminal law by which a man charged with the gravest offence, may, on the certificates of two justices and two medical men, be withdrawn by the Secretary of State from trial; and this, also, without any open examination of witnesses, and without the ordinary test of cross-examination. No doubt at present there may be no probability that a Secretary of State will abuse such a power. But it is an enormous power to give to any person to remove from trial a person who has been committed for trial for a serious offence. Here we have an enactment as to persons "deemed to be lunatics, and to be not under proper care and control," and it is an enactment in which the Legislature have endeavoured by every species of safeguard to prevent the liberty of these unhappy persons from being improperly restrained or interfered with. But it is remarkable that almost every one of those safeguards which the Legislature has thus provided has been neglected in the present case; and it is stated by the clerk to the magistrates that it has been the practice for seventeen years to make lunacy orders in this way. What then are the provisions of the statute, which have been almost every one of them disregarded—I will not

say wilfully, but carelessly or neglectfully disregarded in this case? The enactment provides that where there is a person deemed to be a lunatic and not under proper care and control, certain steps are to be taken. First there is to be an information on oath, then a preliminary examination. Then the alleged lunatic is to be brought before two magistrates, and there is to be a "personal examination" by them with the assistance of a medical man, and then, if satisfied by such examination or other proof, they may make the order. First there is to be an information upon oath; but there was none before the proceedings commenced. The magistrates' clerk does not say that there was any such information upon oath, and though the relieving officer is said to have "deposed," that was merely giving evidence, and does not amount to an information (i.e., in writing) upon oath. Afterwards he made an information; but that was after the medical man had made his certificate and after the magistrates had come to their conclusion, and after the alleged lunatic had been taken and was being carried to the asylum, and then it was for the first time the magistrates had an "information." The relieving officer seems to have arranged with Mr. Crosskey, the medical man, to give the certificate, and had arranged with the magistrates to go to meet him at the library, and then it was that the magistrates went and saw Hillman through a glass door, and then without authority, as the magistrates say, Tucker, the policeman, went with another man to Mr. Hillman's lodgings, where he had locked his door, and demanded admittance, and being refused he obtained the assistance of a blacksmith and broke open the door and said, "I must tell you we have come to take you to the asylum," and then they took him. No order, no examination, no information on oath! Nothing had then taken place, except the medical certificate. Mr. Hillman is taken away in the carriage, and then it is that he is taken to the library to be examined by the magistrates, and then it is that the relieving officer swears his information before the magistrates. The magistrates' clerk says the relieving officer went into the room, and then he filled up the information and administered the oath to the relieving officer, and that was the time at which the information on oath was taken, that information which was to be made before any proceeding was taken, but which was not made until the party was actually in custody! The magistrates then come to the conclusion that the party is a lunatic, and the relieving officer makes the information which was to be the basis and beginning of the whole proceeding. That was the way in which the provisions of the statute for the protection of alleged lunatics were carried out. What was the next step to the information? There ought to have been a preliminary examination, but there was nothing of the sort in this case, and could not be, for the magistrates never saw the party until he was brought up in the carriage on his way to the asylum. The man was actually taken into custody before any information was sworn—without any personal examination, and without any order. It appears from the affidavits that the medical man who gave the certificate had his instructions from the relieving officer, not from the magistrates. He says, indeed, that



he was aware he had to examine Mr. Hillman and to assist the magistrates. But he had no order from the magistrates to examine him, which was the only legal authority he could have; and he made his examination of Hillman without any authority. Then, thirdly, after the preliminary examination of the alleged lunatic the magistrates are to have him before them. But none of these requisites were observed. No information on oath had been taken. There was no preliminary examination by a magistrate or report of a medical man. There was no order of the magistrates "under hand and seal" to the medical man to examine the party. There was no personal examination by the magistrates of the party when brought before them. Somebody—who it was we do not know, and everybody repudiates it—somebody sent a policeman and the other man with the blacksmith to the house to break open the door and take him away. Somebody had hired a carriage to take him and two men to go with him. Somebody had caused this to be done without any order, or any previous inquiry, or any personal examination; without any of the conditions prescribed by the statute to authorise the exercise of the jurisdiction, the applicant was put into a carriage and carried away to the asylum. I dare say that the magistrates thought that they were doing what was right, and probably had placed themselves in the hands of their clerk. But I cannot believe for a moment that they could justifiably, without any evidence, find that the applicant was "a person proper to be detained under care and treatment," they themselves finding that he was not dangerous to himself or others, and the only thing put forward in the affidavits being that somebody says his landlady had said that he had thrown open his window—a really ludicrous thing to suggest as an indication of insanity. Under such circumstances the applicant was sent to an asylum without any personal examination under the statute, unless the interview with him which took place while he was in the carriage can be considered such an examination. As to this it is remarkable that the only question the magistrates asked of the man was, "How are you?" That was the only question they put to him. Can that be said to have been an examination such as is required by the statute, that is, such as may satisfy them that the party is a lunatic, and also such a person as is "proper to be detained under care and treatment"—merely to go up to him and ask him, "How are you?" Why, the man was then in custody; he was in a carriage, and had been told that he was to be taken to the asylum, and the certificate had been signed by a medical man. Was that what the statute required? No doubt if the magistrates had jurisdiction we cannot enter into the inquiry whether the inquiry they made was satisfactory, or whether they did all that they might be expected to do on the occasion. In *Weldon v. Winslow* I felt myself fettered by that doctrine, but the court thought that I need not have been so, and that the jury would have had a right to judge whether the order was not a sham order; and that view was upheld by the Court of Appeal; and subsequently, I believe, that question was left to the jury. But had the magistrates jurisdiction in this case? It was held long ago that if a magistrate issues a warrant without information

on oath he acts illegally: (*Morgan v. Hughes*, 5 T. R.) But, passing over that, they were to make a personal examination with the assistance of a medical man; and did they do so? They were to inquire and satisfy themselves before they made the order not only whether the party was a lunatic, but whether he was "a proper person to be detained under care and treatment." But the man was brought up to them in a carriage on his way to the asylum. Everything had been arranged beforehand, and the magistrates then came to the conclusion that he was a lunatic and "a proper person to be detained under care and treatment." And the order being then made the man was at once carried to the asylum without any of the requisites provided by the Legislature having been observed. There was to be "examination" of the alleged lunatic and a judicial examination, for it was a judicial function they had to exercise; and he was to be "brought before them," and though it might be in any place yet the requisites of the statute were to be observed, and he was to have the opportunity of calling witnesses, if necessary, or getting some one to attend on his behalf. But he had no such opportunity, and as the conditions of the statute were not observed I am of opinion that the justices had no jurisdiction to make the order, and that therefore the writ of *certiorari* must issue to bring it before the court that it may be set aside. I regret the result, because the magistrates had no bad motive; but if the Legislature has made certain provisions for the protection of the public it is our duty see that they are not disregarded.

*Rule absolute for certiorari.*

The Justices appealed.

The appeal was argued by Sir F. Herschell (S.-G.) and Grantham, Q.C. (*Gore* with them), for the appellants, and by Sir H. S. Giffard, Q.C. (*Poland and Crump* with him) for the respondent.

The arguments are fully stated in the judgments.

The eighth and ninth paragraphs of Mr. Whitfield's affidavit, which were read in giving judgment, were as follows:

Par. 8:

In order to avoid the necessity of taking Mr. Hillman out of the carriage and bringing him into the library, Mr. Thorne and I went to the carriage and personally examined him there. There were with him in the carriage Sergeant Tucker and another man. I spoke first. I asked Mr. Hillman how he was, he made no reply. Mr. Thorne then shook hands with him, and said, "How are you?" He made no direct reply to this; he said, "Statements that I have made will be proved whether they are true or not, and that will be the proof whether I am insane or not." Mr. Hillman kept us talking all the time, the chief subject of his conversation being some I O U, of which I had no cognisance, and to which neither I nor Mr. Thorne had made any allusion. He also referred to insanity being an hereditary ailment in his family. He made no protest against being considered insane or against being taken to an asylum. The examination lasted, as far as I can judge, some four or five minutes.

Par. 9:

I have been on friendly terms with Mr. Hillman forty years, and I can positively state that from my observation of Mr. Hillman's manner and conversation and general appearance, I came unhesitatingly to the conclusion that he was insane, and as I was satisfied that he was not under proper care and control, I considered him a proper person to be taken care of. I have, moreover,



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personal knowledge of the fact that three members of his family had been confined in a lunatic asylum.

*Cur. adv. vult.*

*Monday, May 4.*—The following judgments were delivered:

Lord COLERIDGE, C.J.—This is a very important case, whether the amendment of the Lunacy Laws now proposed to Parliament by the Lord Chancellor be or be not passed into a statute, by reason of the principles which it brings into discussion and the effect which our decision must have upon the practice of those who have the right to interfere with the personal liberty of alleged lunatics. I will state as accurately and as coldly as I can what are the unquestioned facts as I understand them: Mr. Hillman is a gentleman sixty-seven years of age, and has been for many years residing in Lewes. Down to Nov. 1884 he had never been afflicted with any symptoms of real or supposed insanity. Towards the latter end of Nov. 1884 there is evidence that he conducted himself in a strange and eccentric manner in the streets of Lewes and in his own lodgings. A relieving officer and a policeman formed the opinion that Mr. Hillman was insane, and ought to be sent to a lunatic asylum. A medical man authorised, he does not say by whom, but certainly not by any order under the hand and seal of any magistrate, had a communication in a public library at Lewes with Mr. Hillman, which, if it was an examination, is the only medical examination which was held by anyone at any time or place. He thereupon drew out and signed what he calls a certificate of lunacy. This certificate he handed to the two defendants, who had not at that time either of them signed any order authorising anyone to examine Mr. Hillman, nor had they seen him (to speak to) themselves. The relieving officer now, for the first time, swore his information, and in the statement made by him, which is before us, he expressly states that Mr. Hillman was neither epileptic nor dangerous to himself or others—a statement which the medical man neither qualifies nor contravenes in his certificate or affidavit. He also stated to the magistrates that Mr. Hillman's relatives declined to interfere. In the meantime the relieving officer and the policeman had gone to Mr. Hillman's lodgings, had broken open the door of the room where he was at dinner, informed him that they had come to take him to the county lunatic asylum, and that force would be used if he resisted, and took him with them in a carriage which had been prepared, inside which, with Mr. Hillman, sat the policeman, and outside sat the relieving officer. On the way to the asylum Mr. Hillman, thus in custody, was stopped at the corner of a street in Lewes; the two defendants came to him to the door of the carriage; the interview (I state this as their own affidavit says) lasted four or five minutes; they say that they satisfied themselves that he was a lunatic, and returned to the public library. There they had some further talk with the medical man, and signed the order for Mr. Hillman's reception. The carriage proceeded to the asylum. Mr. Hillman was stripped and examined, and treated in all respects as a lunatic from the 24th Nov. to the 3rd Dec. On the 3rd Dec. he was removed to St. Luke's Hospital, and on the 6th he was discharged. These are, I believe, with exact accuracy, the

facts of the case; and, on these facts, the question is whether a *certiorari* should issue to quash the order of the magistrates, the two defendants, as made without jurisdiction. The Divisional Court has held that the *certiorari* should issue, and I am of opinion that their judgment was correct and should be affirmed. The decision must turn upon the construction to be placed upon 16 & 17 Vict. c. 97, s. 68. This portion of the Act (I say it with all respect) is not happily framed. It attempts to deal in one section with two different subjects, two different states of circumstances, two different procedures, instead of dealing with one in one section and with the other in another. It is certainly a good practical illustration of the *brevis esse laboro; obscurus fio* of Horace. But with a little trouble I think its enactments may be made out with reasonable clearness. There is the "person wandering at large," "deemed to be a lunatic," there is the person "not a pauper and not wandering at large," "deemed to be a lunatic," which is the case of Mr. Hillman. Mr. Hillman is not alleged to have been a raving and dangerous lunatic. The common law always allowed the restraint of the liberty of such persons. The statute authorises, and most properly, interference with the liberty of those who, though not dangerous as regards life or limb to themselves or others, are yet the subjects of "proper care and control." But their liberty is to be interfered with only as the statute directs. What does it direct? 1. Information on oath to a single justice. 2. Either (a) examination of the alleged lunatic by the justice himself, or (b) an order under his hand and seal directing and authorising a medical man to visit, examine, and re-ort in writing to the justice. 3. An order under his hand and seal directing the lunatic to be brought before two justices. In this case none of these things were done. I am of opinion that they are conditions precedent to the exercise of the jurisdiction of the magistrates, protections carefully enacted in defence of liberty; and that a person is not, to use the words of the statute, "brought under this enactment" before the two magistrates unless these conditions are fulfilled, and if not "brought under this enactment" the alleged lunatic is not subject to the jurisdiction which has been exercised in this case. I am quite aware of the argument which has been derived from the proviso towards the close of the 68th section, and the words of it require, no doubt, careful consideration. They are as follows: "Provided always that it shall be lawful for any justice, upon such information on oath as aforesaid, or upon his own knowledge, and alone, in the case of any such person as aforesaid wandering at large and deemed to be a lunatic, or with some other justice in any other of the cases aforesaid, to examine the person deemed to be a lunatic at his own abode or elsewhere, and to proceed in all respects as if such person were brought before him or them as hereinafter mentioned." What is the procedure directed or allowed by these words? A single justice who is authorised by the earlier part of the section "to visit and examine" may, under these words, either have a sworn information to act upon, or, if he has private or personal knowledge of his own, he may act on that, and visit and examine in any place he pleases. Two may do the same thing as to examination;

but, then, one of those two justices, as I read the statute (because the words are he "with some other justice," implying that he, the one justice, must be one of the two), he, I say, must have either a sworn information or private and personal knowledge to act upon; so that in no case can two justices act unless one of them has already had, as a condition precedent to vesting the jurisdiction, either an information upon oath or private and personal knowledge of his own. I conceive, therefore, that the proceeding before or by one justice is a condition precedent to the exercise of the powers of examination given by the proviso to two, and that, though the statute allows the actual bringing before the justices for examination to be dispensed with for reasons of urgency or convenience, yet it protects the alleged lunatic by making the sworn information or the private and personal knowledge of one justice at the least the foundation of the whole jurisdiction. This appears to me to be the natural and proper construction of the proviso. I am constrained to add that any other interpretation renders the enacting part of the statute nugatory or in effect repeals it altogether; whereas this construction protects the alleged lunatic and yet makes provision for an examination elsewhere than in public, which may sometimes be most desirable. The proviso does not say, as I read it, that the conditions precedent to bringing before the justices may be dispensed with, but that when they have been fulfilled the alleged lunatic need not (I should say in cases of urgency or danger or inconvenience) be formally brought before the two justices, one of whom must be, as I have already pointed out, the one justice mentioned earlier in the section, but that they may "proceed" (the word is, I think, important) as if he were brought before them; i.e., I think, proceed to all the subsequent stages of the procedure. I am, therefore, of opinion on this first point that on the true construction of the 68th section these two justices acted without jurisdiction. It is indeed manifest, if my view be correct, that the statute has been violated in its most essential provisions. Next, I think that the statute requires that the examination of the alleged lunatic by the two justices should be in the presence of the medical man. The justices are to do or may do three things, and I think they must do them in the order in which they stand in the statute. 1. Call to their assistance a medical man. 2. Examine the person. 3. (Only if they think it necessary) make further inquiry. Now, it appears to me that the examination of an alleged lunatic is just the very portion of their duty, in which to make it safe or useful, justices will most need the aid of scientific skill, and I should expect, therefore, to find that they were ordered to avail themselves of this skill in this portion of their duty, and I seem to myself to find clearly in the statute what I should expect to find there. "Call to their assistance and examine," means, I think, call to their assistance and with such assistance examine. The examination is imperative, and therefore the assistance which is to make it effective is imperative also. The further inquiry is by the terms of the statute not imperative, and as to that the assistance, which in such case must be useless, is dispensed with. I am aware how differently questions of construction are answered by different minds; but when I remember the possibly frightful con-

sequences to an alleged lunatic of a mistaken inference from this examination by the justices, I cannot persuade myself that my view of the statute is unreasonable or improbable; and if it be not, it is surely the one which a court of law should adopt. With all respect to the magistracy of this country, the great body of justices are men necessarily without the least experience of the fine and subtle shades which distinguish harmless eccentricity, strange opinion, or perversity of judgment from a lunacy which requires restraint. It may be, it very often is, that the medical man has not much more experience; but to hold that because the statute is sometimes necessarily imperfect we should without any such necessity make it in all cases more imperfect still, appears to me to be contrary to true canons of construction, and very dangerous. It is in the process of the examination that the good sense of the layman and the skill of the expert are most needed to correct and supplement each other; and to divorce them, to allow the critical process of personal examination to take place separately by persons who are to concur in the result, seems to me, I own, to render useless, or worse, one of the most salutary provisions of the statute. If the words were clear, the consideration I am about to mention could have no weight; but I am glad to learn that what I think essential is at least the usual practice of the police magistrates and of many most experienced and capable magistrates in the country. On this ground also, therefore, I think that this order was made without jurisdiction. I have more doubt as to another point which was pressed before us, viz., that when the alleged lunatic is before the justices and being examined by them he must know what is taking place and must have an opportunity of defence or explanation. It is no doubt a principle of law that no man is to be condemned unheard, a principle which applies also to a deprivation of liberty, except for the temporary purpose of safeguard and prevention of escape. This is recognised (if formal recognition were needed) in a number of cases which it would be mere waste of time to quote in detail. It is no doubt also a well settled rule that a statute is to be construed as far as may lie in accordance with legal principles; and beyond these general principles there is much in the words of the statute itself to give support to the contention. Why, it may be asked, is the alleged lunatic to be brought before two justices if he is not to be heard? What more cruel and strange wrong can be done to a sane man than to deprive him of his liberty, and shut him up with madmen upon questions put to him by two justices, the object of which he does not know, or by a medical man of whose character and calling he may be unaware? A few words of explanation or denial might make the whole difference; yet these few words his ignorance of what is going on may prevent him from offering. It must be remembered that the use of this hearing is exclusively, or, at least, chiefly, to be found in those doubtful cases in which a knowledge of what is going on is of the very essence of justice. The cases of raving maniacs are plain enough, and at least in such cases the opportunity for a hearing can do no harm; it is in cases, unhappily not uncommon, where fraud and treachery are being skilfully practised against a man, that full knowledge is so essential, yet it

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is said that while the fraudulent relative or dishonest expert may be heard, there is no opportunity secured by law for a like hearing to the hapless object of the conspiracy. These considerations appear to me to be of weight; and if there be no hearing in substance and sense secured to the alleged lunatic, it is a great blot on the statute. If this were the only point on which a Divisional Court had decided I should hesitate long before I differed from such a decision. But as it is not necessary, I will express no positive opinion. I come now to a question of fact and substance on which, though I have formed a clear opinion, I express it with regret. I am unable to hold, as a matter of fact, that the examination, so to call it, made by the two defendants was a real examination, or one within the meaning and intention of the statute. Mr. Hillman was in custody to the knowledge of the justices, as they do not deny; he was actually on his way to the asylum to their knowledge, as they do not deny; indeed, from the eighth paragraph of Mr. Whitefield's affidavit it is certain that they knew these facts. They had had some conversation in Mr. Hillman's absence with Dr. Crosskey, Mr. Shelley and Mr. West, and it is to be observed that medical examination, in the sense of examination into physical facts, such as temperature, digestion, pulse, tongue, and so forth, there appears to have been absolutely none. They then go down into the street and find him in a carriage with Sergeant Tucker, whom they knew, and with two other persons, and then this is the account they give; I say they, because substantially Mr. Thorne's account is the same as the account given of this so-called examination in the eighth paragraph of Mr. Whitefield's affidavit. His Lordship here read the paragraph, which is fully set out *ante*, page 101.] I am here, I know, speaking for myself, and I will own that the experience I have had of the flimsy stuff on which perfectly sane men are sometimes incarcerated in lunatic asylums makes me perhaps a severe critic; but I am not content to consider this sort of thing an examination under the statute. It seems to me the merest travesty of an examination, and the elaborate system of protection and careful inquiry prescribed by the statute, if this is a legal compliance with it, is, to use old and famous words, "a mockery, a delusion, and a snare." Far better, in my judgment, to have no provision for protection at all, than provisions which the proceedings in this case are to be held legally to satisfy. I desire to call attention to the excellent summing up of Crompton, J., as reported in *Hall v. Temple* (3 F. & F. 337). That was an action against a medical man for signing a certain certificate under the Lunacy Acts without reasonable cause. Falsehood and malice, which had been alleged, were struck out of the declaration, which stood ultimately upon negligence only. If a negligent examination is actionable in the case of a medical man, it appears to me that a negligent examination is not an exercise of statutory jurisdiction in the case of justices. This case, with which I absolutely agree, shows to my mind that the statute requires that there should be a real inquiry—a real weighing and sifting of evidence, a real examination with an unbiassed mind, a real, serious, and solemn exercise of judgment. Here there was nothing of the kind; an unauthorised inquiry by a medical man; some statements unin-

vestigated and given behind Mr. Hillman's back by a relieving officer, a conversation of three or four minutes with a gentleman in custody in a carriage on his way to the asylum. Well, if this is held to satisfy the statute, and to justify, in point of law, the sending a sane man to keep company with madmen, I really do not know what would be held not to satisfy the statute and not to justify the sending. I have not said, because I do not think, that the conduct of the defendants was in any way dishonest or *mala fide*; indeed, I think, there is no ground whatever for saying so. But absence of *mala fides* alone in the present case is not enough. The haste, the perfunctoriness, the utter, I had almost said ludicrous, insufficiency of the examination, the place, the time, the surrounding, all seem to me to show that the examination, if it must be called so, was not such as the statute demands, and that the judgment was not such as the statute expects. I am not insensible to the considerations which should lead us to view with friendly eyes the exercise of jurisdiction by men in the position of the defendants; nor do I forget the difficult and responsible duties which they, like other magistrates, have to discharge. But magistrates, as a rule, seek their office; it clothes them with influence and importance, it gives them authority over their fellow-subjects. In the administration of the Lunacy Laws they have the power to take away the liberties of other men, men to whom they are in no way directly responsible, and towards whom they are therefore bound to exercise the most wary caution. They are, as they ought to be, by law the protectors at once of the public against the mischief of uncontrolled lunatics, and the protectors of alleged lunatics against fraud or treachery, or corruption, or recklessness, or incompetence. It seems to me that they would certainly not discharge this latter function if the conduct of the defendants in this case were a fair specimen of the conduct of justices throughout the country. I think it most important that they should know that while courts of law will uphold them in the exercise of their great powers, they will uphold them only when such exercise is serious, reasonable, and judicial. For these reasons, as I have already said, I am of opinion that the judgment of the court below was right, and should be affirmed.

Sir JAMES HANNEN.—This is an appeal from a decision of a divisional court of the Queen's Bench Division, making absolute a rule *nisi* for a *certiorari* to bring up an order of two justices of the county of Sussex for the purpose of quashing the said order on the ground that it was made without jurisdiction. The order in question, dated the 24th Nov. 1884, states that "the said justices having called to their assistance a surgeon, and having personally examined one Charles Hillman, who was not a pauper, and being satisfied that the said Charles Hillman was a person of unsound mind not under proper care and control, and a proper person to be taken charge of and detained under care and control, did thereby direct the medical superintendent of the Sussex Lunatic Asylum at Hayward's Heath to receive the said Charles Hillman as a patient into the said asylum." This order was made under the 68th section of the Lunatic Asylums Act, 1853. It is admitted that the magistrates in making this order acted in good faith, and the

sole question is whether they had jurisdiction to make it. The validity of the order is impeached on the ground that the justices did not make such an examination of the alleged lunatic as is required by the Act. The provisions of the Act which apply to this case are as follows:—By the 68th section it is enacted that “every relieving officer and overseer of any parish who shall have knowledge that any person in such parish not a pauper, and not wandering at large, is deemed to be a lunatic, and is not under proper care and control, shall within three days after obtaining such knowledge give information upon oath to a justice.” In this case Mr. Francis Shelley, the relieving officer of the Lewes Union, states that on the 24th Nov. he received notice from Mr. Braden that Mr. Hillman was insane, and that his family refused to take charge of him, and that their solicitor had advised him (Mr. Braden) to come to Mr. Shelley, and that he must act. Mr. Shelley then saw the two brothers of the alleged lunatic, who referred him to their cousin, Mr. Robert Hillman, for the particulars to fill up the form of statement as to the patient's religion, &c., as required by the Act, and having obtained this information Mr. Shelley went to the magistrates' clerk's office, and asked the magistrates' clerk (Mr. West) to make arrangements for the attendance of magistrates at the Fitzroy Library, where Mr. Hillman was, so as to prevent the necessity of bringing him through the streets to the county hall. At the Fitzroy Library Mr. Shelley met the magistrates, Mr. Whitfield and Mr. Thorne, and there swore to the correctness of the information, and further, upon oath, stated to the magistrates that Mr. Hillman was not under proper care or control, and that his relations refused to take charge of him, and from what he, Mr. Shelley, had himself seen on the previous day he had no doubt of Mr. Hillman's madness. It was not suggested in argument that there was any irregularity in these proceedings, or that there was anything wanting thus far to make it the duty of the magistrates to act in the matter. The sworn information of the relieving officer being thus far brought to the notice of the magistrates, two courses were open to them under the statute—one justice might have visited the alleged lunatic and made inquiry into the matter appearing upon the information, or he might by an order under his hand and seal have directed and authorised some physician, surgeon, or apothecary to visit and examine the patient, and make such inquiry and to report to the justice his opinion thereon, and if upon such personal visit, examination, and inquiry by such justice, or upon the report of such physician, &c., it appeared to such justice that the person in question was a lunatic, and not under proper care and control, the justice might have required any constable or relieving officer of the parish where such person was alleged to be to bring him before any two justices of the same county. The other course which the justices might follow, and which in this case they did follow, is thus described by the Act: “Provided that it shall be lawful for any justice upon such information upon oath as aforesaid or upon his own knowledge,” “with some other justice to examine the person deemed to be a lunatic at his own abode or elsewhere, and to proceed in all respects as if such person were brought before them,” that is, brought before

them by a constable on the order of the justice. The intention of the justices was to examine Mr. Hillman in the Fitzroy Library, but they were prevented from carrying out this intention by Mr. Hillman leaving the building by a side door. Both the justices state that their object in taking this course, instead of having Mr. Hillman brought before them, was to avoid causing him unnecessary pain and inconvenience. The next step which is required by the Act, whether one justice orders the person deemed to be a lunatic to be brought before two justices, or the two justices themselves proceed to examine such person at his own abode or elsewhere, is thus prescribed by the 68th section: “The justices before whom any such person is brought shall call to their assistance a physician, surgeon, or apothecary, and shall examine such person and make such inquiry relative to such person as they shall deem necessary.” In this case the justices called to their assistance Dr. Crosskey, a medical man sworn to be of the highest character and standing. Dr. Crosskey stated to the justices that he had had a long examination of Mr. Hillman that morning, the result of which was that he was perfectly satisfied that he was insane and a proper person to be taken care of. He said he was incoherent in his language and excitable, and had delusions, amongst others that there was a political conspiracy against him, that the chief attendant at St. Luke's Hospital had some plot against him, and that there was an Irish plot going on around him. Having thus consulted with Dr. Crosskey, the justices were about to examine Mr. Hillman, when they were informed that he had left the Fitzroy Library. They were told by the relieving officer that Mr. Hillman had gone to get something to eat, and they were requested to wait a short time. In about ten minutes they were informed that he was in a carriage near his lodgings. The justices thereupon proceeded to the carriage in which Mr. Hillman was, and personally examined him. What occurred on this occasion is thus described by Mr. Whitfield. [His Lordship here read the 8th and 9th paragraphs of Mr. Whitfield's affidavit as set out fully, *ante*.] Having thus examined Mr. Hillman, the justices again consulted with Dr. Crosskey, and having before them his certificate in the form required by the Act that he had personally examined Mr. Hillman, and that he was a person of unsound mind, they signed the order for his reception into the asylum. It is not suggested that either this order, the information of the relieving officer, or the certificate of the medical man, is in any way defective on the face of it. The justices were, therefore, apparently acting within their jurisdiction in all that they did; but it is contended that the evidence shows that they were not in fact acting within their jurisdiction, inasmuch as they did not make such an examination of the alleged lunatic as the Act requires. The objections taken to the examination are three: (1) That the justices did not make the examination in a judicial manner—that is, by giving the alleged lunatic notice of the nature of the charge made against him, and by taking evidence on oath in his presence and giving him an opportunity of meeting the charge by counter-evidence; (2) that they did not examine the alleged lunatic in the presence of the medical

man; and (3) that the examination was not in its nature a real one. With regard to the first of these contentions I can find nothing in the Act to warrant it. The procedure under the Act is applicable to cases in which prompt action is required, such as the case of a person "wandering at large;" or of a person "cruelly treated or neglected by any person having the care or charge of him." It seems to me unreasonable to suppose that the Legislature, by the simple word "examine," meant an inquiry not distinguishable from that upon a criminal charge, or on a commission *de lunatico inquirendo*. It is further to be observed that, in the previous section, where the case of pauper lunatics is dealt with, it is enacted that the alleged lunatic "may be examined at his own abode or elsewhere by an officiating clergyman of the parish, together with a relieving officer, who, after calling a medical man to their assistance, may make an order for the pauper's reception." The clergyman and the relieving officer could not hold a formal inquiry of the kind suggested, and, unless it is to be imputed to the Legislature that it was less careful of the interests of paupers than of other persons, the same interpretation must be put upon the word "examine" in the one section as in the other. The language used in the statute appears to have been specially intended to secure a personal examination by the justices of the alleged lunatic. That this, the natural and obvious meaning of the word, is intended, is indicated by the form F. 1, where the magistrates state in terms that they have personally examined the alleged lunatic, and it would be contrary to the established rules of construction of statutes to give a wider signification to this language unless the ordinary interpretation would lead to some manifest absurdity. The second objection is, that the justices did not examine Mr. Hillman in the presence of the medical man. It is clear that the statute does not say in terms that the justices shall make their examination together with the medical man. I can find nothing in the Act which suggests to my mind any reason why it should necessarily be a joint examination. In the first place, where the statute requires an act to be done jointly by two persons it says so, as in the 61st section, where two visitors are required "together" to inspect the asylum; and where it requires an act to be done by two persons separately it says so, as in the 74th section, where two medical men are required, each of them "separately," to examine the alleged lunatic. I infer from the absence of any words directing either that the justices shall examine the patient with the medical man or without him that they may do either as circumstances may suggest to be most convenient and expedient. In some cases it would be highly unbecoming that the justices should be present when the medical man made his examination, as in the case of females suffering from uterine disease, with which affections of the mind are sometimes connected. On the other hand, it would frequently be useless that the justices and medical man should examine the alleged lunatic together, as in the case of a raving maniac, whose condition might not permit any questioning of him. But the ground on which my opinion on this point rests is, that the statute does not say that the justices shall examine the alleged lunatic

in the presence of the medical man, and, therefore, that such a condition ought not to be imported into the Act. The construction I put upon the 68th section is that it requires the justices to call in an independent medical man for their assistance on the particular occasion, that is, that they are not to act on the certificate of a medical man upon whose selection they have not used their own judgment; but if they do call to their assistance a medical man for the occasion, then the requirements of the statute will be satisfied by that medical man, after personal examination of the patient, giving his certificate in the form prescribed by the Act. That is the assistance which the Act contemplates. After directing the justices to call in the medical man, the 68th section proceeds to enumerate the conditions upon which the justices shall make their order, in these terms: "And if upon examination of such person, or other proof, such two justices shall be satisfied that such person is not under proper care and control, and that he is a proper person to be taken charge of, and if such physician, &c., sign a certificate with respect to such person, it shall be lawful for the said justices, by an order under their hands and seals, to direct such person to be received into such asylum." These are all the conditions required, and they have all been complied with. The last objection is, that the examination was not a real one, and ought to be regarded as a nullity. The perfect good faith of the justices being admitted, and the truth of their statements of the facts not being controverted, this objection resolves itself into this, that an examination lasting only four or five minutes cannot be valid. The cases of *Reg. v. Bolton* (1 Q. B. 66) and *Ex parte Hopwood* (15 Q. B. 121), and numerous other cases decide that the question of jurisdiction of justices depends not on the correctness of the order they may make, but on whether they had the right to enter upon the inquiry in the course of which they make the order sought to be impeached. Here it was the duty of the justices to enter upon the inquiry whether Mr. Hillman was insane. Their examination of him or other proof must satisfy them that he was so. The statute does not and cannot prescribe the amount of examination which shall bring conviction to the minds of the justices. The Act is one of general application to all cases of insanity, ranging from a simple melancholia to raving mania. A very short inspection of a man struggling to injure himself or others unless restrained, would be sufficient to satisfy any one of his madness. It cannot be justly said in answer that this was not such a case, because that involves an inquiry into the merits of the case and the correctness of the conclusion arrived at by the magistrates, and the court below, as we think rightly, refused to receive further evidence on this point. The justices may have been wrong in thinking that they could judge from Mr. Hillman's manner, conversation, and general appearance, that he was insane, but the law cast upon them the duty of forming an opinion, and left them to estimate the amount of examination which should satisfy them upon the point. If then I could clearly see that I should not myself have come to the same conclusion as the justices did in this case, this would not be sufficient to support the judgment appealed from, but I must add that I see no reason to suppose that the justices had not

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sufficient evidence to justify the opinion they formed. There is a further objection to the validity of the justices' order relied on by Huddleston, B., which I ought not to omit to notice. He says that Dr. Crosskey was not properly called in by the justices. Speaking of Dr. Crosskey's affidavit, the learned baron says, "he does not venture to say that he had an order under the hands and seals of the magistrates to examine him (Mr. Hillman), which was the only authority that he ought to, or that he could have had." But the 68th section only requires a justice to give an order under "his hand and seal" directing the medical man to visit and examine where the object is to have the alleged lunatic brought by the constable before two justices, but when the two justices go to him, they are only required to call to their assistance the medical man. It is not required that this shall be done in writing. Mr. Whitfield distinctly states that he arranged with the relieving officer that Mr. Crosskey, whom he had known many years, should be called in to assist him and the other magistrate, and both Mr. Whitfield and Mr. Thorne state that before they examined Mr. Hillman they consulted with Dr. Crosskey as to the case. I have not thought it necessary to comment on the means taken to get Mr. Hillman into the carriage, because the evidence clearly shows that the justices had nothing to do with it, and the conduct of the others is not now in question. For these reasons I am of opinion that the justices were acting within their jurisdiction in making the order complained of, and therefore, that the appeal against the judgment of the court below must be allowed; and as the application is against magistrates, it should be with costs here and in the court below.

LINDLEY, L.J.—The question in this case is whether the two justices of the peace, who made an order for the reception of Mr. Hillman into the Sussex Lunatic Asylum, had jurisdiction to make such order, or whether they had not. The order was made under the provisions of sect. 68 of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97); and so far as form is concerned, the order is free from objection, but it is alleged to be invalid on the ground that the magistrates who made it did not examine Mr. Hillman as required by the statute, before they made the order, and that they consequently had no jurisdiction to make it. It is contended on behalf of Mr. Hillman that the examination required by the statute is an examination of a judicial nature to be made by the justices in the presence of a medical gentleman, and with the knowledge of the alleged lunatic, so that, if capable of appreciating what is going on, he may be in a position to explain his conduct, and remove incorrect conclusions from what may appear to be signs of insanity. If the statute requires such an examination as this, it is admitted that no such examination took place, for when the justices examined Mr. Hillman no medical gentleman was present with them, nor did Mr. Hillman know that he was being examined in any sense or for any purpose. In order to determine the question thus raised, it is necessary carefully to examine the provisions of the statute, and to ascertain exactly what the justices actually did. The statute deals with three classes of alleged lunatics who may be ordered by justices to be taken to lunatic asylums, viz. —1. Alleged pauper lunatics not wandering

at large (sect. 67). 2. Alleged lunatics wandering at large whether pauper or not (sect. 68). 3. Alleged lunatics, not pauper and not wandering at large, but not under proper care and control, or who are cruelly treated (sect. 68). The statute also provides, by sect. 74, for the reception into lunatic asylums of persons certified to be lunatic, without the order of any justice. Mr. Hillman was not sent to an asylum under sect. 74; he was sent by an order of two justices under sect. 68, as a lunatic who was not a pauper and not wandering at large, but who was not under proper care and control. Sect. 68 is very long and complicated, but the following is a short analysis of it so far as it applies to persons like Mr. Hillman. The section is divisible into three parts. The first relates to the mode of bringing the alleged lunatic before two justices; the second relates to what they are to do when he is brought before them; the third, which is in form a proviso, is an alternative to the first part, and enables two justices to act, although the alleged lunatic may not have been brought before them as provided in the first part. The short substance of these three parts is as follows:—  
1. *Mode of getting him before two justices:* Constable, &c., to give information on oath to a justice. On such information, or on the information on oath of any person, the justice shall, either himself visit and examine such person, or by order under his hand and seal direct a medical man to do so, and then if it appears the person is a lunatic, the justice shall order him to be brought before two justices. 2. *What they are to do:* And they shall (1) Call to their assistance a medical man; and (2) Examine such person; and (3) Make such inquiry as the justices shall deem necessary. And if on examination or other proof they are satisfied that the person is a lunatic, and if the medical man signs a certificate in the form F. 3, the justices may order the lunatic to be received into an asylum in Form F. 1. It is to be observed that under this part of the section no particular form or method of calling in a medical man is prescribed, nor is there any necessity for any order under the hand or seal of any justice appointing the medical man whom the two justices are to call to their assistance. 3. *The alternative to 1:* Then comes the third part or proviso, which runs thus: "Provided always that it shall be lawful for any justice, upon such information on oath as aforesaid, or upon his own knowledge, and alone, in the case of any such person as aforesaid wandering at large and deemed to be a lunatic, or with some other justice, in any other of the cases aforesaid, to examine the person deemed to be a lunatic, at his own abode or elsewhere, and to proceed in all respects as if such person were brought before him or them as hereinbefore mentioned." Under this proviso one justice may act in a case like Mr. Hillman's on information on oath, or on his own knowledge, but with some other justice, as if the alleged lunatic had been brought before them as provided in Part I. In other words, the procedure in Part I. is dispensed with, and two justices may, on information on oath, or on the knowledge of one of them, proceed as directed in Part II. There is no necessity in this case even for any information on oath, if one justice is in a position to act on his own knowledge, nor is there any necessity for any order under any justice's hand and seal



directing any medical man to visit and examine the said lunatic. As regards the appointment of a medical man, all that is required is that the two justices shall call to their assistance a medical man, no particular form being prescribed. The justices are not to act on a certificate signed by a medical man of whom they know nothing; he must be a person approved by them and called in by them to their own assistance. The form of the certificate which the medical man is required to sign (F. 3) shows that he is also personally to examine the alleged lunatic. The two justices must also examine him. There is, however, nothing (beyond the expression, "call, &c., and examine") either in the statute or in the forms to show that the medical man called in must examine the alleged lunatic in the presence of the justices; nor to show that it is obligatory on the justices to examine the alleged lunatic in the presence of their medical assistant. On these points the Act is silent, and it appears to me that this matter is left to the discretion of the justices. It is obvious that it must frequently be desirable for the medical assistant to examine the alleged lunatic in private, and it is clear, I think, that such an examination, although not required, is permitted by the statute. So it is obvious that it may often happen that an examination by two justices in the presence of their assistant may be quite unnecessary, and as the statute does not in terms require such an examination, I see no sufficient grounds for insisting on it in all cases. The protection given by the statute to alleged lunatics, whether sane or insane, is, first, an examination by a competent medical man called in by the justices to assist them; and, secondly, an examination by them themselves and I cannot find either in the language of the statute or in the nature of the case, any necessity or legal justification for holding that the justices' order is null and void simply because their medical assistant is not actually present when they themselves see and examine the alleged lunatic. If they desire his presence then they are entitled to have it; but if they do not require his attendance at that moment, I can find nothing in the statute which makes such attendance imperative. Nor do I see that general considerations of expediency require so strict a construction to be put on the words of the statute. Full effect can be given to them without engrafting on them anything not to be found in them. I cannot help thinking that if the Legislature had intended to make an examination by the justices in the presence of their medical assistant an essential condition to the justices' jurisdiction, the Legislature would have said so in clear and unmistakable terms. It has not done so. The other inquiries which the justices are to make if they think necessary can hardly be required to be made in the presence of their medical assistant, although he might in many cases suggest them. This circumstance affords an argument, though I admit a slight one, against requiring the examination to be in his presence, for the language is the same in both cases. I pass now to the next point, and consider whether the examination by the justices must be made in such a way as to afford the alleged lunatic an opportunity of explaining his conduct and the appearances against him. This, in my opinion, is a far more important and difficult point than that to

which I have already adverted; but I have arrived at the conclusion that it is not necessary under the statute with which we have to deal. My reasons for this conclusion are as follows:—There is no trace in the statute of any difference in this respect between the various classes of lunatics with which it deals. Nothing approaching a judicial inquiry is requisite under sect. 74, and the provision in sect. 67 for examination of pauper lunatics by a clergyman and relieving officer or overseer of the poor shows to demonstration that in these cases anything like a judicial inquiry is quite out of the question. Moreover, the language of sect. 68 does not point to anything like such an investigation as takes place under a writ *de lunatico inquirendo*. The object of the statute is not to enable justices to adjudicate a person to be *non compos mentis*, but to enable them to place under proper care and control persons who they are satisfied are lunatics and require to be so placed. They have to act in cases of emergency and of great danger, as well as in other cases; their measures are precautionary measures only; if they make a mistake, it can soon be corrected (see sect. 79). Moreover, it must never be forgotten in dealing with the insane, that the whole object of such an examination as justices could be expected to make would frequently be frustrated by informing the insane person that justices were about to examine him with reference to his insanity. The statute has given justices of the peace and medical men large powers; but the statute is based upon the theory that they can be trusted; and it appears to me that the time and place and manner of making the examination which they are required to make are all left to their discretion. The kind of examination which the justices are to make is not defined by the statute; it need not even satisfy them that the person examined is a lunatic. They must be satisfied of that fact; but their own examination may not be sufficient for the purpose, hence the introduction of the words "or other proof." They must be satisfied by examination or other proof; if satisfied by their own examination, no further proof is necessary; but if their own examination is not sufficient to satisfy them they must obtain other proof. An examination which is made as a mere form, i.e., not *bonâ fide* for the purpose of information and guidance, would not be an examination such as the Act requires; and such an examination might and ought to be treated as a sham, and as no examination at all. But provided an examination be made by two justices, *bonâ fide* for the purpose of satisfying themselves of the sanity or insanity of the person examined, such examination is sufficient to enable the magistrates to make an order for his confinement if they are satisfied by such examination or other proof of his insanity, and if they have in other respects complied with the statute. The justices cannot be considered as having acted without jurisdiction by reason only of their having made a less full and complete examination than the court may think they ought to have made. For the reasons above stated, the conclusion at which I have arrived is that the only conditions essential to the exercise by justices of their jurisdiction under the statute in question are those expressly mentioned in the statute itself. Those conditions are: (1) Information on oath or knowledge on the part of one



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justice; (2) personal examination by the two justices of the alleged lunatic; (3) personal satisfaction that he is a lunatic; (4) such satisfaction being arrived at after their own examination and after calling to their assistance a medical man, and making such other inquiries, if any, as they may think necessary; (5) and lastly, their medical assistant must himself examine the alleged lunatic and give the certificate required by the statute. Having now ascertained what the statute requires to be done, let us see what in fact was done, and in what respects, if any, the justices acted improperly. According to Mr. Hillman's affidavit he was spoken to by Dr. Crosskey, but was not examined by him. He was afterwards seen by two justices through a glass door in the Lewes Public Library, and afterwards in the carriage when on his way to the lunatic asylum, but was not examined by them. A Mr. Keeble, the managing clerk to Mr. Hillman's solicitors, made an affidavit stating, amongst other things, that he was told by Shelley, the relieving officer, that he went for Dr. Crosskey and got him to see Mr. Hillman and give the certificate; that then Shelley went with the certificate to the magistrates' clerk, and swore the usual information; that then, two magistrates having been found, he, Shelley, went with them to the library where Hillman was; that the order for Mr. Hillman's confinement was made directly after the magistrates had seen him through the glass door in the library, and before he was arrested, and without any further examination by them; and that he was arrested and taken to the lunatic asylum pursuant to such order. Now, if the facts had been as represented in these affidavits, I should be clearly of opinion that the provisions of the statute had not been complied with. But the affidavits filed on behalf of the magistrates show a very different state of things. From these affidavits it appears: (1) That Dr. Crosskey was requested to examine Mr. Hillman with the approval of Mr. Whitfield, one of the magistrates, and in order to assist him and his brother magistrate. (2) That Dr. Crosskey saw Mr. Hillman in the public library, conversed with him for twenty minutes or half-an-hour, satisfied himself of his insanity, and shortly afterwards wrote and signed the certificate. (3) That Mr. Whitfield and his brother magistrate, being informed that Dr. Crosskey had examined Mr. Hillman, and that he was at the library, went there to examine him, but did not then do so. He appears to have left the library as they arrived, for Mr. Whitfield did not see him at all, and Mr. Thorne only saw him through a glass door, and then only for a moment. (4) That Shelley then swore his information, and made a further statement on oath as to Mr. Hillman's insanity, and the refusal of his friends to take care of him. (5) That the magistrates then consulted Dr. Crosskey, who was present and was informed that he had that morning examined Mr. Hillman, and was satisfied he was insane. They then received from him the certificate he had signed. (6) That the magistrates, having ascertained that Mr. Hillman had left the library, waited for him. (7) That they were shortly afterwards informed that he was in a carriage below, and they went and saw and spoke to him there in the presence of Tucker, a policeman, and another man, and satisfied themselves that Mr. Hillman was out of his mind.

(8) That the magistrates then returned to the library, had a further conversation with Dr. Crosskey, and then, and not before, signed the order for Mr. Hillman's removal to the asylum. (9) That Mr. Whitfield had known Mr. Hillman for forty years, and had been on friendly terms with him. Mr. Thorne, the other magistrate, had also known him some time, and had been on friendly terms with him, and both magistrates were so struck with his appearance and conversation in the carriage as to have had no doubt of his insanity. (10) That the only reason why the magistrates did not have Mr. Hillman brought before them in the county hall, or in the room where they were waiting, was to avoid causing him pain and inconvenience, he being well known in Lewes. I pass over for the present the evidence as to how Mr. Hillman was got into the carriage. The magistrates deny that they ordered him to be arrested, or to be got into the carriage, or to be brought to them; and this part of the case cannot, in my opinion, affect the validity of the order they made for his removal to the asylum. The affidavits filed on behalf of the magistrates appear to me trustworthy, and I accept them as being a correct version of their conduct in this matter. Taking this view of the evidence, I am of opinion that all the conditions required by the statute were complied with in the present case. There was an information on oath; the magistrates consulted a proper medical man approved by themselves; he himself examined Mr. Hillman, and signed a certificate as required by the statute; the magistrates saw and examined Mr. Hillman themselves, and were satisfied of Mr. Hillman's insanity; they then again consulted their medical adviser, and then, and not before, they gave an order for Mr. Hillman's reception into the county lunatic asylum. It seems to me, therefore, that it is impossible to say that the order so made was without jurisdiction and ought to be quashed. Before concluding I wish to add that, in my opinion, proceedings of this kind cannot be too narrowly watched, and that not only magistrates and medical men, but also everyone concerned in causing a person to be sent to a lunatic asylum, ought to be extremely careful to avoid even the appearance of haste or impropriety. I feel very strongly that Mr. Hillman had much to complain of as regards the mode in which he was got into or induced to enter the carriage in which he was taken to the asylum; and if the justices had been in any way parties to that proceeding I should have looked with very grave suspicion on the *bona fides* of their examination of him when in the carriage. But their affidavits satisfy me that they had nothing whatever to do with Mr. Hillman's arrest, and that to say that they examined him when already on the way to the asylum is to say that which, though true in a sense, is not true if what is meant is that the justices had made up their minds to send him there before they themselves had seen him, and regardless of the opinion they might form after seeing him. Mr. Hillman was got into the carriage by the relieving officer and the policeman in the expectation that the justices would make an order authorising him to be taken to the asylum; but he was not in any accurate sense being taken there before their order had been obtained. The fact, however, remains that he was improperly got into the carriage, and he did not get out of it

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until he arrived at the asylum, and that the magistrates' examination of him consisted of a view of him and a talk with him whilst in the carriage. Such proceedings cannot be approved; but it is one thing to disapprove of them and another to hold judicially that the order of the justices was made without jurisdiction. I am unable to come to that conclusion, and am of opinion that the appeal ought to be allowed, and that the order of the Divisional Court ought to be discharged with costs here and below.

*Appeal allowed.*

Solicitors for appellants, *Palmer and Bull*, for *Gell, Drake, and Lee*, *Lewes*.

Solicitors for respondent, *Wynne Baxter, Rand, and Meade*.

May 6 and 22, 1885.

(Before BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.)  
REG. ON THE PROSECUTION OF THE JUSTICES OF  
DEVON v. THE LOCAL GOVERNMENT BOARD. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Highway—Main road—Road ceasing to be turnpike road after 1870—Order declaring road ought to cease to be main road—Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), s. 16.*

*Where a road has ceased to be a turnpike road between the 31st Dec. 1870 and the date of the passing of the Highways and Locomotives Amendment Act 1878, and no application has been made under the first paragraph of sect. 16 of that Act for a provisional order declaring that such road ought not to become a main road, and therefore such road has become a main road by sect. 13, the Local Government Board has power, under the second paragraph of sect. 16, to make a provisional order declaring that such road has ceased to be a main road and become an ordinary highway.*

THE turnpike trusts of certain roads in Devonshire expired in Nov. 1877. No application was made under sect. 16 of the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77) before the 1st Feb. 1879 for a provisional order declaring that the roads ought not to become main roads, and they became main roads by sect. 13. (b)

In 1884 the justices of Devon, acting as the county authority, applied to the Local Government Board for a provisional order under sect. 16 (c), declaring that the roads had ceased to be main roads and become ordinary highways.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

(b) By 41 & 42 Vict. c. 77, s. 13, roads ceasing to be turnpike roads either between the 31st Dec. 1870 and the passing of the Act, or after the passing of the Act, are to become main roads.

(c) Sect. 16: If it appears to a county authority that any road within their county which within the period between the 31st day of December 1870 and the date of the passing of this Act ceased to be a turnpike road, ought not to become a main road in pursuance of this Act, such authority shall, before the 1st day of February 1879, make an application to the Local Government Board for a provisional order declaring that such road ought not to become a main road.

Subject as aforesaid, where it appears to a county authority that any road within their county which has become a main road in pursuance of this Act ought to cease to be a main road and become an ordinary highway, such authority may apply to the Local Government

The Local Government Board refused to make an order, on the ground that they had no jurisdiction.

The Divisional Court (Lord Coleridge, C.J. and Smith, J.) refused a *mandamus*.

A rule *nisi* was granted by the Court of Appeal for a *mandamus*, directing the Local Government Board to entertain and determine the application for a provisional order.

May 6.—Sir F. Herschell (S.-G.) and Channell, for the Local Government Board, showed cause.—The Local Government Board do not wish to raise the point that a *mandamus* will not lie, but they refused the application for a provisional order because on the true construction of the statute they have no authority to make one. The effect of the words "subject as aforesaid," at the beginning of the second paragraph of sect. 16, is to exclude from the operation of that clause such roads as are within the first paragraph, and as to which an application might have been made before the 1st Feb. 1879.

*Charles, Q.C. and Bucknill*, for the county authority, in support of the rule.—If the words "subject as aforesaid" have the operation contended for on the other side, the effect is that roads such as those now in question must always continue to be main roads, now matter how circumstances may change. This is an unreasonable result, and can never have been intended. The words only mean "subject to the provisions of the Act." The meaning of sect. 16 is that roads which ceased to be turnpike roads after the 31st Dec. 1870, and as to which no application was made before the 1st Feb. 1879, have become main roads by sect. 13, and will continue so until steps are taken to alter their condition under the second paragraph of sect. 16.

*Cur. adv. vult.*

May 22.—The following judgments were delivered:

BRETT, M.R.—In this case an application was made for a *mandamus* directing the Local Government Board to consider an application for a provisional order under the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), s. 16, and no objection has been taken on the ground that *mandamus* to the Local Government Board will not lie. The Local Government Board thought that they had no jurisdiction under sect. 16, and accordingly declined to entertain the application. Whether they were right in the view they took depends entirely on the construction of the statute. The roads in question had originally been turnpike roads, but in Nov. 1877 they ceased to be so, and afterwards, as no application was made under the first clause of sect. 16, they became main roads under sect. 13. The order now asked for is a provisional order under the second clause of sect. 16, declaring that the roads have ceased to be main roads and become ordinary highways. That clause would appear to

Board for a provisional order declaring that such road has ceased to be a main road and become an ordinary highway.

The Local Government Board, if of opinion that there is probable cause for an application under this section, shall cause the road to be inspected, and, if satisfied that it ought not to become or ought to cease to be a main road and become an ordinary highway, shall make a provisional order accordingly, to be confirmed as hereinafter mentioned.

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be large enough to give jurisdiction to the board to make the order asked for, unless the words "subject as aforesaid" prevent it from having that effect. It is contended on behalf of the respondents that the power given by the clause in question is so fettered and controlled by the words "subject as aforesaid" that the Local Government Board has no jurisdiction to make the order which is asked for in the present case. The earlier sections of the Act deal with highway authorities and the mode of payment of certain expenses, and make certain other provisions. Then, by sect. 13, roads ceasing to be turnpike roads, either between the end of 1870 and the date of the Act, or after the date of the Act, are to become main roads. Under that section no steps need be taken by anyone to cause the roads to become main roads. But such a road may be prevented from becoming a main road by the interference of the county authority and the Local Government Board under the first clause of section 16. If such interference takes place the road becomes—or, rather, remains—an ordinary highway, and does not become a main road, as it otherwise would under sect. 13. By sect. 15 the county authority has power, on the application of the highway authority, to declare that an ordinary highway shall become a main road. We must consider what power is given by sect. 16 with regard to such roads as have become main roads under sects. 13 and 15. If the second clause of sect. 16 did not begin with the words "subject as aforesaid," I do not see how it could be suggested that the clause did not include and apply to roads which have become main roads under sect. 13, in the absence of any interference under the first clause of sect. 16; and I cannot see how the words "subject as aforesaid" can have the effect contended for on behalf of the respondents—that is to say, the effect of preventing the words which follow them from applying to roads which have ceased to be turnpike roads between the end of 1870 and the date of the Act, and have become main roads in the absence of an application for a provisional order before the 1st Feb. 1879 under the first clause of sect. 16. The Act provides for declaring ordinary highways to be main roads and for declaring main roads to be ordinary highways, as circumstances may from time to time require; and it would seem strange, in the absence, apparently, of any sufficient reason, to except a particular class of main roads, and to fetter the power of the Local Government Board with regard to such main roads in the manner suggested. I think the real meaning of the words "subject as aforesaid" is "subject to all the previous provisions of the Act with regard to the management of the roads;" but, whether this is their true meaning or not, I do not think they can be construed according to the respondents' contention. I am therefore of opinion that the rule ought to be made absolute for a *mandamus*.

BAGGALLAY, L.J.—I am of the same opinion. By sect. 13 of the Act roads which cease to be turnpike roads either between the 31st Dec. 1870 and the date of the Act, or after the date of the Act, are to become main roads. By sect. 15 the county authority may declare an ordinary road to be a main road on the application of the highway authority. Sect. 16 provides for the conversion of main roads into ordinary highways. The first clause applies to roads which, in the

absence of interference, would become main roads by virtue of sect. 13, and provides for an application before 1st Feb. 1879 to prevent their becoming main roads. By the second clause, "subject as aforesaid, where it appears to a county authority that any road within their county which has become a main road in pursuance of this Act ought to cease to be a main road and become an ordinary highway," they may apply for a provisional order for that purpose. If it were not for the words "subject as aforesaid," there could be no doubt that this clause would apply to the present case; but it is suggested on behalf of the respondents that those words mean "in any other case than that already mentioned." I think the natural meaning is not this, but is "subject to all the provisions previously made." This appears to me to be the sensible and reasonable construction, whereas the other would produce this difficulty: that a road which had ceased to be in the nature of a main road—as, for instance, where some other means of communication had been made—would always continue to be a main road within the meaning of the Act, and there would be no means of causing it to be declared an ordinary highway.

BOWEN, L.J.—I am of the same opinion. I think the words of the second clause of sect. 16 support the appellants' contention, unless the effect is cut down by the words "subject as aforesaid." Whatever the previous provisions may be which are intended to be referred to by those words, I find none which, giving the words their natural sense, are inconsistent with the wider construction contended for on behalf of the appellants.

*Rules absolute.*

Solicitors for the appellants, *Cooke and Jones*, for *Michelmores*, Exeter.

Solicitors for the Local Government Board, *Sharpe, Parkers*, and Co.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Tuesday, March 31, 1885.*

(Before MATHEW and SMITH, JJ.)

KNIGHT v. BOWERS. (a)

*Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 6—Sale of Food, &c., Act Amendment Act 1879 (42 & 43 Vict. c. 30), s. 2—Tradesman supplying different article from that demanded by purchaser.*

*Sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), as interpreted by and read together with sect. 2 of the Sale of Food and Drugs Act Amendment Act 1879 (42 & 43 Vict. c. 30) is not limited to cases of mixing and adulterating only, but applies also to cases where an article entirely different from, and not being of the nature or substance or quality of the article demanded by the purchaser, is supplied by the seller; and therefore a tradesman, who in response to a request for "saffron" supplies a customer with "sac'n," comes within and is liable to the penalty imposed by sect. 6 of the Act of 1875.*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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THIS was a case under the 20 & 21 Vict. c. 45, stated by the stipendiary magistrate for the district of the borough of Stoke-upon-Trent, in the county of Stafford.

At a petty sessions holden at Fenton, in the parish of Stoke-upon-Trent aforesaid, on the 24th Oct. 1884, the respondent Samuel Bowers, a herbalist, carrying on business at Longton, in the said parish, was charged, on an information and complaint preferred and issued against him at the instance of the appellant, Knight, an inspector duly appointed under the Sale of Food and Drugs Act 1875, for that he, the respondent, did on the 16th Aug. 1884, in the parish of Stoke-upon-Trent, unlawfully sell, to the prejudice of one Sarah Anne Onions, the purchaser, a certain drug, to wit, *savin*, which was not of the nature, substance, and quality of the article demanded by such purchaser, contrary to the provisions of the statute; and at the hearing of the said information and complaint the following were proved or admitted to be the facts:—

On the 16th Aug. 1884 the said Sarah Anne Onions, the purchaser, went to the shop of the respondent Bowers, and then and there demanded of him and requested him to sell to her a quantity of saffron, without any intention of using it for medicine or any other purpose than that of analysis, and did not state to the respondent that it was required for any medicinal purpose. The respondent thereupon then delivered to her a certain article, for which she paid to him the sum of 3d., the price demanded by him for the said article.

Immediately on the completion of the purchase the said S. A. Onions informed the respondent that she had made the purchase for the purpose of having the article supplied by him analysed by the public analyst, and she then thereupon divided it into three parts, and delivered one part to the respondent, and the other two parts to the appellant, as such inspector, who duly delivered one of such parts to the public analyst for the county of Stafford.

The public analyst certified that the article supplied was not "*saffron*," and at the hearing of the information before the magistrate he proved that it was "*savin*;" and he, as well also as a doctor of medicine and a pharmaceutical chemist, who were also called and examined as witnesses for the appellant, testified that "*saffron*" and "*savin*" were both articles included in the British Pharmacopœia, but that they were dissimilar in colour, size, shape, and appearance, and had diverse medicinal properties, saffron being used mainly in the treatment of measles, and as a colouring agent, and "*savin*" being sometimes improperly used in the preparation of a decoction which is administered for the purpose of procuring abortion.

It was not contended or attempted to be proved that the article supplied by the respondent had been in any way adulterated; and it was admitted and proved to be in its natural condition, unadulterated, and not admixed or compounded with any other drug, article, or ingredient.

The appellant relied on the simple fact that "*savin*," the article supplied by the respondent, was "not of the nature and quality of the article demanded by the purchaser," viz., "*saffron*." The respondent did not call any witnesses, but con-

tended that, as no adulteration or improper mixture had taken place, the statute did not apply.

The magistrate was of opinion that the respondent's contention was correct, and that the preamble of the repealed Act of 1872 (35 & 36 Vict. c. 74), and that of the Act of 1875 (38 & 39 Vict. c. 63) showed clearly that the only object of the law was to prevent the adulteration of articles of food and drugs, and to insure the selling of them in a pure and genuine condition, and that it was not intended to make it an offence to sell an article that was pure in itself, though it was not the article demanded. Accordingly he dismissed the information and complaint without calling on the respondent to give any evidence.

The question for the opinion of the court was whether the magistrate's decision was right in point of law?

If the court should be of opinion that the decision of the magistrate was right, the information and complaint were to stand dismissed; but, if the court should be of opinion that such decision was wrong, and that the respondent ought to have been called upon for his defence upon the facts, then the case was to be remitted to the magistrate with the opinion of the court thereon.

*Bosanquet, Q.C.*, for the appellant, the inspector, argued that the conclusion at which the magistrate had arrived in the matter was erroneous. By supplying "*savin*" for "*saffron*" the respondent had brought himself within the terms of sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63). The article supplied by him to the purchaser was not of the nature of the article demanded by the latter, and that was an offence by the express words of that section. The Act was not confined to cases of adulteration, and sect. 6, which created a new offence, was intended to meet the present objection that it was so confined. By sect. 2 of the Sale of Food and Drugs Act Amendment Act 1879 (42 & 43 Vict. c. 30) the words "of the nature, substance, and quality," &c., in sect. 6 of the Act of 1875 shall be construed in the disjunctive, so that to supply an article that fails in any one of those conditions would be a violation of the Act and an offence within sect. 6, which was passed for the protection of the uneducated and poorer classes, who in all probability would be unable to distinguish the difference between "*savin*" and "*saffron*" or coffee and chicory, or between other drugs and articles which may somewhat resemble each other in appearance. The magistrate should have followed and acted upon the words of sect. 6 in preference to the preamble of the Act, on which latter it is submitted he placed too exclusive a reliance. A contrary construction to that now contended for by the appellant would not only reduce the Act to a nullity, but would even render it positively mischievous, inasmuch as the consequence would be, that a tradesman who merely mixed an article with some other, it might be, harmless ingredient, as, for instance, coffee with chicory, or butter with lard, would thereby commit an offence and render himself liable to a penalty, whilst another tradesman who should supply an entirely different article to that which a customer demanded would escape scot free from any penalty whatever. The section clearly contemplates and renders liable to a

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penalty the act of selling an article different in name, in character, or in quality from that which is demanded; and it is submitted that the case must go back to the magistrate upon the question of the proper legal construction of the statute.

The respondent did not appear.

MATHEW, J.—In my opinion the learned stipendiary magistrate was wrong in the view which he took of the statute on this question, and consequently the case must be remitted to him. The reason and ground of his decision is stated by him, at the end of the case, as being that, in his judgment, it was not the intention of the framers of the statute in question, the Act of 1875 (38 & 39 Vict. c. 63), that the selling an article of food or a drug, pure and genuine in itself, but not being the precise article demanded by the purchaser, should be an offence subjecting the seller to a penalty; and he referred to and relied on the preamble of both the repealed Sale of Food and Drugs Act 1872 (35 & 36 Vict. c. 74), and the repealing Act of 1875 (38 & 39 Vict. c. 63), as supporting his view, and showing that the only object of the law was to prevent the adulteration of articles of food and drugs, and to insure the selling of these in a pure and genuine condition. Now, in my opinion, the learned magistrate has put too large an interpretation upon, and given too much effect to, the language of the preamble of the Act of 1875. The preamble of that Act recites that "it is desirable that the Acts now in force relating to the adulteration of food should be repealed, and that the law regarding the sale of food and drugs in a pure and genuine condition should be amended." This, although very wide no doubt, and seemingly referring to adulteration alone, cannot, I think, be held to control all the subsequent sections of the Act, or as showing that every one of them must necessarily be construed as applying solely to adulteration; and if any doubt existed with regard to the construction of the preamble, it would, I think, be removed upon a closer inspection of sect. 6 of the Act, as interpreted by sect. 2 of the subsequent Act, the Sale of Food and Drugs Act Amendment Act (42 & 43 Vict. c. 30). That 6th section enacts that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser," under a penalty not exceeding 20*l.* for each such offence. Then comes sect. 2 of the amending Act of 1879, which provides that "it shall be no defence to any prosecution under the provisions of the principal Act" (the Act of 1875) "to prove that the article of food or drug in question, though defective in nature, or in substance or in quality, was not defective in all three respects;" thus evidently construing the words "any drug which is not of the nature, substance, and quality of the article demanded," as meaning any drug defective in its nature, or in substance, or in quality; so that sect. 6 must be read as if it ran "no person shall sell, &c., any drug which is not of the nature or substance or quality of the article demanded," &c. In this case the article demanded by the purchaser was "saffron," and that which was sold and delivered to her by the respondent was "savin," an entirely different article in every respect, though probably, as one may conclude,

the two drugs may somewhat resemble each other in external appearance. Now, if the statute were really limited to and dealt with adulteration only, it would be binding on the court so to hold; a construction, however, which would lead to the escape of numerous and daily offenders; for instance, those who, where butter is asked for, sell a substance which contains not an atom of the desired article, or who supply chicory and nothing else in place of coffee, and sell boiled and exhausted tea leaves as tea fit for the purchaser's use and consumption. Cases of this kind all seem to me to be within the language of the Act, and the mischief it was directed against; and therefore, without saying that the learned magistrate should have convicted the respondent in this case, it is my clear opinion that he should have entertained and gone into the inquiry, on the assumption that the Act of Parliament was applicable to the case before him; and consequently the case must be remitted to him with this expression of the opinion of the court.

SMITH, J.—I am of the same opinion, for I cannot at all see my way to construing sect. 6 otherwise than as Mr. Bosanquet, on the part of the appellant, has asked us to construe it, and I think, therefore, that we must adopt his construction. At the same time I must say that I very much doubt whether, when this Act was passed, it was the intention of the Legislature to include within its penal provisions a case like the present, and to enact that, where one drug is demanded, and another and different one—albeit perfectly pure and genuine—is delivered, and although the seller, for aught that appears, as here, may have *bonâ fide* believed he was delivering the article demanded, he, the seller, should thereby be committing an offence rendering him liable to a pecuniary penalty. But however that may be, I cannot get out of the words of sect. 6. The Act itself (the Act of 1875) is entitled "An Act to repeal the Adulteration of Food Acts, and to make better provision for the sale of food and drugs in a pure state," which of course means that they should be unadulterated; and the preamble is in the words and to the effect already stated by my brother Mathew; and of course, as he has already observed, neither title nor preamble is sufficient alone to control the express wording of the subsequent sections of the Act. Now, by sect. 3, the mixing of ingredients injurious to health with any article of food, with intent to sell the same, is penally prohibited; sect. 4 is directed against the mixing, or permitting to be mixed, with drugs any ingredients deleterious to health; and by sect. 5 it is provided that it shall be a defence if the accused person proves to the court's satisfaction that he did not know that the article had been so mixed. Then comes sect. 6, which is the all-important section in the present case, and that section, when, as I apprehend must be done, we read into it sect. 2 of the subsequent amending Act of 1879 (42 & 43 Vict. c. 30), which has already been read and referred to by my brother Mathew, must be held to enact as follows: "No person shall sell any drug which is not of the nature or substance or quality of the article demanded," &c. If, then, a person asks for "saffron" and the seller sells him "savin," or *vice versâ*, the question arises, has the seller sold any drug which is not of the "nature of the article demanded?" There can

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be no doubt that he has, and of course therefore has brought himself within the terms of this Act of Parliament. I cannot escape from this reading and construction of the section, although, as I said at first, I entertain much doubt whether the Legislature, when it passed that Act, amending it as they do by the subsequent Act of 1879, intended that what has been done by the respondent here should be an offence. The case must be remitted.

*Case remitted to the magistrate.*

Solicitors for the appellant, *Thos. White and Sons*, agents for *Hand, Blakiston, Everitt, and Hand*, Stafford.

Tuesday, March 31, 1885.

(Before GROVE and LOPES, JJ.)

MOORHOUSE v. LINNEY AND ASHTON.

THORPE v. LINNEY AND ASHTON. (a)

*Municipal corporation—Election of councillors—Nomination paper—Signature of assenting burgesses—Inaccurate description on burgess roll—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 241.*

By sect. 241 of the *Municipal Corporations Act 1882* (45 & 46 Vict. c. 50), "no misnomer or inaccurate description of any person, body corporate, or place named in any schedule to the *Municipal Corporations Act 1835*, or in any roll, list, notice, or voting paper required by this Act, shall hinder the full operation of this Act with respect to that person, body corporate, or place, provided the description of that person, body corporate, or place be such as to be commonly understood."

At an election of town councillors the nominations of the petitioners were objected to on the ground that one of the assenting burgesses, "Charles Arthur Burman," was not upon the burgess-roll, and the mayor allowed the objection, and declared the respondents duly elected.

The assenting burgess, whose full and correct name was "Charles Arthur Burman," was entered on the burgess roll as "Charles Burman" only.

It was a fact in the special case that "Charles Arthur Burman" was generally known to his friends as "Charles Burman," and the description in the burgess roll would, by any one acquainted with Charles Arthur Burman, have been commonly understood to refer to the said Charles Arthur Burman, and to no other person.

Held, that the mayor was right in allowing the objection, and that it was not a "misnomer or inaccurate description" within the meaning of sect. 241 of the *Municipal Corporations Act 1882*.

The words "commonly understood" in the above section mean commonly understood by any person comparing the nomination paper and the burgess-roll.

By an order of Wills, J. the petitions of the petitioners against the return of the respondents, as councillors for the Dukinfield Ward, in the borough of Stalybridge, were consolidated, and the case raised by the petitions respectively stated as a special case for the opinion of the High Court of Justice.

#### SPECIAL CASE.

1. The borough of Stalybridge, in the counties of Lancaster and Chester, is divided into four

wards, one of which is called the Dukinfield Ward, and the election of the two councillors for the said ward was appointed to be holden on the 1st Nov. 1884. The petitioners, Sydney Moorhouse, and Daniel Thorpe, and the respondents, Nathan Edward Linney and Joseph Ashton, were respectively candidates at the said election, and the said respondents have respectively been declared to be duly elected in the manner hereinafter appearing.

2. The petitioners and respondents were respectively duly qualified to be elected, and were respectively duly nominated, unless the objection to the respective nomination papers of the petitioners hereinafter mentioned and allowed by the mayor of Stalybridge, was a valid objection.

3. The following is a copy of the nomination paper of the petitioner Sydney Moorhouse, which was duly signed by the persons whose names appear therein as proposer, seconder, and assenting burgesses respectively, who, unless the said objection allowed by the mayor was a valid objection thereto, were respectively entitled to subscribe the same, and subject to the said objection the said nomination paper was in all respects good and sufficient:

#### NOMINATION PAPER.

Borough of Stalybridge.

Election of councillors for Dukinfield Ward, in the said borough, to be held on the 1st day of November 1884.

We the undersigned, being respectively burgesses, hereby nominate the following person as a candidate at the said election:

Surname.	Other Name.	Abode.	Description.
Moorhouse.	Sydney.	Off Cheetham Hill-road, Stalybridge.	Brass Founder.

We the undersigned, being respectively burgesses, hereby assent to the nomination of the above-named person as a candidate at the said election.

Dated this 24th day of October 1884.

Signature.	Number on burgess roll, with the ward or polling district, if any, having a distinct numbering.
Charles Arthur Burman,	467, Dukinfield Ward Polling District.

4. The nomination paper of the petitioner, Daniel Thorpe, was subscribed by the same proposer, seconder, and assenting burgesses respectively, and was in all respects precisely similar to that of which a copy is set forth in the last paragraph except that the surname, other names, place of abode, and description of the said Daniel Thorpe, were therein correctly inserted instead of those of the said Sydney Moorhouse.

5. On the 25th Oct. 1884, which was the day after the last day for the delivery of nomination papers, the mayor, accompanied by the assistant town clerk, duly attended at the town hall, when an objection in writing to the nominations of the petitioners respectively was handed into the mayor, the ground of objection being that one of the assentors, Charles Arthur Burnam, was not upon the burgess roll, and therefore was ineligible to subscribe to such nominations. The mayor allowed the said objection, and decided that the nominations were bad, upon the grounds that one of the assentors, upon the two nomination papers, named Charles Arthur Burman, was not a burgess

(a) Reported by H. D. BOWSEY, Esq., Barrister-at-Law.



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of the borough of Stalybridge his name not appearing upon the burgess list for the borough. The respondents, Nathan Edward Linney and Joseph Ashton, were declared duly elected.

6. The said Charles Arthur Burman, who subscribed the said nomination papers of the petitioners respectively, was duly qualified to be enrolled on the ward roll for the said Dukinfield Ward, and the names Charles Arthur Burman was the surname, and other names in full of the person who was intended to be enrolled in the ward roll for the said Dukinfield Ward by the name of Charles Burman. The number (467) given in the said nomination papers respectively as the number on the burgess-roll of the said Charles Arthur Burman is the number on the ward roll of the said Charles Burman.

7. The said Charles Arthur Burman, and his brother Joseph Burman, live together as joint occupiers at No. 61, Caroline-street, in that part of the township of Dukinfield which is in the municipal borough of Stalybridge, and carry on business there as butchers in partnership under the style or firm of "Burman Brothers," "Burman, Butcher," appears over the door of the said No. 61, Caroline-street. The said Joseph Burman is enrolled in the ward roll for the said Dukinfield Ward, and his number in such roll is 466.

8. There was no other person of the name of "Charles Burman" or "Charles Arthur Burman" residing at the said address or elsewhere in the said ward. The said Charles Arthur Burman, and his brother the said Joseph Burman, were at the time of the last revision, and of the said election, the only persons of the name of Burman residing in the said ward or in the said borough of Stalybridge, and in the occupation of any qualifying property therein. Charles Arthur Burman was generally known to his friends as Charles Burman, and the name Charles Burman, and the description in the said roll would, by any one acquainted with Charles Arthur Burman, have been commonly understood to refer to the said Charles Arthur Burman, and to no other person. Anyone who did not know the said Charles Arthur Burman, but who had inquired for him by the name of Charles Burman, and the description in the said roll, or by the name of Charles Burman alone, would have been directed to the said Charles Arthur Burman, and to no one else. There was no doubt of the identity of Charles Arthur Burman, who subscribed the said nomination papers, with the Charles Burman whose name appeared on the said roll.

9. The following is a copy of the said entry in the said roll. [This is described in the judgment.]

10. At the time when the said objection was handed in to the mayor there were present, on behalf of the petitioners, the petitioner Daniel Thorpe, and John Renshaw, the cashier of the petitioner Sydney Moorhouse, and on behalf of the respondents Thomas Machell and Charles Johnson. There were also other persons representing candidates for other wards present. Before the mayor gave his decision the said Daniel Thorpe told him two or three times that Charles Arthur Burman was the same person as the said Charles Burman mentioned in the burgess-roll, that he lived in Caroline-street at the number mentioned in the burgess-roll, and that there was no other Charles Bur-

man at that house, in that street, or in the ward, and the said John Renshaw also said the same. No person contradicted the statements of the said Daniel Thorpe and the said John Renshaw (as was the fact) to have told the truth, but said he was bound by the burgess-roll that it was not within his province to amend the burgess-roll; that that was the revising barrister's duty, and allowed the objection, giving his decision in writing as hereinbefore set out in the fifth paragraph.

11. The mayor had no personal acquaintance with, or knowledge of either the said Joseph or Charles Arthur Burman.

12. Before the mayor gave his said decision, the said Daniel Thorpe told him that his decision, if against him and the said Sydney Moorhouse, would be questioned by petition.

13. The petitioners, after the said election, in due course respectively duly petitioned against the return of the respondents, praying that it might be declared that the said respondents, Nathan Edward Linney and Joseph Ashton, were respectively not duly elected, and that the said election was void. A copy of one of the petitions is annexed to this case, and marked "A."

14. The petitioners and respondents respectively have agreed that the court shall be at liberty to draw inferences of fact.

15. The question for the consideration of the court is, whether the mayor was right, in the circumstances above mentioned, in allowing the said objection to the respective nominations of the petitioners.

16. If the decision of the mayor was wrong, the election of the respondents, Nathan Edward Linney and Joseph Ashton respectively, is to be declared void. If the decision of the mayor was right, the said petitions respectively are to be dismissed, and the court may in either case make such further order as to them shall seem meet.

Sir F. Herschell, S.G. (*Aspland* with him) for the petitioners.—The reference in the nomination paper to the number on the burgess-roll was right; there was no one else in the town of the same name. No one could be misled by the insertion of the second Christian name in the nomination paper. The omission of a second Christian name from the entry on the burgess-roll is not a variance which can invalidate the nomination. The defect is cured by the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 241. He cited

*Attorney-General v. Hawkes*, 1 Cr. & J. 121;

*Gothard v. Clarke*, 5 C. P. Div. 253;

*Reg. v. Thwaites*, 1 E. & B. 704;

*Hinton v. Hinton*, 14 L. J. C. P. 58.

*Arbuthnot* (E. Clarke, Q.C. with him) for the respondents.—The principle laid down in *Gothard v. Clarke* (5 C. P. Div. 253) and *Henry v. Armitage*, is that the mayor is not to hold a court of inquiry for which there is no provision in the Act, but is to compare the burgess roll and nomination paper. The mayor did so, and rightly decided that "Charles Arthur Burman" was not entitled to subscribe the nomination paper as an assenting burgess, because Charles Arthur Burman was not an enrolled burgess. It is not a mere "misnomer or inaccurate description" within the meaning of sect. 241 of the Municipal Corporations Act 1882. *Reg. v. Thwaites* (1 E. & B. 704) was



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the converse to the present case. The burgess signed the voting paper with the name on the burgess-roll, although it was incorrect. The question then was as to his being entitled to vote, and the same principles do not apply. In *Hinton v. Hinton* (14 L. J. 58, C. P.) there was a mere error in spelling, which would not have misled anyone.

*Cur. adv. vult.*

May 22.—The judgment of the court was delivered by

LOPES, J.—We are of opinion the mayor was right in the circumstances mentioned in the special case in allowing the objection to the respective nominations of the petitioners. The ground of objection to the nominations of the petitioners was that one of the assentors, Charles Arthur Burman, was not upon the burgess-roll, and was therefore ineligible to subscribe to such nominations. Charles Arthur Burman was so described, and of 467, Dunkinfield Ward Polling District, in the respective nomination papers. The following is the entry in the burgess-roll:—"M. 466. Burman, Joseph, 61, Caroline-street. House (joint), 61, Caroline-street. M. 467. Burman, Charles, 61, Caroline-street. House (joint), 61, Caroline-street." It is convenient first to consider the case independently of sect. 241 of the Municipal Corporations Act 1882. Has there been a sufficient compliance with the form? It has been held that the form is mandatory, and not directory (*Henry v. Armitage*, 53 L. J. 111, Q.B.). The reason why the form is to be complied with is that a person who sees the nomination paper may be able to decide whether the candidate is properly nominated and assented to by enrolled burgesses, and to determine this by a mere comparison of the nomination papers and burgess-roll without any further and laborious inquiry. Could this be done in the present case? We think not. No person by merely comparing the nomination paper and burgess-roll could tell that Charles Arthur Burman and Charles Burman were the same person. It is true the number 467 is the same in the nomination paper and burgess roll, but this does not assist a person who has before him nothing but the nomination paper and burgess roll. There is no reason, so far as appeared in the nomination papers and roll, why Charles Arthur Burman and Charles Burman should not be different individuals—for instance, one the father the other the son. But it is said the defect may be cured by sect. 241 of 45 & 46 Vict. c. 50, which is as follows: "No misnomer or inaccurate description of any person, body corporate, or place named in any schedule to the Municipal Corporations Act 1835, or in any roll, list, notice, or voting paper, required by this Act, shall hinder the full operation of this Act with respect to that person, body, corporate, or place, provided the description of that person, body corporate, or place, be such as to be commonly understood. The case finds: "There was no other person of the name of 'Charles Burman' or 'Charles Arthur Burman,' residing at the said address or elsewhere in the said ward. The said Charles Arthur Burman and his brother the said Joseph Burman were, at the time of the last revision and of the said election, the only persons of the name of Burman, residing in the said ward or in the said borough of Stalybridge, and upation of any qualifying property

therein. Charles Arthur Burman was generally known to his friends as Charles Burman, and the name Charles Burman and the description in the said roll would, by anyone acquainted with Charles Arthur Burman, have been commonly understood to refer to the said Charles Arthur Burman, and to no other person. Anyone who did not know the said Charles Arthur Burman, but who had inquired for him by the name of Charles Burman, and the description in the said roll or by the name of Charles Burman alone, would have been directed to the said Charles Arthur Burman, and to no one else. There was no doubt of the identity of Charles Arthur Burman who subscribed the said nomination papers with the Charles Burman whose name appeared in the said roll. We do not think the provision applies to a case like the present. We think "commonly understood" means commonly understood by any person comparing the nomination paper and the burgess-roll. The abbreviations Frank for Francis, Fred. for Frederick, Harry for Henry, Joe for Joseph, would be covered by this provision, because everybody of ordinary sense would understand that was what was meant, and this upon a mere comparison of the nomination paper and burgess-roll without going further. Can it be said that Charles Burman is so commonly understood to be Charles Arthur Burman that no person would be misled, and that a mere comparison of the nomination paper and burgess-roll would prove this without further inquiry? We think not. If not, the mayor in every case where an objection like the present was taken would have to hear evidence and decide how far the inaccuracy was likely to mislead or had misled, and whether a person was commonly known by a name other than that by which he was described in a nomination paper. Such a proceeding it was said in *Gothard v. Clarke* (5 C. P. Div. 253) never could have been contemplated, and the inconvenience of it is too obvious for argument. We think the petitions respectively should be dismissed with costs.

*Petition dismissed with costs.*

Solicitors for the petitioners, *Sharpe, Parkers, Pritchard, and Sharpe.*

Solicitors for the respondent, *Shaw and Tremellen.*

Tuesday, May 5, 1885.

(Before POLLOCK, B. and DAY, J.)

REG. on the prosecution of THE GUARDIANS OF THE POOR OF THE EDMONTON UNION (apps.) v. THE GUARDIANS OF THE POOR OF ST. MARY, ISLINGTON (resps.). (a)

*Poor law—Settlement—Person above the age of sixteen—Birthplace, or parent's settlement—The Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 35.*

*By the 35th section of 39 & 40 Vict. c. 61 it is provided that no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father, or of its widowed mother, as the case may be, up to that*

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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*age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.*

*Persons above the age of sixteen who have never acquired any settlement by any act of their own cannot, according to the true meaning of the section, be deemed to have taken and to retain the settlement of their father or widowed mother, but must be deemed to be settled in the place of their birth.*

THIS was a case stated by justices of the county of Middlesex for the opinion of the court, in the following terms:—

This was an appeal against an order made by two justices bearing date the 10th Feb. 1884, for the removal of Alice Davis from the parish of St. Mary, Islington, in the county of Middlesex, to the parish of Enfield, in the same county, and in the Edmonton Union.

The appeal was tried at the Midsummer Quarter Sessions for the county of Middlesex, when that court quashed the said order with costs against the respondents, subject to the following case:

Alice Davis, the pauper, was born on the 27th June 1855, in the parish of Enfield, in the Edmonton Union, and is the legitimate daughter of Richard Davis and Jane his wife. She never acquired any settlement by any act of her own.

Richard Davis, the father of the pauper, was born on the 14th Nov. 1830, in the parish of St. Alphage, in the city of Canterbury. He acquired no other settlement.

On the 16th Feb. 1884 the said order of removal was obtained, on the ground that the pauper was born in the Edmonton Union.

It was contended on behalf of the respondents that the words "no person," commencing the 35th section of 39 & 40 Vict. c. 61, are by the context limited to a pauper whose settlement is under consideration, and that thus the present pauper, having arrived at the age of twenty-eight years at the time when her settlement was being inquired into, was to be deemed not to have derived a settlement from her father, but to be settled in the parish in which she was born. It was further contended that by force of the same section the birth settlement of the father was not a settlement which the daughter could derive.

It was contended on behalf of the appellants that, on the true construction of the section, this pauper was settled in the parish in which her father was born.

The court were of opinion that the contention of the appellants was right, and quashed the order.

The question for the opinion of the court is, whether the pauper is settled in the place of her birth, or in the place of her father's birth.

If the court shall be of opinion that the pauper was settled in the place of her birth, then the order of removal shall stand confirmed, and the order of sessions quashing the same shall be quashed; but if the court shall be of opinion that the pauper was settled in the place of her father's birth, then the order of sessions shall be confirmed.

*Tickell (Besley with him) for the guardians of*

the poor of St. Mary, Islington.—The Court of Quarter Sessions were wrong in deciding that this pauper was settled in the parish in which her father was born. The 35th section of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) (a) provides that no person shall be deemed to have derived a settlement from any other person by parentage or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or widowed mother, as the case may be, up to that age, and retain it until it shall acquire another. This provision clearly means that, where inquiry is being made into the settlement of a child under the age of sixteen, it shall take the settlement of the father or widowed mother unless it has by its own act acquired some other settlement. But the section does not mean that, where you are inquiring into the settlement of a pauper over the age of sixteen, such pauper is to be deemed, if he or she has acquired no other settlement, to have acquired while under the age of sixteen the settlement of the father and retained it afterwards, for if that were so the whole mischief of long and useless inquiries into the derivative settlements of paupers, which it was the object of the section to do away with, would be still left in existence. This, then, is not the plain meaning of the section, and it is not the meaning placed upon it by the court in the case of *Reg. v. The Guardians of Bridgnorth* (48 L. T. Rep. N. S. 600; 11 Q. B. Div. 314), which has overruled the previous decisions on this point, and placed on the section the only construction which is compatible with the intention of the Legislature to abolish derivative settlements. In that case an order for the removal of a pauper wife and her three children, on the ground that the settlement of her husband was the birth settlement of his father within the union to which the removal was made, having been made and appealed against, the birth settlement of the husband's father in such union was proved, but no other settlement either of the husband or of his father being set up, the order was quashed by an order of the Court of Quarter Sessions, which was confirmed by the Queen's Bench Division and the Court of Appeal, on the ground that evidence of the settlement of the husband's father was inadmissible and could not be acted upon in making the order of removal, as it went to prove the derivative settlement of the parent of the

(a) The 35th section of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) is as follows:

35. No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

children contrary to this 35th section of the Act of 1876. There Brett, M.R. explains the way in which the section should be read. "The section," he says, "begins abruptly thus: 'No person shall be deemed to have derived a settlement from any other person.' There is no introduction to say whether that is with regard to the law of removal or not, and it is obvious that one must apply the necessary introduction, and it will then read thus: 'In any question of the removal of a pauper no person shall be deemed to have derived a settlement from any other person.' It seems to me that the person there meant is the person whose removal is in question. 'No person' there consequently is the pauper, and if that stood alone, and if there were no exception, it would be that wherever there is a question of the removal of a pauper no such pauper shall be deemed to have derived a settlement from any other person. But then this section goes on to say, 'Whether by parentage, estate, or otherwise, except in the case of a wife from her husband.' The wife, if she had been the person whose removal was in question, would have come within the term 'person' at the beginning of the section. . . . Now that seems to me to show that in the case where the question is as to the removal of a wife she may derive a settlement from her husband. There it stops. Then the section goes on with a further exception, 'And in the case of a child under sixteen.' A child over sixteen, therefore, is not excepted, and this section must be read that in the case of a question as to the removal of a child under sixteen such child shall take the settlement of its father or of its widowed mother." And Cotton, L.J. says still more forcibly: "The argument really is this, that the derivative settlement of William Hughes could be entered into because William Hughes was once a child, and the court may consider what settlement he had when he was a child. In my opinion it would be forcing language to say that one can consider William Hughes, who is now the father of a family, as coming under this exception, which is pointed, in my opinion, only to those who can properly be called children at the time when the question arises as to their removal. In my opinion it cannot possibly be right, according to ordinary English language, to say that a man of fifty or sixty, both of whose parents were dead, and who was the head of a family instead of a child, could be considered as a child within the meaning of this Act of Parliament. If that argument were right, it would be in effect to repeal the enactment that no person shall be deemed to have derived a settlement by parentage, and would entirely, as far as I can see, render that enactment inoperative, and, as I do not see at what step of the pedigree you could stop, introduce all the difficulties and expense which arise from the question of a derivative settlement being entered into." These remarks apply exactly to the present case, and as the pauper in question was not at the time of the inquiry under the age of sixteen, she did not come within the exception provided for by the section; she could not, therefore, be deemed to have derived a settlement from any other person, and the order of removal to the parish in which she was born was correct, and ought not to have been quashed by the Court of Quarter Sessions.

*Poland* for the Guardians of the Edmonton

Union.—The order of quarter sessions is correct, and ought to be upheld. The meaning of the section is, that children up to the age of sixteen follow the settlement of their parents, and that whatever the settlement of their parents is when they arrive at that age, that settlement they keep until they acquire another. Here the pauper was born in 1855, and at her birth took her father's settlement under the old law:

*The Guardians of Tenterden Union v. The Guardians of St. Mary, Islington*, 38 L. T. Rep. N. S. 485.

This settlement she clearly retained up to the age of sixteen, and still retains, there being nothing in the Act of 1876 to take away that settlement or give her another. The case of *Reg. v. The Guardians of Bridgnorth* (48 L. T. Rep. N. S. 600; 11 Q. B. Div. 314), cited by the learned counsel for the appellants, is not in point in this case, since it turned entirely upon the third part of the 35th section, with which the present case has nothing to do, it being sought in that case to go into the derivative settlement of the parent, which is forbidden by the last paragraph of the section. That case merely decided that it was not possible by reason of the latter part of the section to inquire into the settlement of the grandfather. In this case the settlement of the father is not derivative, and no question arises upon the latter part of the section. Leaving, therefore, that case for the present, the general law is that all children, both legitimate and illegitimate, take and follow alike the settlement of the parent up to the age of sixteen; but any settlement obtained by the parent afterwards does not affect them, since they retain the settlement which the parent has when they arrive at the age of sixteen until they acquire another by some act of their own. This is clear from the case of *The Guardians of the Hereford Union v. The Guardians of the Warwick Union* (40 L. T. Rep. N. S. 588; 48 L. J. 111, M. C.), where a pauper born in 1840 in the Hereford Union had never acquired any settlement in her own right, and her father born at Leominster in 1798 had never acquired a settlement elsewhere, and it was held that the 35th section of the Act of 1876 was retrospective in its operation, and that therefore the pauper at the age of sixteen acquired her father's settlement which was a birth settlement, and could be ascertained without inquiry as to his derivative settlement. [POLLOCK, B.—Was not the practical object of the Act to abolish the law of emancipation.] That was the object of the Act, but there is no reason why children should not take their father's birth settlement, and there is nothing in the section on which such an interpretation ought to be put. In *The Guardians of Liverpool v. The Overseers of Portsea* (50 L. T. Rep. N. S. 296; 12 Q. B. Div. 303), upon appeal against an order for the removal of a widow and her children it appeared that the widow had acquired no settlement since her husband's death, and her husband, the father of the children, was born in the appellant parish, but never acquired a settlement for himself, and there was no evidence as to the settlement of his parents, and it was held that under this section the children took a settlement from their father in the appellant parish, and that the order for their removal thither was right. This case, therefore, followed the decision in *The Guardians*

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of *Hereford Union v. The Guardians of Warwick Union* (*ubi sup.*), notwithstanding that the case of *Reg. v. The Guardians of Bridgnorth* (*ubi sup.*), relied upon by the appellants, had been decided in the meantime by the Court of Appeal, the only difference being that in the Hereford case the pauper was thirty-nine, whereas in the Liverpool case the children were under sixteen; but the point was taken in the judgment in the latter case by Lord Coleridge, C.J., that there was no evidence that the father had any derivative settlement, and therefore there was no necessity to inquire into it, and the latter part of the section did not apply. In the present case, then, the child had, when sixteen years old, the parent's settlement, and, as that settlement was a birth settlement and can be shown without any inquiry into the derivative settlement of the parent, there is nothing to displace it. This is the plain meaning of the section, and the construction which has been placed upon it by judicial decision. Against this view the appellants are only able to cite the case of *Reg. v. The Guardians of Bridgnorth* (*ubi sup.*), in which it was improperly sought to inquire into the derivative settlement of the parent, viz., into the settlement of the grandfather of the pauper children—a course clearly forbidden by the section, which has subsequently been again negatived in *Reg. on the prosecution of the Guardians of High Wycombe v. The Guardians of Marylebone* (50 L. T. Rep. N. S. 442; 13 Q. B. Div. 15), where it was held that under this section an illegitimate child under sixteen does not take the settlement of the mother, where such settlement has been derived from the mother's father, but such child is remitted to its birth settlement. These cases establish that as soon as you discover the parent's settlement to be derivative you are remitted to the child's settlement of birth, but they are not in point here, where the settlement is not derivative. The order, therefore, of quarter sessions was right, and ought to be upheld.

*Tickell* in reply.—The appellants do not rely upon the latter part of the section, which deals with children under sixteen, but upon the first part, which precludes this pauper from deriving her settlement from any other person, since she does not come within the exception "except in the case of a child under the age of sixteen." Any other view necessitates, as was pointed out in *Reg. v. The Guardians of Bridgnorth* (*ubi sup.*), the position that the word "child" in the section comprises everybody who has been a child. [He was stopped by the Court.]

*POLLOCK, B.*—This is a case which has given rise to considerable difficulty in my mind, because I should wish to give effect to every part of the 35th section of the Act of 1876 (39 & 40 Vict. c. 61), and I have been much puzzled by the words relating to children under sixteen, "which child shall take the settlement of its father, or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." Now, I find a difficulty in giving their full and proper effect to those words without adopting Mr. Poland's argument. I think, however, that, looking at the whole of the section, we must follow the view taken by Brett, M.R. and Cotton, L.J. in *Reg. on the prosecution of the Guardians of Madeley Union v. The Guardians of Bridgnorth*,

and that the true effect of the section is to do away with derivative settlements, except in two cases—first, in the case of a wife; secondly, in the case of children under sixteen. I think that, looking at the words of the Legislature, this view places a plain and ordinary construction on the section, and the result of this view is that, when any court is called upon to inquire into the settlement of any particular person, no person is to be deemed to have derived any settlement from any other person, except wives from their husbands, and children under the age of sixteen from their parents. This exception clearly does not apply to a person of twenty-nine, who, of course, was at one time under sixteen. Then, if we take this view, the words "and shall retain the settlement so taken," must be understood to apply to children removed under the age of sixteen, in whose case it is necessary to look at what settlement was acquired at the time of such removal. I think that that is a fair meaning to place upon the section, although the words of it are by no means clear, and it is, further, the construction which I think the Master of the Rolls and Cotton, L.J. intended to place upon it. The decision, therefore, of the Court of Quarter Sessions was, in my opinion, not correct, and must be varied.

*DAY, J.*—I only differ from my brother Pollock in the one immaterial particular, that I feel no difficulty as to the construction to be placed upon the section, and I think that that contended for by the learned counsel for the appellants is correct. The object of the section is to get rid of all derivative settlements. The section begins: "No persons shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise." If the section stood there there would be an end of all derivative settlements, but, if that were so, there would be a gross injustice in two cases, namely, in the case of children and in the case of wives, for the section would then bring about separations between parents and children, and husbands and wives, since the parent would, in some cases, be kept in one place and the child be sent to another. In my opinion the time of "deeming" is the time of "adjudicating," and the words "child under the age of sixteen" mean "a child under the age of sixteen at the time of adjudicating," so that such a child would not be separated from its parent. This, I think, is the meaning of the section, and it is a meaning which is consistent with the main object of the Act, and calculated to prevent injustice. Where, the section says, there is a "deeming" or "adjudicating" in the case of a child under the age of sixteen, such child shall take the settlement of its father, and in such cases it shall retain it. It is an exception engrafted upon the general abolition of derivative settlements. The next argument of Mr. Poland is based upon the next paragraph of the section, dealing with illegitimate children. I see nothing there inconsistent with my interpretation of what has gone before—in fact, I think it is perfectly consistent. Illegitimate children under the age of sixteen, whose settlement is being adjudicated upon, shall take and retain the settlement of their mother until they acquire another. They have no fathers, therefore the Legislature provides for them, as nearly as their case makes it possible, in the same way as for legitimate children. The next part of

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the sectio removes a grievance which still remained in consequence of the exceptions engrafted on the first part of the section. As Mr. Poland pointed out, there was always great expense and difficulty in going back beyond the settlement of a pauper's father; the Legislature, therefore, enacts that, where it is necessary to go back in search of a settlement, the settlement of the father may be taken, but the search must not be carried any further. With respect to the cases cited, in the case of *The Guardians of Hereford Union v. The Guardians of Warwick Union* the point was not raised at all. The question determined there was whether the Act is retrospective or not, and no one doubts that it is. Then, in *The Guardians of Liverpool v. The Overseers of Portsea*, the children were under the age of sixteen, and, therefore, the case is not at all in point. Lastly, as to the case of *Reg. v. The Guardians of Bridgnorth*, although the point decided there by the Court of Appeal may be very different from that which is raised here, and the point now before us may not have arisen in that case, yet the spirit of the judgment is entirely in accordance with the construction I have placed upon the section. I think, therefore, that the order of Quarter Sessions must be quashed, and the order of removal made.

*Order of Quarter Sessions quashed, with costs.*

Solicitor for appellants, *F. Shelton*.

Solicitor for respondents, *William Lewis*.

Wednesday, June 10, 1885.

(Before MANISTY, MATHEW, and WILLS, JJ.)

WAYE (app.) v. THOMPSON (resp.). (a)

*Public Health Act 1875 (38 & 39 Vict. c. 55), s. 117.*

— *Unsound meat — Punishment of offender — Admissibility of evidence of unsoundness before justice empowered to convict.*

*By the 117th section of the Public Health Act 1875 (38 & 39 Vict. c. 55), if it appears to the justice that any animal carcase, meat, &c., seized by any medical officer of health or inspector of nuisances under the 116th section of the Act, and carried away to be dealt with by a justice, is diseased or unsound, or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding 20l. for every animal carcase or fish, or piece of meat, flesh, or fish so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months, and the justice who, under this section, is empowered to convict the offender may be either the justice who may have ordered the article to be disposed of or destroyed, or any other justice having jurisdiction in the place.*

*Certain meat having been seized by an inspector of nuisances and condemned and ordered to be destroyed by a justice, an information was preferred under the above section against T., in whose possession it was found, who, on the hearing thereof, proposed to call evidence as to the sound-*

*ness of the meat. This was objected to, on the ground that the question of soundness had already been adjudicated upon by the justice who condemned the meat, but the justices overruled the objection, and heard the evidence.*

*Held, on case stated, that the justices were right.*

THIS was a special case stated under 20 & 21 Vict. c. 43, by justices of the county of Cumberland, for the opinion of the court.

The case was, so far as material, as follows :

At a petty sessions holden at Millom, in the division of Bootle, in the county of Cumberland, on the 8th Nov. 1884, a certain information was preferred by Henry Waye, the inspector of nuisances for the local board for the district of Millom, hereinafter called the appellant, against William Henry Thompson, butcher, hereinafter called the respondent, under sect. 117 of the Public Health Act 1875 (38 & 39 Vict. c. 55) alleging that the appellant did on the 21st Oct. 1884, by virtue of and in accordance with the provisions in that behalf of the Public Health Act 1875, inspect and examine certain meat (that was to say) fourteen pieces of the carcase of a cow, in or upon the premises of the respondent; that the said meat was then in possession of the respondent, and was exposed for sale on the said premises, and was intended for the food of man; that the said meat then was diseased, unsound, unwholesome, and unfit for the food of man; and that the said appellant did thereupon seize the said meat by virtue of the said Act, and prayed that the said meat might be condemned and ordered to be destroyed, or so disposed of as to prevent it from being exposed for sale or used for the food of man.

Upon the hearing of the said information, the following facts were proved, viz., that the said meat was in the possession of, and exposed for sale by, the respondent, and was intended for the use of man; that it was seized by the appellant on the 21st Oct. 1884, and on the same day taken before a justice of the peace for the county of Cumberland, and that it appearing to him on an *ex parte* statement not on oath that such meat was diseased, unsound, unwholesome, and unfit for the food of man, he did thereby condemn the said fourteen pieces of meat, and ordered the same to be destroyed or so disposed of as to prevent the same from being exposed for sale, or used for the food of man. On the following day, however, the said justice, at the request of the respondent, directed the appellant not to destroy the carcase of meat until the owner could have it inspected by a veterinary surgeon, which inspection was accordingly made by witnesses on respondent's behalf. The appellant then called witnesses to prove that the said meat was diseased, unsound, unwholesome, and unfit for the food of man. The respondent thereupon proposed to call the witnesses who, by permission of the said justice, had inspected the said meat on the respondent's behalf, and also other witnesses, some of whom had seen the cow before it was slaughtered and after it had been dressed, and others who had seen other portions of the carcase of the cow from which the alleged diseased meat had been cut some time before, and others after the same had been condemned by the said justice, including medical and veterinary men, and other witnesses, who alleged they had partaken of meat from the

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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same animal. This testimony was objected to by the appellant on the following grounds: That the question of the said meat being diseased, unsound, unwholesome, and unfit for the food of man had already been adjudicated upon and decided in the affirmative by a justice of the peace for the said division, on an *ex parte* proceeding, evidence of which had been presented to us; that evidence to the contrary should not be admitted by us; that the evidence adduced and furnished to us by the appellant was sufficient to justify a conviction of the respondent under the 117th section of the Public Health Act 1875, for the offence alleged against him.

We, however, overruled the said objections, and heard the evidence of the defendant's witnesses, which satisfied us that the said meat was not diseased, but was wholesome, sound, and fit for the food of man, and gave our decision against the appellant, and ordered him to pay to the respondent the sum of 7*l.* 7*s.* 6*d.* for his costs incurred by him on that behalf.

The 116th and 117th sections of the Public Health Act 1875 (38 & 39 Vict. c. 55) are as follows:

116. Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice.

117. If it appears to the justice that any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk so seized is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be destroyed, or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal carcase, or fish, or piece of meat, flesh, or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread, or flour, or for the milk so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months.

The justice who, under this section, is empowered to convict the offender may be either the justice who may have ordered the article to be disposed of or destroyed, or any other justice having jurisdiction in the place.

V. Fitzgerald for the appellant.—It was not competent for the justices to receive evidence of the soundness or unsoundness of the meat, that being *res judicata*. Such a course would in fact amount to an inquiry as to whether the justice who condemned the meat was right in so doing, and it cannot be intended that a court of summary jurisdiction should be a court of appeal from the justice who condemned the meat. [MATHEW, J.—Is the offence, then, the exposing for sale meat which is not in fact unwholesome, but which someone has said is unwholesome?] In *Whits v. Redfern* (41 L. T. Rep. N. S. 524; 5 Q. B. Div. 15) it was held that meat might be taken before a justice under these sections and condemned, without any summons or notice to

the person to whom it belonged, and that such person having been, subsequently to the destruction of the meat, summoned and convicted of an offence under these sections, such conviction was good. Field, J. in that case actually discussed the point raised here, and decided that, however strong a measure it might be to deprive a man of the opportunity of being heard, the Legislature had in this case done so. "I feel," he says, "very strongly the possible injustice that might be done by depriving a man of his property without giving him an opportunity of being heard, and without giving him compensation if not himself in default; and it would require very strong words in an enactment to lead me to the conclusion that it was intended that this might be done;" and then he goes on to examine these sections, and finally decides that "the responsibility of the duty is imposed on the medical officer of health or inspector of nuisances of satisfying himself that the article is exposed for sale, and intended for the food of man, and, if he is so satisfied, he may seize." "Then is he bound," he continues, "to give notice to the owner before proceeding to apply to a justice to condemn the article so seized? It is contended that he is bound to give such notice. Ordinarily such a proceeding would be necessary. The Legislature generally cannot be considered to have intended that a man's property may be destroyed without giving him an opportunity of being heard; but here the paramount object would appear to be the speedy destruction of a noisome and unwholesome thing. There is nothing in the words of the 117th section, which gives power to the magistrate to condemn the article seized, to lead to the conclusion that he is to hear anybody. All he has to do apparently is to inspect the article, and, if he is satisfied that it is unsound or unwholesome, he is to condemn the same and order it to be destroyed, or so disposed of as to prevent it from being used for food." The Legislature has, therefore, for its own purposes placed the decision of this matter arbitrarily in the hands of the justice, and, as the court of summary jurisdiction cannot be a court of appeal from him, the party charged may give evidence that the meat was not his, or was not exposed for sale, but as to the soundness or unsoundness of it the case is concluded against him. [WILLS, J.—Why should not this point also be open to the party charged in the ordinary way? It is certainly against the general rule to send a man to prison for a matter on which he is not heard.] The only reason is that the statute says that that point is to be decided by a justice, who need not hear him on it. [MATHEW, J.—Suppose the sanitary inspector were to come forward and say he was sorry he had made a mistake?] The summons would be withdrawn. The sanitary inspector is constituted a judicial officer by the Act. [MATHEW, J.—Is it usual to place a man's liberty arbitrarily in the power of a judicial officer of this description?] In *Vinter v. Hind* (48 L. T. Rep. N. S. 359; 10 Q. B. Div. 63), it is taken for granted all through that the question rests with the sanitary inspector and justice. [WILLS, J.—There the words of the statute were not satisfied.] There are other sections also in which it is undoubtedly intended that the justice should act *ex parte*—e.g., the 124th section, which empowers a justice to make an order for the removal of infected persons to a hospital.



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Besides, Stephen, J. at the end of his judgment in *Vinter v. Hind* (*ubi sup.*) gives an express opinion in favour of the construction contended for by the appellants. "A further observation," he says, "is that, suppose there had been a regular seizure under sect. 116, and a regular condemnation by a justice under sect. 117, and that then the person to whom the meat belonged had been summoned before the justices, could he have been heard to say on that summons that the meat was not in fact unsound? It appears to us that he could not, for the discretion of the justice on that is to be taken to be conclusive, and if the person summoned could only dispute the unsoundness, that is a strong ground to support our construction of the Act." [MANISTY, J.—The object of the 116th section is, as Field, J. says in *White v. Redfern* (*ubi sup.*), the speedy abatement of the nuisance; but, the nuisance having been abated, why should not the party charged be allowed to contest the unsoundness of the meat when he is charged with the offence?] The offence is having in possession and exposing for sale the meat so condemned. [WILLS, J.—But is it not a condition precedent to the conviction that the meat must be diseased and unfit for food?] There is no authority to the effect that a decision of a judicial officer is capable of being reviewed by any court but a Court of Appeal. [WILLS, J.—Is there any decision to the effect that a man may be sent to prison for three months without being heard?] MATHEW, J.—What reason is there for saying that the court of summary jurisdiction shall not in these cases hear all the material evidence in the ordinary way? In *Gill v. Bright* (25 L. T. Rep. N. S. 591; 41 L. J. 22, M. C.) it was held that, where liquors kept for unlawful sale had been seized under the 15th section of 33 & 34 Vict. c. 29, the justices could not order them to be sold without giving the person, upon whose premises they were seized, an opportunity of being heard, and of showing that the seizure was improper and that the sale ought not to take place.] That case was cited in *White v. Redfern* (*ubi sup.*), and did not influence the decision of the court in that case.

Henry, for the respondent, was not called upon.

MANISTY, J.—This is a case stated by justices under 20 & 21 Vict. c. 43, for the opinion of the court on the question whether they ought or ought not to have heard the evidence of certain witnesses called by a person charged under the 117th section of the Public Health Act 1875 (38 & 39 Vict. c. 55) with having in his possession and exposing for sale on his premises certain meat intended for the food of man, which meat was diseased, unsound, unwholesome, and unfit for the use of man, and was seized and taken before a justice, and, it appearing to him to be diseased, unsound, unwholesome, and unfit for the use of man, was condemned and ordered to be destroyed. The facts seem to be that, on the 21st Oct. 1884, Inspector Wayne, under the powers of the 116th section, of the Public Health Act, seized certain meat belonging to Thompson, and exposed for sale on his premises, on the ground that it was unfit for human food, and having so seized it under the 116th section, carried the same before a justice of the peace, to be dealt with under the 117th section. Then, by the 117th section, if it appears to the justice that any meat seized under the 116th

section is unfit for food, he shall condemn the same and order it to be destroyed, or so disposed of as to prevent it from being exposed for sale or used for the food of man. He has, therefore, nothing to do but to inquire into that single fact. This the justice in this case did, and ordered the meat to be destroyed; but on the next day he wrote a letter ordering the inspector not to destroy the meat until the owner could have it examined by a veterinary surgeon. Whether he had power to make that order or not, it is not necessary to inquire; but the inspection was made by witnesses on the owner's behalf. Whether the meat was or was not destroyed we are not told; but on the 4th Nov. we find that an information which had been laid against the owner of the meat came on for hearing, and, on the hearing, the justices decided to hear evidence on behalf of the owner as to whether the meat was in fact unfit for human food, and the question whether they had power to do so is the question which is now raised before us. In my opinion, the two cases cited do not assist us very much. *White v. Redfern* deals with the entirely different question whether, when the meat is taken before the justice to be examined and if necessary condemned, the owner is entitled to a summons or notice of what is being done, and it was there decided that he was not. "There is nothing," it is there said, "in the words of the 117th section, which gives power to the magistrate to condemn the article seized, to lead to the conclusion that he is to hear anybody." But the reason for this is also to be found there, viz., that the paramount object of the Act would appear to be the speedy destruction of a noisome and unwholesome thing. This, however, does not assist us on the point whether, when another application is made to the justices to inflict a penalty on the owner, or send him to prison, they are to hear evidence on his behalf. In my opinion, it is necessary in every case that a man should be heard before he is sent to prison. The justice, it is true, was satisfied that the meat was unfit for human food; but if the respondent were to be debarred from giving evidence in his defence, and were to be sent to prison without being heard at all, this would, I should say, be the first case in which a man has ever been imprisoned without being heard in his defence. I am of opinion, therefore, that the justices were right in hearing the evidence tendered by the respondent, and that this appeal must be dismissed.

MATHEW, J.—I am of the same opinion. The object of these sections was to prevent the sale of meat unfit for human food. That object is secured when the justice has dealt with the meat under the powers of the first part of the 117th section and ordered it to be destroyed, and, when a court of summary jurisdiction comes to deal with the offence of the person to whom the meat belonged, they must deal with that offence in the ordinary way in which they usually deal with other offences, and are bound to hear the evidence tendered to them. The learned counsel for the appellant has seized upon the words, "so condemned," in the 117th section, and it is, of course, quite open to argument whether those words are a mere description of the article, or a definition of the offence. The learned counsel says that they are a definition of the offence, and that the offence is the having in possession, and exposing for sale, an article which



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an inspector shall have seized, and procured condemnation of at the hands of a justice. This construction would, to my mind, lead to a most extraordinary result. The justice may condemn the meat without hearing the owner. If, therefore, the enactment is to be construed in this way, a man may be sent to prison for three months for the misfortune of having in his shop meat which a sanitary inspector is mistaken in supposing to be unfit for human food, without having any opportunity of producing evidence to prove that the meat was not unfit for human food. I cannot believe that this is the result of the enactment. I therefore think that the justices were quite right in the decision at which they arrived, and that the appeal ought not to be allowed.

WILLS, J.—The legislation contained in these sections is not new. It is to be found first in the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), s. 131, but that Act provided only for the infliction of a fine for the offence, and did not give the power of imprisonment. This, however, was introduced by 26 & 27 Vict. c. 117, s. 2, the powers of which section were re-enacted by the 116th and 117th sections of the Public Health Act 1875, so that this enactment has been in force for more than twenty years, and it is now, if the contention of the appellant in this case is correct, for the first time discovered that a man may under its provisions be sent to prison for three months without being heard in his defence, because it is said the Legislature has so enacted. To my mind this is a most alarming innovation, and diametrically contrary to every characteristic of English law. We ought not, therefore, lightly to assume that this is the right construction of the section, and when we come to examine it, we find that the only ground for the contention is a highly technical construction of the words used. But it is said that this construction is supported by decided cases. As I read the case of *White v. Redfern*, no colour is given by that case to the suggestion; in fact, I find that it is said in the judgment in that case that it was conceded that, in the case of proceedings against the person, a summons must be taken out in the ordinary way. Why, then, should the other proceedings differ? In what way is that case an authority for saying that the other proceedings ought not to be carried on in the ordinary way. Then in *Vinter v. Hind* the animal confessedly died of disease, and it does not appear to have been open to the defendant to take that point. As far, therefore, as there is any expression of opinion in that case that the person charged could not have been heard to say on the summons that the meat was not unsound, such expression of opinion was wholly immaterial to the decision in that case, and was, I think, made without an adequate appreciation of the effects which such a construction would have. It has been decided that, on the application to order the destruction of the meat, the owner need not be heard; but it seems to me, for the reasons I have given, that the proposition that he is not to be heard upon the question of his own imprisonment needs only to be stated to be its own emphatic condemnation.

*Appeal dismissed with costs.*

Solicitor for the appellant, *Windybank*.

Solicitors for the respondent, *Helder and Roberts*.

Wednesday, June 17, 1885.

(Before Lord COLERIDGE, C.J. and MATHEW, J.)

REG. v. THE JUSTICES OF DENBIGHSHIRE. (a)

*Rating—Poor rate—Appeal—Notice—Valuation list amended by assessment committee—Appeal without further notice against rate on amended valuation list—Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), s. 1.*

*By the 1st section of the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), before any appeal shall be heard against a poor rate for any parish contained in any union to which the Act applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union; provided that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just.*

*In May 1884 a rate was made upon H. in respect of a farm occupied by him on a gross estimated rental of 404l. and a rateable value of 385l. 5s. In July 1884 H. gave notice of objection to the assessment committee against the valuation list, and on the appeal being heard by them the gross estimated value was reduced to 381l. 15s. and the rateable value to 363l., but no supplemental list was made. On the 4th Nov. a rate was made on this amended valuation, against which H. appealed to the next quarter sessions. At the hearing of the appeal the respondents objected that the court had no jurisdiction to hear the appeal, on the ground that the provisions of the Act had not been complied with, inasmuch as a second notice of objection to the list as amended had not been given subsequent to the making of the rate appealed against. The Court having decided that they had no jurisdiction:*

*Held, on rule for a mandamus, that the appellant, having once applied to the assessment committee and failed to get such relief as he deemed just, was not bound to give a second notice of objection to the list as amended, and that the justices therefore had jurisdiction to hear and ought to have heard the appeal.*

THIS was a rule nisi calling upon the justices of the county of Denbigh to show cause why a writ of *mandamus* should not issue commanding them to enter or cause to be entered continuances from session to session to the next general quarter sessions of the peace, to be holden in and for the said county, upon the appeal of Robert Bamford Hesketh against a rate or assessment made for the relief of the poor of the parish of Abergele, in the said county, on or about the 4th Nov. 1884, and at such next general quarter sessions of the peace to proceed to hear and determine the merits of the said appeal.

The appeal in question was against an assessment by which a certain farm called Gwrych Farm, owned and occupied by the appellant

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

Robert Bamford Hesketh, and consisting of 277a. 2r. 27p. was assessed on a gross estimated rental of 381l. 15s. and a rateable value of 363l.

The circumstances under which the appeal was made were as follows:—

Prior to Jan. 1884 the appellant's assessment for Gwrych Farm stood as follows: Acreage, 334a. 3r. 27p.; gross estimated rental, 404l. 15s.; rateable value, 385l. 5s. It was then discovered by the appellant that a portion of the land amounting to fifty-seven acres, which originally formed part of Gwrych Farm, had been taken from it and added to other farms, the tenants of which had for many years been paying rates thereon as well as the appellant.

The attention of the overseer having been called to the mistake, the assessment committee on the 17th Jan. 1884 reduced the acreage in the assessment list from 344a. 3r. 27p. to 277a. 2r. 7p., but made no reduction in the assessment.

The next rate on the amended assessment list of the 17th Jan. 1884 was made in May 1884, and the appellant was assessed as follows: Acreage, 277 acres; gross estimated rental, 404l. 15s.; rateable value, 385l. 5s.

The appellant in July 1884 gave notice of objection to the assessment committee against the assessment list as it then stood, and on the appeal being heard before the assessment committee on the 4th Sept., the gross estimated rental was reduced from 404l. 15s. to 381l. 15s., and the rateable value from 385l. 5s. to 363l.

No supplemental list was made or published, and on the 4th Nov. the first rate on the amended valuation list was made.

Against this rate the appellant appealed to the then next quarter sessions held on the 9th Jan. 1885.

At the hearing of the appeal the respondents took the objection that the court had no jurisdiction to hear the appeal, on the ground that the provisions of 27 & 28 Vict. c. 39, s. 1, had not been complied with, inasmuch as a second notice of objection to the said list had not been given subsequent to the making of the rate appealed against, and relied upon the case of *Reg. v. The Great Western Railway Company* (20 L. T. Rep. N. S. 481; L. Rep. 4 Q. B. 323.) The appellant relied upon the cases of *Reg. v. The Justices of Wiltshire* (40 L. T. Rep. N. S. 681; 4 Q. B. Div. 326), and *Reg. v. The Justices of Derbyshire* (25 L. T. Rep. N. S. 43) as showing that no second application to the assessment committee was necessary.

The Court decided that they had no jurisdiction to hear the appeal, inasmuch as the appellant ought to have gone to the assessment committee again after the rate was made before appealing to quarter sessions.

The appellant thereupon obtained a rule *nisi*, calling upon the justices of the county of Denbigh to show cause why a *mandamus* should not issue commanding them to enter continuances from session to session to the next general quarter sessions of the peace to be holden in and for the said county, upon the said appeal, and at such next general quarter sessions of the peace to proceed to hear and determine the merits of the said appeal, and this was the rule which now came on for argument.

*McIntyre*, Q.C. (with him *Marshall*), for the respondents, showed cause against the rule.—The

justices had no jurisdiction, under the statute and the cases, to hear this appeal, and therefore this rule ought to be refused. By the 1st section of the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39) (a) the appellant was bound to give to the assessment committee notice of objection against the list in conformity with which the rate appealed against was made, and having failed to do so, had no right to enter an appeal against the rate. This was decided as long ago as 1869 in the case of *Reg. v. The Great Western Railway Company* (20 L. T. Rep. N. S. 481; L. Rep. 4 Q. B. 323). In that case the appellants, having been assessed to a poor rate in conformity with a valuation list, gave notice to the committee of their objection to the list, but the committee refused to alter the list, and on appeal the rate was confirmed subject to a case. While the case was pending, a second rate was made in conformity with the list, which remained unaltered as to the appellants, and the appellants having applied to the quarter sessions to enter the appeal against the second rate without having given a fresh notice to the committee of objection to the list, it was held that a fresh notice of objection to the list was a condition precedent to the right to enter the appeal against the second rate. That case is exactly in point in the present case, and is fatal to the appellants, who were bound to give fresh notice to the assessment committee of their objection to the list subsequent to the rate of the 4th Nov., and having failed to perform that condition precedent are precluded by the Act from having their appeal heard. Before the Court of Quarter Sessions the appellants appear to have relied upon the cases of *Reg. v. The Justices of Derbyshire* (25 L. T. Rep. N. S. 43) and *Reg. v. The Justices of Wiltshire* (40 L. T. Rep. N. S. 681; 4 Q. B. Div. 326) but neither of these cases are at all in point. In *Reg. v. The Justices of Derbyshire* there was no second rate made as in the present case. There the appellants were assessed to a poor rate, and gave notice of objection to the valuation list deposited, but did not appear on the day fixed for hearing objections. The list was approved, and a rate made in conformity with it. On the following day the appellants gave notice of their intention to dispute their liability to pay

(a) The Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), s. 1, is as follows:

1. Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies, the appellant shall give twenty-one days notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union; provided that after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list; although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly.

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the sum at which they were assessed. The assessment committee heard the objection made by them, and reduced the rate, whereupon the list and rate were amended. Being dissatisfied with the amount of reduction, the appellants gave notice of appeal against the rate as it was made in the first instance. The quarter sessions, however, declined to hear the appeal on the ground that the appellants were not persons who had failed to obtain relief within the 1st section of 25 & 26 Vict. c. 103, as they had not given to the assessment committee notice of objection to the amended list and rate; and on a rule for a *mandamus*, it was held that the appellants having objected to the valuation list, and having failed to obtain such relief as they deemed just, were entitled to have their appeal heard, and need not repeat their notice of objection, although some reduction in the amount of the assessment had been made by the committee, and the list and rate amended. In that case, therefore, it was not a second and distinct rate, as here, which was appealed against, but the old rate; and it was held, as might have been expected, that the fact that it had been somewhat reduced made no difference, as it had not been reduced to such an extent as the appellants deemed just. Otherwise, by making an infinitesimal reduction, and then waiting for a further objection and making another infinitesimal reduction, the assessment committee might keep an appellant at bay for any length of time. Here, however, the appeal is against a second and distinct rate, and consequently all the formalities prescribed by the Act are necessary, since otherwise a person who had once made an objection to a list would be free afterwards from all the conditions with which the Legislature has seen fit to hamper the right to appeal. If, for instance, the appellant was entitled to appeal without further objection to the assessment committee against this November rate, then he was also entitled, if he chose, to let this November rate go by and appeal, if he thought good, against the rate of the February following without any previous objection to the committee, and so on. In fact, having once appealed to the assessment committee and got a reduction, he could let four or five rates pass by and then appeal to the quarter sessions. This, it is quite clear, could not have been the intention of the Legislature. [Lord COLERIDGE, C.J.—I cannot imagine why it should not have been, unless the Act of Parliament says that it was not so. The appellant has given the assessment committee an opportunity of reviewing their decision. What more is required?] The contrary view was taken by the court in *Reg. v. The Great Western Railway Company* (*ubi sup.*). The only other case relied upon by the appellants was *Reg. v. The Justices of Wiltshire* (40 L. T. Rep. N. S. 681; 4 Q. B. Div. 326), but there again there was no second rate. In that case the absurd contention was raised that, where an appellant had given notice to the assessment committee of objection to a valuation list and failed to obtain relief before a rate was made in conformity with it, so soon as the rate was made he was bound to begin again and give a fresh notice of objection to the list, after the making of the rate, in order to be entitled to appeal, and it was decided that he was not bound to do so. That was, therefore, a

case of the appellant's right to continue an appeal which he had already initiated, and not like the present, a case of a second appeal against a second rate. [Lord COLERIDGE, C.J.—In my opinion the case of *Reg. v. The Great Western Railway Company* is a most unsatisfactory case. The judgment is not the judgment of any single judge, but is reported in five lines as the judgment of the court. Against that we have the detailed judgments of Hannen, J., in *Reg. v. The Justices of Derbyshire*, and of Cockburn, C.J. and Lopes, J. in *Reg. v. The Justices of Wiltshire*, both judgments being of a later date than *Reg. v. The Great Western Railway Company*, and delivered with a full knowledge of that decision.] Those cases are both distinguished from the earlier case by the fact that there, as in the present case, the appeal was against a second and distinct rate, and on that earlier case, which has never been overruled, the respondents rely.

*Clement Higgins* (with him *Charles*, Q.C.) for the appellant.—[Lord COLERIDGE, C.J.—It is to my mind quite clear that it is not necessary for an appellant to object again to a valuation list which he has once objected to, but the words of the section are, "unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just." Now, here the rate of the 4th Nov., against which you are at present appealing, was made in conformity with the amended valuation list as amended by the assessment committee on the 4th Sept. Can it be said that you have given notice of objection against the said list; that is, the list in conformity with which the rate was framed? The list we are appealing against is the same list against which we originally gave notice of objection. It is stated in the affidavits, and was the case, that no supplemental list was made or published. The original list was merely altered. The list was therefore the same.

Lord COLERIDGE, C.J.—This is a case in which we are obliged to form our judgment in the best way we can in the face of decisions which appear to be somewhat conflicting, and which it is therefore difficult for us to apply to this case without coming to a decision which will appear contrary either to those cited on the one side or on the other. In favour of the appellants there are two decisions, both of which have been referred to, and both of which are of later date than the one relied upon by the respondents. One of these decisions was given in 1871, and the other in 1879, and in both of them the earlier case was cited and commented upon. It cannot, therefore, be said that Hannen, J. and Cockburn, C.J., who respectively delivered those decisions, were unaware of the existence of the earlier case. Now, the facts of the case, as I understand them, are these: In May 1884 a rate was made on the appellant on an amended valuation list, dated the 17th Jan. 1884. Against this rate the appellant did not appeal to the June sessions, but in July 1884 gave notice of objection to the assessment committee against the valuation list as it then stood, and on the matter being heard by the assessment committee on the 4th Sept. they gave him some redress, but not such as he thought he ought to have. And I may remark that when the reduction was made

on the 4th Sept. no supplemental list was made or published, but the list appealed against was altered. Then on the 4th Nov. the first rate on the amended valuation list was made, and the appellant thereupon, without making any further objection to the assessment committee, appealed against the rate to the January sessions, which were the next practicable sessions, and at the hearing of the appeal the respondents took the objection that the court had no jurisdiction to hear the appeal because the appellant had not, before appealing, given a second notice to the assessment committee of objection to the list subsequent to the making of the rate appealed against, and gone through the form of a second appeal before the assessment committee. The question therefore which we have to decide is, whether he had or had not a right to appeal in this manner without giving such notice of objection. This question depends upon the true construction of the 1st section of the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), which provides that "no person shall be empowered to appeal to any sessions against a poor rate framed in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just." Now, in this case, it appears to me that the appellant had given to the assessment committee notice of objection against the valuation list current at the time of making of the November rate, and had failed to obtain from the assessment committee such relief in the matter as he deemed just. I pause here to observe that the statute does not say if he shall have failed to obtain any relief in the matter, but if he shall have failed to obtain such relief in the matter as he deems just. Now, if I were deciding this point for the first time I should most certainly say that, having given this notice to the assessment committee and not having received from them such relief, he had done sufficient to entitle him to a hearing of his appeal at quarter sessions, and that the justices ought to have heard and decided it. But it is said that it is not so, and that there is authority for their refusal. Three cases have been cited to us on the point. The first case is that of *Reg. v. The Great Western Railway Company* (20 L. T. Rep. N. S. 481; L. Rep. 4 Q. B. 323). The facts of that case were, that the appellants having been assessed to a poor rate in conformity with a valuation list gave notice to the committee of their objection to the list; but the committee refused to alter the list, and on appeal the rate was confirmed subject to a case. While the case was pending a second rate was made in conformity with the list which remained unaltered as to the appellants, and the appellants having given the twenty-one days' notice of appeal against the rate to the committee, applied to the quarter sessions to enter the appeal against the second rate, without having given a fresh notice to the committee of objection to the list, and it was held that a fresh notice of objection to the list was a condition precedent to the right to enter the appeal against the second rate. Now there can be no doubt as to what the decision was in that case. It differs some-

what in circumstances from the present case, but it is so similar that I think the justices were well warranted in relying upon it in the decision at which they arrived, since it contains many circumstances clearly in favour of the respondents. But this decision has come under the consideration of two courts since it was delivered. The first occasion was in June 1871, when it came before Hannen, J., in the case of *Reg. v. The Justices of Derbyshire* (25 L. T. Rep. N. S. 43); and the second still later, in May 1879, when in the case of *Reg. v. The Justices of Wiltshire* (40 L. T. Rep. N. S. 681; 4 Q. B. Div. 326) it came before Cockburn, C.J. and Lopes, J. In both these cases the case to which I have referred was brought to the attention of the court, and the court, it appears to me, intimated in each case that there was grave doubt as to whether the earlier case was rightly decided. It appears to me from the arguments used by Hannen, J. and Cockburn, C.J. that the case was rightly doubted. In *Reg. v. The Justices of Derbyshire*, Hannen, J., says: "I am, however, of opinion that the appellants have done everything required by the statute to entitle them to have their appeal heard, and that it was not therefore necessary for them to go through the same process of objecting over again, possibly a great number of times. I cannot think that the Legislature intended that to be done, and I therefore adopt the more reasonable construction of the Act of Parliament—viz., that if there has been an objection to the valuation list, and that has failed to produce the relief to which the person objecting thinks himself entitled, although some alteration may have been made, such objection is sufficient;" and Cockburn, C.J., in *Reg. v. The Justices of Wiltshire*, puts the point even more strongly. "The contention," he says, "on the part of the applicants is, that though the party may have gone to the assessment committee and sought relief once, so soon as the rate is made he is bound to go again and reopen the same matter before he can appeal. It is impossible to suppose that the Legislature can have intended such an absurd result. It is contended that we are bound by the decision in *Reg. v. The Great Western Railway Company*. There the court held that, though the list stands good until a fresh one is made, with respect to each rate made upon such list a party intending to appeal must challenge the list afresh. I own that the discussion in the present case has somewhat shaken my confidence in the correctness of our decision in that case, but our decision in the present case does not overrule it, for the two cases are clearly distinguishable." In my opinion, if we were to decide in favour of the appellants in this case it would, as Cockburn, C.J. says, make the Act of Parliament have enacted an absurd result, and would, as Hannen, J. says, have given the parish officers the power of wearing out an appellant by perpetual appeals. They could have made a small amendment, then a fresh appeal would have been necessary, and an opportunity for vexatious delay would have been created which never existed before—a result the very opposite to that which it was the intention of the Act of Parliament to bring about. I think, therefore, that the construction we are placing upon the section is the true construction, and that if the appellant has before his appeal applied to the assessment committee and failed to get such

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relief as he deems just, he is entitled to have his appeal heard. These seem to me to be the only conditions precedent to such hearing, and I think that the appellant in the present case performed those conditions precedent, and that the justices had jurisdiction to hear and ought to have heard this appeal. I am of opinion, therefore, for these reasons that this rule should be made absolute, and that a *mandamus* should issue to the justices directing them to hear and determine this appeal.

MATHEW, J.—I entirely agree with my Lord. There can be no doubt that the object of the Act of Parliament was to enable persons aggrieved by a valuation list to obtain relief from the assessment committee instead of being obliged to take their appeal, in the first instance, to quarter sessions. But, at the same time, the Legislature contemplated that it was possible that the assessment committee might go wrong, that it might still be necessary to appeal to the Court of Quarter Sessions. Now, here we are asked to say that an appellant who had been once to the assessment committee and only got a fraction of the relief he wanted, ought before going to quarter sessions to have gone again to the assessment committee and asked them to hear over again precisely what had been heard by them before. Such a course would, in my opinion, be meaningless, and at the same time expensive, and I decline to give any such meaning to the Act of Parliament. I entirely agree, therefore, that the justices ought to have heard and determined this appeal, and that a *mandamus* ought to issue directing them so to do.

*Rule absolute.*

Solicitors for the appellant, *Field, Roscoe, and Co.*, for *E. Morris*, Wrexham.

Solicitors for the respondents, *Kennedy, Hughes, and Kennedy*, for *Gold Edwards and Weston*, Denbigh.

Tuesday, June 23, 1885.

(Before Lord COLERIDGE, C.J. and MATHEW, J.)

JOSOLYNE v. MEESON. (a)

*Metropolitan Building Act 1855—Public building—Ambulance station—Notice to district surveyor—Deposit of plans and sections—18 & 19 Vict. c. 122, ss. 3, 38—41 & 42 Vict. c. 32, s. 16, bye-law 5.*

*An ambulance station structurally disconnected with any building, and from which the public is rigorously excluded, is not of itself a public building within sect. 3 of the Metropolitan Building Act 1855, so as to require the builder to deposit plans and sections of the building with the notice of its erection to the district surveyor under bye-law 5, made under sect. 16 of the Metropolitan Management and Building Acts (Amendment) Act 1878.*

THIS was a case stated by one of the Metropolitan Police magistrates in pursuance of 18 & 19 Vict. c. 122, and the material facts were as follows:—

The appellant is a builder and contractor, and the respondent is the district surveyor appointed under the Metropolitan Building Act 1855 to the district of East Hackney (North) in the county of Middlesex.

Upon the 4th Oct. 1884 a complaint was made by the respondent to H. J. Bushby, Esq., the magistrate then sitting at the Worship-street Police-court, that the appellant had neglected to deposit with the respondent, as such district surveyor, plans and sections of an ambulance station in Brooksby's-walk within the district, contrary to the provisions of the statute of 18 & 19 Vict. c. 122, and the Metropolitan Management and Building Acts Amendment Act 1878 (41 & 42 Vict. c. 32), and the bye-laws made by the Metropolitan Board of Works under the authority of the same, whereby it was alleged that the appellant had incurred certain penalties under the said Acts, and thereupon the said magistrate issued a summons for the said penalties dated the 4th Oct. 1884, hereinafter called summons No. 1, directed to the appellant and requiring him to appear and answer such complaint.

Upon the same day the respondent also made complaint to the said magistrate that the appellant had neglected to give the respondent, as such district surveyor, due notice under sect. 38 of the Metropolitan Building Act 1855 in respect of the said ambulance station, contrary to the provisions of the Act, whereby it was alleged that the appellant had incurred certain other penalties under sect. 41 of the Act, and a summons against the appellant (hereinafter called summons No. 2) in respect of such penalties was also issued by the magistrate.

Both of the summonses came on for hearing on the 19th Nov. 1884, at Worship-street Police-court, before J. L. Hannay, Esq., one of the magistrates for the Metropolitan Police District, who heard evidence in support of and in opposition to the said two summonses.

It was contended by the respondent, in support of summons No. 1, that the ambulance station was a "public building" within the meaning of the Metropolitan Building Act 1855 and of sect. 16 of the said Amendment Act of 1878, and that the bye-laws made in pursuance of the last-mentioned section applied to and could be enforced with respect to the ambulance station, and that the appellant was bound to deposit plans and sections of the said ambulance station with the district surveyor in accordance with the requirements of the bye-laws.

It was contended by the appellant in opposition to the summons that the ambulance station was not a public building within the meaning of the aforesaid Acts, and that therefore the bye-laws did not apply to and could not be enforced with respect to it.

It was contended by the respondent, in support of summons No. 2, that the notice which had been given by the appellant to the respondent as such district surveyor, in respect of the ambulance station, in pursuance of sect. 38 of the Metropolitan Building Act 1855, was bad or insufficient upon the ground that "particulars" within the meaning of the Act had not been given, because in the case of a public building, considering the duties of a district surveyor under sect. 38, plans and sections should be given as part of such particulars.

It was contended by the appellant, in opposition to the summons, that it was not necessary that plans and sections should be deposited with the notice provided for in sect. 38 of the Act.

(a) Reported by W. F. EVERSLY, Esq., Barrister-at-Law.

The following facts were proved or admitted at the hearing before the magistrate:

That the ambulance station was to be erected by the appellant under a contract with the managers of the Metropolitan Asylum District, hereinafter called "the managers," made in accordance with the powers of the managers under the Metropolitan Poor Act 1867 and the Acts amending the same. That two days before the building or any work, to, in, or upon the same was commenced, the appellant sent to the respondent, as such district surveyor, a notice in writing stating that he was about to commence building the ambulance station as required by sect. 38 of the Metropolitan Building Act 1885. No plans or sections accompanied the said notice.

That the land upon which the ambulance station was to be erected was acquired by the managers in the year 1883, and that the land adjoined that upon which the Homerton Hospital stood, which was one of the hospitals belonging to the managers, and was built in 1870.

The ambulance station was being paid for out of the rates levied on the several parishes and unions in the metropolis, and when completed would be the station for the East-end of London for the ambulances and other conveyances, horses, and the staff which were employed for the conveyance of persons suffering from infectious diseases from that district to the various hospitals in the Metropolitan Asylum District. The said ambulance station was not attached to or worked in any way in connection with the Homerton Hospital, but was established for the carrying of patients from the East-London district to all the hospitals alike, and the two hospital ships at Long Reach on the river Thames.

The ambulance station was not connected structurally in any way with the Homerton Hospital, but was divided therefrom for the greater part by the backs of the buildings, and by a brick-wall eight feet high, none of which had any doors, windows, or other openings of any kind, with the exception of one small ventilator, and the hospital was built, as hereinbefore appears, fourteen years previously to the ambulance station.

The ambulance station was used solely for the purpose of housing the ambulances, stabling the horses, and providing accommodation for the staff employed by the managers at the station for the ambulance service. The public were rigorously and absolutely excluded at all times from the ambulance station, and the gate was always kept closed and under the charge of a porter, who opened it only to allow the ambulances to leave and enter the building. No persons other than the servants of the station were ever to be admitted under any circumstances into any portion of the ambulance station, and no persons other than such servants would have any right or reason of any kind to enter therein.

The ambulance station consisted of four buildings, and had no communication whatever with the hospital, and there was no entrance or means of access of any kind from the one to the other, the entrance to the ambulance station being solely for the use of the station.

The magistrate being of opinion with respect to summons No. 1 that the buildings in the ambulance station were public buildings within

the meaning of the Act of 1855, convicted the appellant of the offence charged and fined him 2s. and 2s. costs. And being of opinion with respect to the summons No. 2 that the said notice referred to was bad upon the ground that no plans and sections of the ambulance station had been deposited with such notice, convicted the appellant of the offence charged and fined him the sum of 2s. and 2s. costs.

The questions of law for the opinion of the court were: Upon summons No. 1, (1st) whether the said buildings were public buildings within the meaning of the Metropolitan Building Act, 1855. Upon summons No. 2, (2nd) whether sect. 38 of that Act imposed upon the appellant the liability to deposit plans and sections of the ambulance station with the notice provided for by the said section.

By 18 & 19 Vict. c. 122, sect. 3:

"Public building" shall mean every building used as a church, chapel, or other place of public worship, also every building used for purposes of public instruction; also every building used as a college, public hall, hospital, theatre, public concert room, public ball room, public lecture room, public exhibition room, or for any other public purposes.

By bye-law 5, under 41 & 42 Vict. c. 32:

Deposit of plans and sections:

On notice being given to a district surveyor of the intended erection, execution, alteration of, or addition to a public building, or a building to which section 56 of the Metropolitan Building Act 1885 applies, it shall be the duty of the person giving such notice to deposit plans and sections of such erection, re-erection, alteration or addition with the district surveyor. Such plans and sections shall be of sufficient detail to show the construction.

*Percy Gye* for the appellant.—The question here is, whether this building in question is a public building within the meaning of the definition clause, sect. 3 of the Metropolitan Building Act 1855. This building is not used for a public purpose; it has no connection with the Homerton Hospital, though it is close to it. The general public are rigorously excluded from it. The mere fact of its being built by a public body does not constitute it a public building. A public building is a building intended to hold a large number of people, such as a church or theatre, to which the public resorts. This not being a public building, the notice given by the appellant to the respondent was sufficient, and the decision of the magistrate ought to be reversed.

The Respondent in person.—It is really to the advantage of the public that such a building as this should be considered a public building. The magistrate has found that it is a public building, and consequently the appellant's notice was bad. The decision ought to stand.

By the COURT.—We are clearly of opinion that the building in question is not a public building, as contended for the appellant; and that the conviction ought to be quashed.

*Conviction quashed.*

Solicitors for the appellant, *Rogers, Sons and Russell.*



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DANIEL v. WHITFIELD.

[Q.B. Div.]

Tuesday, June 23, 1885.

(Before FIELD and MANISTY, JJ.)

DANIEL v. WHITFIELD. (a)

*Baker—Sale and delivery of bread—Loaves sold and weighed at shop in customer's presence—Delivered at customer's house by baker's cart at customer's request—Cart not provided with beam and scales, &c.—6 & 7 Will. 4, c. 37—Sect. 7—Bread "carried out and delivered for sale."*

*Bread, bought by a customer at a baker's shop, and then and there weighed in the customer's presence was afterwards, at the customer's request and to oblige her, sent by the baker in his cart, with other goods purchased by the customer, to her house three miles off, where it was delivered by the baker's man, the cart not being provided with beam and scales with proper weights as directed by sect. 7 of the 6 & 7 Will. 4, c. 37. The justices having convicted the baker of an offence under sect. 7 in carrying out and delivering bread from a cart not provided with beam and scales, &c., it was Held, by Field and Manisty, JJ., on appeal therefrom, that the bread was not "carried out and delivered" by the appellant as a baker "for sale," but for the convenience and at the request of the customer, the sale and weighing having taken place at the shop, and as no offence therefore had been committed under sect. 7, the conviction was wrong and must be quashed.*

*Robinson v. Cliffe* (34 L. T. Rep. N. S. 680) and *Ridgway v. Ward* (51 Ib. 704) distinguished.

THIS was a case stated by three justices of the peace for the county of Monmouth under the 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with the determination of the said justices upon the question of law which arose before them as hereinafter stated.

The appellant was convicted before the said justices, on the 13th Dec. 1884, on an information which charged, "for that he on the 6th Dec. inst., at the parish of Trevechen, did convey, carry out, and deliver bread for sale in a certain cart without being provided with a beam and scales with proper weights, in order that the bread sold might be weighed by the purchaser thereof, contrary to the statute 6 & 7 Will. 4, c. 37, s. 7."

The following facts were proved before the said justices on the hearing of the information:—

The appellant, John Daniel, is a grocer and provision dealer carrying on business at his shop at Pontypool and Abersychan. On Saturday, the 6th Dec., one Mary Ann Smith, a customer of the appellant's, called at appellant's shop and purchased three loaves of bread, which were weighed by the appellant in her presence, and she requested the appellant to oblige her by sending them to her house with other goods which she had purchased.

Police constable Thomas O'Donnell, on Saturday 6th Dec., saw a man named William Evans delivering bread at the house of the said Mary Ann Smith (who resides about three miles from Pontypool) from a cart belonging to the said appellant, and it was admitted on the part of the appellant that there were no beam and scales with the cart.

It was contended on the part of the appellant

that the bread was not offered for sale from the cart; that the cart was not kept for the sale of bread; and that the bread had been sold in the shop and weighed by the appellant himself, who handed the bread to the purchaser.

By sect. 6 of the 6 & 7 Will. 4, c. 37, it is enacted that,

Every baker or seller of bread shall cause to be fixed in some conspicuous part of his, her, or their shop, on or near the counter, a beam and scales with proper weights or other sufficient balance, in order that all bread there sold may from time to time be weighed in the presence of the purchaser or purchasers thereof.

By sect. 7 of the same statute it is enacted that,

Every baker or seller of bread, and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey and carry out bread for sale in and from any cart or other carriage shall be provided with, and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his, her, or their journeyman, servant, or other person, may from time to time be weighed in the presence of the purchaser or purchasers thereof. . . . And in case any such baker or seller of bread, or his or their journeyman, &c., shall at any time carry out or deliver any bread without being provided with such beam and scales, &c., then and in every such case every such baker shall for every such offence forfeit and pay any sum not exceeding 5l.

The justices were satisfied that the bread was sold at the shop to the purchaser, but they were not satisfied that the bread was delivered to the purchaser at the shop, but were of opinion that the bread was delivered at the house; and they decided therefore that, under the above section, the not having the beam and scales in the cart at the time of the delivery of the bread was an offence within the meaning of the statute, and they accordingly convicted the defendant in a penalty of ten shillings.

If the said decision of the justices is right, the conviction is to stand; but if otherwise, the summons is to be dismissed.

A. T. Laurence (with whom were Jelf, Q.C., and Acland), for the appellant, contended that the transaction between the appellant (the baker) and the customer at the shop where the bread was weighed in the customer's presence constituted a complete contract of sale and delivery, and that there was therefore nothing more to be done by the baker in the matter under the statute 6 & 7 Will. 4, c. 37, the terms and requisitions of which had been fully complied with. He cited

*Robinson v. Cliffe*, 34 L. T. Rep. N. S. 680; L. Rep.

1 Ex. Div. 294; 45 L. J. 119, M. C.; and

*Ridgway v. Ward*, 51 L. T. Rep. N. S. 704; 54 L. J. 20, M. C.; 14 Q. B. Div. 110;

and submitted that the justices in the present case had decided erroneously, and the conviction must therefore be quashed.

Mattinson, for the respondent, *contra*, supported the conviction, and urged that the sale and weighing of the bread in the shop was not sufficient. The statute required that the bread should be weighed on delivery, which took place here from the baker's cart, which ought to have been furnished with beam and scales with proper weights; the object of the Act being to insure to the customers the delivery of bread of full weight. There are passages in the judgment of Lord Bramwell (then Bramwell, J.) in *Robinson v. Cliffe* (*ubi sup.*), and in that of

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.



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Grove, J. in *Ridgway v. Ward* (*ubi sup.*), which are against the appellant, and in favour of the respondent.

FIELD, J.—A question, which has been discussed and decided in more than one case already, is again raised in the present case, namely, under what circumstances a baker is by law bound to carry a beam and scales with proper weights in his bread cart. The question arises under 6 & 7 Will. 4, c. 37, an Act the object of which was to prevent a baker from delivering short weight bread to his customers, and to provide a means which should operate as an efficient check upon the baker in that respect, and at the same time should prevent the possibility of a dispute with regard to the weight of the bread between him and his customers. The provisions of sect. 6 of the Act apply, and have reference to the sale and delivery and weighing of bread in the baker's shop, whilst sect. 7 deals with and provides for the more general cases of bread being ordered at the shop and then delivered by the baker from house to house. A good deal of controversy has taken place with regard to the meaning of the words "carry out for sale," in sect. 7, which enacts that every baker or seller of bread, and every journeyman, &c., employed by such baker or seller of bread, who shall convey and carry out bread for sale in and from any cart, &c., shall constantly carry in such cart a correct beam and scales, with proper weights," &c. It seems to me that the better opinion on the subject is, that those words imply the necessity for beam and scales only in cases where bread is being carried out for sale from the cart, which certainly was not the case here, for the justices have found that the sale took place at the shop. Then further on the section proceeds as follows: "And in case any such baker, &c., shall at any time carry out or deliver any bread without being provided with such beam and scales." Now, these words, "carry out or deliver any bread," have also been the subject of controversy. In this part of the section it is to be observed that the words "sell" or "for sale" do not appear, and the justices considering that, although there was a sale at the shop, there yet remained something to be done by the baker, that is to say, to "carry out and deliver," were of opinion that the present case came within those words; and if that were so, and if there had been a "carrying out and delivering of the bread" here, then the case would come within the judgment of Lord Bramwell in *Robinson v. Cliffe* (*ubi sup.*), and of my brother Grove in *Ridgway v. Ward* (*ubi sup.*). If the above-mentioned words are to be construed in a narrow and strictly literal sense, then undoubtedly the baker here did "carry out" and did "deliver" this bread; but, in my opinion, the carrying out and the delivery here were not within the meaning of the section, because the baker did not on this occasion carry out for sale or deliver the bread as a baker. In *Robinson v. Cliffe* the baker had a standing order from the customer to supply bread. His man went round for orders from the customers and returned with bread in his cart, and without doubt in that case the conviction of the baker was quite right. The case of *Ridgway v. Ward* (*ubi sup.*) is somewhat nearer the present case. The customer there gave his order to the traveller, and the baker weighed the bread, but not in the customer's presence, and then sent it out, and I agree that

there an offence was committed. But in his judgment in that case my brother Grove said: "The object of the Act evidently is, that when bread is delivered to a purchaser he shall have an opportunity of seeing it weighed. He may not have scales and weights of his own, or, if he had, the baker might dispute their accuracy, and therefore the statute obliges the baker to have proper scales and weights with his cart when the bread is delivered, otherwise in all the large number of cases where a baker delivers bread in pursuance of a previous order the Act would be defeated. For, suppose the purchaser in the present case actually saw a quartern loaf weighed and put aside in the shop, and a quartern loaf was afterwards sent to her, the object of the Act would not be attained unless she could see that quartern loaf weighed at her house. But I need not consider such a case, because here the loaf was not weighed before her in the shop, nor had she chosen it there, and asked the baker to send it to her." And in his judgment in the same case my brother Hawkins goes further still. He says: "The meaning of the word 'deliver' in the Act is really this: if any baker shall deliver any bread without beam and scales he shall be liable to a penalty. If a man takes out bread to deliver in pursuance of a contract of sale and delivery, and does not carry beam, scales, and weights, he comes within the Act. Suppose the person who gave the order to the traveller had sent her servant, saying, 'You represent me, go to the shop and have a loaf weighed for me and set aside, and when the baker comes round let him bring it,' I am far from saying that it would be necessary for the baker to send a beam and scales with that particular loaf. True, the baker might abstract some portion of the bread, and my brother Grove says the customer has a right to have an opportunity of testing it. But I have considerable doubt of that. For, if the purchaser sent his servant and said, 'You see the bread weighed and set aside,' and the servant did so, that would, I think, be a perfect contract of sale and delivery. Suppose that, after seeing it weighed, the servant had told the baker to cut a notch in it so that it might be identified, and he had done so, then under such circumstances, the loaf having been bought and appropriated, and set aside and weighed, and paid for, any transmission of it to the customer as a favour or otherwise would not be carrying out and delivering within the meaning of the Act. But I think that, if there is simply an order for two or three loaves of bread, the mere weighing out of the loaves by the baker or his man, and putting them aside, intending them to be delivered, is not a delivery within the meaning of this Act. I think that the meaning of the Act is, that when bread is either sold from a cart, or delivered from a cart, in fulfilment of a contract of sale and delivery, that is the sale and delivery intended by the Act." The question then is, does the present case come within that decision? I infer from the facts, as stated in the case, that the customer here paid for the loaves, and that they were set apart for her, and that she assented to this, and treated them precisely as she did the other articles which she had purchased. The justices say that they are not satisfied that there was a delivery at the shop. In so saying I think they are qualifying a

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previous statement made by them; that is, they seem to doubt whether there could be a delivery until the goods were sent home. But it is, in my opinion, clear that there might be, and that the baker may have acted, in carrying the bread and other things, simply as a friend; and in my opinion that is just what actually occurred. No offence therefore, that being so, had been committed under the Act. Were this to be held to be an offence, no baker would be able to carry a loaf of bread in his cart, to oblige a neighbour, unless the cart were provided with beam and scales and weights. This conviction must be quashed.

MANISTY, J.—I am of the same opinion, and think that the cases that have been cited and referred to are clearly distinguishable from the case now before us, and that our decision here to-day, therefore, conflicts in no way with the decisions in those cases, although I differ, however, from many of the dicta contained in them. In *Robinson v. Cliffe* (*ubi sup.*) there was neither any sale or any delivery except from the baker's cart; and in the other case of *Ridgway v. Ward* (*ubi sup.*) there was no weighing in pursuance of a contract and no appropriation. The present case, therefore, is altogether different from either of those two cases. We are now dealing with a penal statute, and before finding that an offence against it has been committed we are bound to see that the case comes clearly within the terms of the statute. It is assumed by sect. 7 that bread is sent out by the baker for sale and delivery, as no doubt it very often is, and the words "any baker" in the second or latter portion of that section mean "any such baker," that is to say, any baker who sends out bread for "sale and delivery," and not a baker who, having sold, weighed, and appropriated bread for a customer in his shop, afterwards sends it out or carries it home to the customer at the latter's request. If this were an offence, no baker would ever be able to carry out bread as a favour to a neighbour unless he were provided with weights and scales, and that is surely not the intention of the statute.

*Judgment for the appellant, quashing the conviction.*

Solicitors for the appellant, *Few and Co.*, agents for *Greenway and Bythway*, Pontypool.

Solicitors for the respondent, *Johnston, Harrison, and Powell*, agents for *Martin Edwards*, Pontypool.

## HOUSE OF LORDS.

April 24, 27, and May 12, 1885.

(Before Lords BLACKBURN, WATSON, and FITZGERALD.)

MAYOR OF PORTSMOUTH v. SMITH. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.  
*Towns Improvement Clauses Act 1847* (10 & 11 Vict. c. 34), s. 53—*Street—Expenses of paving—Liability of adjoining owners.*

*The appellants, the Corporation of P., bought some land of the respondent abutting upon a country road within a district to which a local Act incorporating sect. 53 of the Towns Improvement*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

*Clauses Act 1847 applied. The corporation, in pursuance of an agreement, improved the road and laid out a footpath by the side of it. Some years afterwards they paved and flagged the footpath, and sought to recover the cost from the respondent as adjoining owner under sect. 53 of the Act of 1847. The jury found, in answer to questions left to them, that before the footpath was paved the road was not a "street" in the popular sense of the word, and that the footpath was "otherwise made good."*

*Held (affirming the judgment of the court below), that the respondent was not liable for the expenses of paving the footpath.*

*The word "theretofore" in sect. 53 of the Towns Improvement Clauses Act 1847 refers to the period before the work is done.*

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Baggallay and Bowen, L.JJ.), reported in 50 L. T. Rep. N. S. 308, and 13 Q. B. Div. 184, reversing a judgment of Lindley, L.J. upon further consideration.

The facts appear sufficiently from the report in the court below, and from the judgment of Lord Blackburn.

*Bompas, Q.C.* and *Pitt-Lewis* appeared for the appellants, and contended that the road in question was a "street" within the meaning of the Act, and the appellants could exercise their power of paving under sect. 53 once at any time. The word "theretofore" refers to the period before the passing of the special Act.

*A. Charles, Q.C., Bullen, and Bovill Smith*, for the respondents, were not called upon to address the House.

At the conclusion of the argument for the appellants, their Lordships took time to consider their judgment.

May 12.—Their Lordships gave judgment as follows:—

LORD BLACKBURN.—My Lords: This is an appeal against an order made by the Court of Appeal, by which the judgment of Lindley, L.J. on further consideration for the plaintiffs was set aside and judgment entered for the defendant with costs instead. The counsel for the appellants were fully heard at your Lordships' bar; when they concluded it was not convenient at that time to hear the further argument. The further consideration was therefore postponed *sine die*, and it was at the same time intimated that if the House required to hear further argument notice would be given to counsel. My Lords, I have, without calling on the respondents' counsel to argue, come to the conclusion that the order appealed against is right. There is, I think, now no controversy on the state of things before 1874. Milton Lane was in 1857 a country lane, being a highway, but in no popular sense of the word a street, and then lying entirely outside the borough of Portsmouth. The site of this lane was included in the ambit of a local Act (20 & 21 Vict. c. xxxvii.) called the Landport and Southsea Improvement Act 1857. That Act by the 16th section incorporated part of the Towns Improvement Act 1847 (10 & 11 Vict. c. 34), and by the 20th section enacted that, in construing the Towns Improvement Act 1847 in connection with that Act, sects. 53, 54, and 73 should be read as if the word "owners" was substituted for "occupiers,"

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Sect. 34 was: "Nothing in this Act or in any Act incorporated therewith shall empower the commissioners to charge the owners of any land with the expenses of paving, flagging, making, or repairing any footways passing solely through a field or fields." It is not disputed that Milton Lane was not a footpath passing solely through a field or fields, but a highway. I do not think it is material to notice any more of the Landport and Southsea Improvement Act. In 1874, but not before, some alteration was made in Milton Lane (as to which more must be said hereafter) and its name was then changed to Asylum Road. The mayor &c., of Portsmouth were in 1864 the local board acting for the borough of Portsmouth, forming a district in which the Local Government Act 1858 had been adopted. On their petition as to three local Acts, of which the 20 & 21 Vict. c. xxxvii. was one, the Secretary of State made a provisional order, confirmed by the Local Government Supplemental Act 1864 (No. 2). I will now read the material parts of that order: "Now therefore, in pursuance of the powers vested in me by the said Local Government Act, I, as one of Her Majesty's principal Secretaries of State, do by this provisional order under my hand direct that from and after the passing of any Act of Parliament confirming this order: 1. The said hereinbefore recited local Acts except the parts thereof specified in the schedule hereunto annexed shall be repealed." "5. The provisions of the said hereinbefore recited local Acts not hereby repealed and of the Acts incorporated in whole or in part with the said hereinbefore recited local Acts or any of them shall, except as hereinafter provided, extend to the whole of the said district, and shall be incorporated with the said Local Government Act, and the said local board shall be the commissioners for executing the said Acts; provided that sects. 34 and 35 of the said firstly hereinbefore recited local Act, and sect. 102 of the said secondly hereinbefore recited local Act, and sects. 47 and 50 of the said thirdly hereinbefore recited local Act, shall apply only to the districts to which they respectively applied before the passing of any Act confirming this present order. Given under my hand this eleventh day of June, one thousand eight hundred and sixty-four. (Signed), G. Grey. Schedule to which this order refers. The sections to be retained in the hereinbefore recited local Acts are: 3. In the said thirdly hereinbefore recited Act (20 & 21 Vict. c. xxxvii.) the 16th section, in so far as it incorporates the following sections of the Towns Improvement Clauses Act 1847, viz., sects. 53, 98, 147 to 151 (both inclusive), 196, 197, and the section numbered 20 in so far as relates to the interpretation of the 53rd section of the Towns Improvements Clauses Act 1847; 32, 34, 47, 49, 50. So much of sect. 61 as relates to the incorporation of the Waterworks Clauses Act 1847. So much of sect. 84 as relates to abusive language; 85, 86, and 97 except as to the first proviso of the last hereinbefore recited section." The 53rd section of the Towns Improvement Clauses Act 1847 was incorporated in the local Act 20 & 21 Vict. c. xxxvii. in 1857, with the slight alteration of "owners" for "occupiers," and that section still remained after the provisional order was in force. It is a common practice in modern Acts to introduce interpretations. I am old enough to remember when that was a novelty, and, the older draftsmen

said, likely to be a very mischievous novelty. I think that experience has shown that the older draftsmen had some reason, but the practice is now inveterate. In the Towns Improvement Clauses Act 1847, it was enacted (sect. 3): "The following words and expressions in both this and the special Act and any Act incorporated therewith shall have the meanings hereby assigned to them unless there be something in the subject or context repugnant to such construction." "The word 'street' shall extend to and include any road, square, court, alley, or thoroughfare within the limits of the special Act." Milton Lane in 1857, and thence down to 1874, was admittedly not a street in the ordinary and general sense of the word, which has reference to houses, or at least to sites for houses, in some degree of contiguity, but it was both a "road" and a "thoroughfare." In 1874 the mayor, aldermen, and burgesses of Portsmouth, by articles of agreement under seal, bought from the now appellants seventy-five acres of land for the purpose of making a lunatic asylum. This seventy-five acres were bounded on the north by Milton Common Lane, with which, as I understand it, we have nothing to do in this case, and on the south by a public road. This I understand to be that which was then called Milton Lane, and is now called Asylum Road. It was part of the bargain between the corporation and the vendors that "the vendors shall set back the land on the north and south sides of the said roads, so that the same may become and be made of a uniform width of forty feet between the points C. and D. on the north, and the points E. and F. on the south, as shown on the plan hereinafter referred to, and the expenses of widening and making up the said road shall be borne by the corporation." On reference to the plan, it appears that from E. to F. is a part of Milton Lane, where the land on the north belonged to the vendors. From F. onwards towards the east, the land on the north of Milton Lane was bought by the corporation to build on it their new asylum. The bargain was carried out, the vendors set back the land, and the road was widened. On part of the land thus added to the road a footpath was made. All expenses of "making up" the widened road and the footpath were paid by the corporation. This was completed about 1875. In 1879, three or four years after this was done and paid for by the corporation of Portsmouth in their capacity of purchasers of the land for the purposes of making an asylum, they, in their capacity as urban authority, caused the footway which had been laid down in 1875 to be paved and flagged. This action is brought to recover from the respondent, as owner of the land on the north side of Asylum Road, the expenses of so doing. The cause came on for trial before Lindley, L.J. and a jury, of whom eight had a view. Lindley, L.J. reserved the case for further consideration, but took the opinion of the jury on all questions which the counsel on either side contended were, or might be, questions for the jury, reserving to himself, on further consideration, if he thought any of them were questions for the court, to decide them for himself, and I do not see how any better course could have been pursued. The road or thoroughfare called Milton Lane was in 1857, and before, a highway. It seems clear that, after some skirmishing, it was admitted that it was a

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highway repairable by the parish, and consequently, if that be material, after 1857 repairable by the commissioners under sect. 49 of the Towns Improvement Clauses Act 1847, but it was neglected. It was not, in fact, paved or flagged at that time, and indeed the land on which the footway now in question has been made was not then, nor at least till 1875, a part of the road. The portion of the summing-up which I shall now read shows plainly what the questions left to the jury were: "Exercising your own judgment, you must consider, now it is admitted, as an important fact that in 1875 the corporation widened this road, and did it under an agreement with the present defendant, and that the expense of making up this road, and so on, should be made and borne by the corporation, and although the agreement with the present defendant does not say anything about the footpaths, the mode in which the corporation understood what they were to do in making up the road is shown by what they did; and we know, as a fact, that they did make this road, they did metal the carriage-path when they made up the footpath in this way, that they put kerbstones and proper channels, and they made it up, that is to say, they did something to the footpath, they put gravel upon it, and put it in such a way as that it is admitted it was a good gravel path. That is not denied. Now the question is, whether that is not sufficiently 'otherwise made good.' I confess if it were for me—I do not know that it is for me—but if I had to decide that, and it should be altogether a question of law, I should be of opinion that it was made good. But again I agree that this is rather a question for you than for me. There are the facts. It really depends upon this, 'otherwise made good,' for what purpose? Common sense would suggest it must be for the purpose for which it is used. Bear in mind, now, it is conceded that in 1879, and years before, there were no houses on the north side of this lane, and if there is a good gravel footpath I do not see myself that that is not sufficiently good for all the purposes. It may be a question for you or for me, but, in order to save further expense, I will ask you these two questions, whether this place was a street in the popular acceptance of the term in 1879, before it was flagged and paved, or was the footpath on the north side sufficiently made good before the corporation dealt with it? Will you be kind enough to answer those two questions, and then I will dispose of the knotty point which may arise in the way I shall be advised. The jury considered. The Associate: Gentlemen, are you agreed? The Foreman: Quite agreed. The Associate: What do you find? The Foreman: That it was not a street in the popular sense of the word, and it was otherwise made good." The judge did not put to the jury any question as to the distinction between the capacity of the corporation in what they did in 1874-75 when building the asylum, and their present capacity as urban authority acting as commissioners under the provisional order. That could hardly be supposed to be a question for a jury. On further consideration Lindley, L.J. expressed himself as agreeing with all that the jury had found, and, I think, would have given judgment for the defendants but for the construction which he felt obliged to put on the word "theretofore" in the 53rd section. He

thought it necessarily must be construed as meaning before the passing of the special Act, that is, in this case, in 1857. And it being quite clear that this footway in question had not been in any sense made good till long after 1857, he gave judgment for the plaintiffs. Where a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act. I do not mean that, if there was in the original Act a section not incorporated, which came by way of a proviso or exception on that which is incorporated, that should be referred to. But all others, including the interpretation clause, if there be one, may be referred to. It is a dangerous mode of draftsmanship to incorporate a section from a former Act; for, unless the draftsman has a much clearer recollection of the whole of the former Act than can always be expected, there is great risk that something may be expressed which was not intended. I think, therefore, that the clauses 54 and 55, though not incorporated by the order, were properly referred to as throwing light on the 53rd section, which was; and I think also that the interpretation clause (which, I may observe in passing, is not the same as the interpretation of the same word "street" in the Public Health Act, and does not contain the word "highway") was properly referred to. If I came to the conclusion that, on the true construction of the Towns Improvement Clauses Act 1847, the Legislature had said that if any road or thoroughfare in the district (even one so thoroughly rural that there was then no pretext for saying that it was in the popular sense of the word a street), although a public highway at the time of the passing of the special Act, that is, in this case 1857, had not before that time, 1857, been well and sufficiently paved, flagged, or otherwise made good, the commissioners might at any time (in this case 1879), even though there had been no such change by building of houses or otherwise as to make it now a street (as meaning something more than a mere country road) in their discretion cause it to be paved, flagged, or otherwise made good at the expense of the owners of the land abutting on the road or thoroughfare, I do not see how, as a judge, I could do otherwise than give effect to the expressed intention of the Legislature and support the judgment of Lindley, L.J. I might think the Legislature improvident and unwise, and that the owners of the land were hardly treated, but I should feel obliged to carry out the expressed intention of the Legislature. There might still be an answer if the commissioners themselves had before 1879 otherwise made good the road, as they would from that time be liable to repair the street. Brett, M.R. thought that what was done by the corporation of Portsmouth in 1875, in pursuance of the bargain they made in 1874, when buying land on which to build the asylum, would have been illegal unless done by the same corporation in their capacity as urban authority, and that it ought, therefore, to be inferred that they did it in that capacity, and consequently that since 1875 they were bound to keep the street as such in

repair. I am inclined to think that the capacity of the corporation of Portsmouth when purchasing land for the purpose of making an asylum is distinct from their capacity as urban authority; and that what was done in 1875 should have the same effect and no more than if the purchase had been by a county authority for the purpose of making a county asylum. I do not decide this, and go no further than to say that I should not affirm the order on this ground without at least calling on the respondents' counsel to argue in support of this position. But the case is very different if the true construction of the Towns Improvement Clauses Act 1847 be that at any time when the state of the neighbourhood becomes such as to make it proper to pave, flag, or otherwise make good a road to an extent which would not have been required so long as it was merely a rural highway, the commissioners may, although the road was a highway at the time of the passing of the Act (in this case 1857) flag, pave, or otherwise make good the road at the expense of the owners of the adjoining land, unless theretofore, that is, before that time, the road had been already well and sufficiently paved, flagged, or otherwise made good. If the finding in this case that the road was not in 1879 a street in the popular sense, is true, I doubt whether the urban sanitary authority could then, under any circumstances, pave the road at the expense of the adjacent landowners, though if they had waited till more houses were built they probably could have done so; but it is not necessary to say how that is. But if, on the construction of the whole Act, the word "theretofore" in the 53rd section of the Towns Improvement Act 1847 refers not to the time of the passing of the special Act (in this case 1857) but to the time when the commissioners caused such street to be paved and flagged or otherwise made good (in this case 1879), then on the findings of the jury that the footway had been otherwise made good before 1879, I think the judgment should be for the defendants. I think there is no doubt that in construing an Act you are to give effect to the intention of the Legislature appearing on the whole Act from the words used, and that the words are to be construed in their ordinary grammatical meaning, or, as the Master of the Rolls, perhaps more accurately, says, in their "ordinary idiomatic" meaning. And I think there is a rule of construction commonly expressed thus, that "words of relation refer to the last antecedent." Some subtle remarks on this rule by Lord Bramwell in *Ewing v. Ewing* (8 App. Cas. 831) may be perused with interest. I do not think that the "last antecedent" is necessarily the nearest, nor even that the word "antecedent" is confined to what in the collocation of words comes before the word of relation. I think that, if the words of this section had been slightly transposed, and, to avoid any difficulty about the interpretation clause, the words of that clause had been used instead of "street," and, abridging it, it had read thus, "if any road have not theretofore been well and sufficiently made good, the commissioners may cause such parts thereof as have not theretofore been well and sufficiently made good to be made good in such manner as they think fit, although the road was a public highway at the passing of the special Act," no one could well have doubted that the grammatical or idiomatic mean-

ing of the words would be to refer "theretofore" to the time when the commissioners acted. That, though coming after the word of relation, would, I think, be an antecedent within the grammatical or idiomatic rule I have referred to. Baggallay, L.J. does not transpose the words, "although a public highway at the passing of the special Act," as I have done, but reads them as if in a parenthesis. Brett, M.R. seems to say that the rule of idiomatic English that the relative is to refer to the "antecedent" is so strong that, though of necessity when there is no antecedent you must make the relative relate to something subsequent, you must not do so if there be anything antecedent to which it can relate. I cannot agree in this. The cases which were cited do not, I think, give much help. *Robinson v. Local Board of Barton Eccles* (8 App. Cas. 798; 50 L. T. Rep. N.S. 57) was on a different Act, and a different clause, and a different interpretation clause. I should say that the great judicial difficulty felt in construing that Act is a strong proof of the soundness of the objection of the old school of draftsmen to the introduction of interpretation clauses. As I agree with Baggallay, L.J. in his interpretation of this Act, I think on that ground that the order appealed against should be affirmed and the appeal dismissed with costs.

LORD WATSON.—My Lords: I am of opinion that the order of the 12th Dec. 1883 must be affirmed although I do not concur in all the reasons which influenced the learned judges of the Court of Appeal. The jury have found that in 1879, at the time when the appellants executed the operations the cost of which they are seeking to recover from the respondents, the road or lane now known as Asylum Road "was not a street in the popular sense of the word." Upon that finding, the appellants could not recover, if the word "street" is used in the popular acceptation in sect. 53 of the Towns Improvement Clauses Act 1847. That section is detached from its group of clauses relating to the paving and maintenance of streets in the Act of 1847, and is incorporated *per se* with the Portsmouth provisional order of 1864, confirmed by the Local Government Supplemental Act 1864 (No. 2). I agree with the learned judges of the courts below, that sect. 53 must notwithstanding, for the purposes of this case, be read in the light afforded by the interpretation clause and context of the Act of 1847. There does not appear to be anything in the terms of the provisional order of 1864 which can alter or qualify its original meaning in the statute of 1847. I am unable at present to concur with the learned judges who have held that the word "street," as it occurs in sect. 53, embraces every kind of road or highway which, according to the interpretation clause (sect. 2) it may include. I very much doubt whether it was the intention of the Legislature to empower the commissioners to pave and flag mere country roads at the expense of the occupiers (or in the case of Portsmouth the owners) of the adjoining lands. At the same time I think a road might fairly be held to be a street within the meaning of sect. 53 although it did fall somewhat short of the popular idea of a street. If, for instance, a road were laid out as a street, in this sense, that preparations were being made for erecting buildings which on their erection being completed would make it in popular acceptation a street, it rather appears to me that

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the commissioners would be entitled to deal with the road in virtue of the powers given them by sect. 53. But I have found it unnecessary to form a deliberate judgment upon this part of the case; because I am of opinion that, assuming the appellants to have been warranted in treating Asylum Road in 1879 as a "street" falling under the provisions of sect. 53, the respondents are yet entitled to prevail on other and independent grounds. The owners of lands abutting on a street, which have been paved by the appellants professedly in terms of sect. 53, have in my opinion, a good defence to any claim made upon them for the cost of paving, if they can show that, before the work was executed by the appellants, the street had been "well and sufficiently paved and flagged or otherwise made good." The word "theretofore" is, no doubt, capable of receiving two different constructions; it may be held to refer either to the time when the work is executed by the commissioners, or to the time when the special Act was passed. I prefer the construction adopted by Baggallay, L.J. I agree with his Lordship that the words "although a public highway at the passing of the special Act" are parenthetical; and in that view it appears to me to be more natural as well as more reasonable to connect the word "theretofore" with the period of the commissioners' operations. The jury have found that the footpath of Asylum Road, so far at least as the respondents' lands abut upon it, though neither paved nor flagged, had been "otherwise made good" before the appellants proceeded to pave it in 1879. It was proved at the trial that about the year 1874, in the course of widening and making up Asylum Road under an agreement between the respondents and the corporation of Portsmouth, that part of the footpath which is now in question was kerbed, channelled, and made up with gravel. It was maintained for the appellants that your Lordships ought to disregard the finding of the jury in respect that a footpath so constructed could in no circumstances be regarded as "otherwise made good" within the meaning of sect. 53. It was argued that, in order to satisfy the statute, the footpath must have been formed with wood or asphalt, or some similar material. In short, the materials suggested as the only possible equivalents for paving or flagging permitted by the expression "otherwise made good" were all such as are used to form what, in common language, is termed pavement. That cannot, in my opinion, be the meaning which the Legislature intended to convey by that expression. I cannot from my own experience say that a footpath in a street cannot be made sufficiently good for all reasonable purposes by kerbing, channelling, and gravelling; and even if I had to decide the question which was submitted to the jury, I should hesitate to differ from their conclusion. These appear to me to be sufficient reasons for affirming the order appealed from. I desire to add that, if a street has been sufficiently paved, flagged, or otherwise made good before the commissioners proceed to pave, it is immaterial for the purposes of sect. 53 to consider by whom that may have been done. In the present case the operations, upon which the finding of the jury was based, must, in my opinion, be attributed to the joint action of the respondents and the corporation of Portsmouth. But the corporation appears to me

to have acted in the matter as the borough authority under the Lunatic Asylums Act 1853, and as such having interests and duties altogether different from those with which they are charged in their capacity as urban sanitary authority. I cannot therefore assent to the view that the present appellants made good the footpath in or after the year 1874.

Lord FITZGERALD.—I also, my Lords, am of opinion that the judgment of the Court of Appeal should be affirmed, and for the reasons shortly expressed by Baggallay L.J. I desire to add that the case seems to me to exhibit in a remarkable manner a state of legislation for local purposes so complicated, so bewildering, and so difficult to apply as not to be a credit to us. This no doubt has caused the present litigation, and will continue to be a cause of expensive litigation in the future.

*Order appealed from affirmed; and appeal dismissed with costs.*

Solicitors for appellants, *Williamson, Hill, and Co.*, agents for *A. Hellard*, Portsmouth.

Solicitors for respondents, *Ford and Ford*, agents for *R. W. Ford and Son*, Portsmouth.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Thursday, Jan. 15, 1885.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

LINE AND OTHERS v. WARREN AND OTHERS. (a)

*Municipal election — Four vacancies — Petition against three only of the candidates returned on a ground affecting the validity of the whole election — Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), ss. 87, 88, 91, Sched. 3, Part 2, rr. 3 and 10 — Appeal — Municipal Corporations Act 1882, s. 93, sub-sect. 7, s. 242, sub-sect. 3 — Supreme Court of Judicature Act 1881 (44 & 45 Vict. c. 68), s. 14.*

*At a municipal election held to fill four vacancies in the town council of a borough, nine persons were nominated under the Municipal Corporations Act 1882. Objections were taken to the nomination papers of H. and three other candidates, but the objection to H. was withdrawn. The mayor erroneously (as was now admitted) allowed the objections, and the three candidates objected to were prevented from going to the poll, and at the election subsequently held H. and the three respondents to this petition were declared to be duly elected. Upon a petition against the return of the three respondents, to which petition H. was not made a party, it was admitted that the decision of the mayor was erroneous, and that if H. had been made a party to the petition the whole election must have been invalidated, as the objection went to the root of the election, and applied equally to him as to the three respondents; but it was contended that, as H. was not before the court, and therefore his election could not be questioned, the return of the respondents must stand good. Held, that although the erroneous decision of the*

(a) Reported by A. A. HOPKINS, Esq. Barrister-at-Law.



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mayor affected the validity of the whole election, yet the court had power to deal with those candidates returned who were petitioned against, and that there is nothing in the Act of 1882 to prevent the election of the respondents being set aside, notwithstanding that the return of H. could not be questioned, he not being a party to the petition. Judgment of the Queen's Bench Division (*ante*, p. 531; 52 L. Rep. N. S. 258) affirmed.

In municipal election petitions an appeal from a judgment of the Queen's Bench Division lies to the Court of Appeal if leave to appeal be given by the Divisional Court.

This was an appeal from a judgment of the Queen's Bench Division (the Divisional Court consisting of Mathew and Day, JJ.), reported *ante*, p. 531; and 52 L. T. Rep. N. S. 258.

The facts are fully stated in the report of the proceedings before the Queen's Bench Division (*ubi sup.*) where the special case is set out, and the more material facts may be gathered from the above head-note.

The Divisional Court gave judgment in favour of the petitioners, but granted leave to appeal.

The respondents appealed.

*Yarborough Anderson* (*Montague Shearman* with him) for the petitioners.—There is a preliminary objection to the hearing of this appeal. The points raised by this petition were stated as a special case, and the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 93, sub-sect. 7, enacts that the decision of the High Court upon such special case shall be final. No appeal to this court therefore lies.

*Lewis Coward* for the respondents to the petition.—An appeal lies by virtue of sect. 14 of the Supreme Court of Judicature Act 1881 (44 & 45 Vict. c. 68). The court below gave special leave to appeal, and the section of the statute just cited enacts that the jurisdiction of the High Court to decide questions of law under (*inter alia*) the Corrupt Practices (Municipal Elections) Act 1872 (35 & 38 Vict. c. 60), is to be final, unless special leave be given to appeal. The Corrupt Practices (Municipal Elections) Act 1872 is an Act amending the Municipal Corporations Act 1835, and is therefore incorporated in the Municipal Corporations Act 1882, by sect. 242, sub-sect. 3, which enacts that where any Act refers to the Municipal Corporations Act 1835, or to any Act amending it, the reference shall be deemed to be to the Municipal Corporations Act 1882. Therefore, sect. 14 of the Supreme Court of Judicature Act 1881 must now be deemed to refer to the Municipal Corporations Act 1882, and consequently this appeal lies, special leave having been given.

BRETT, M.R.—We think we ought to hear this appeal.

*Lewis Coward* for the respondents to the petition.—The petition does not allege against any of these respondents any personal disqualification, the basis of the petition is a ground which vitiates the whole election. The decision of the mayor in allowing the objection to the nomination papers was erroneous, and that decision may be reversed upon a petition questioning the whole election. That is what this petition ought to do. The respondents cannot be unseated without declaring the whole election void, but the whole election cannot be declared void on this petition because it is a petition against individual elected candidates,

and Harris is no party to it; the respondents, therefore, cannot be unseated on this petition. *Howes v. Turner* (35 L. T. Rep. N. S. 58; 1 C. P. Div. 670) and *Budge v. Andrewes* (39 L. T. Rep. N. S. 166; 3 C. P. Div. 510) show that in cases of this nature the proper course is to declare the whole election void, but in this case that cannot be done for the reasons before given. Therefore, because no order can be made affecting the return of Harris, whose return is liable to the same objection as the return of the respondents, the respondents cannot be unseated on this petition.

*Yarborough Anderson* and *Montague Shearman*, for the petitioners, were not called on to argue.

BRETT, M.R.—In this case four candidates have been elected as municipal councillors. There were other candidates who might have been elected if they had been allowed to go to the poll; they ought to have been allowed to go to the poll, but the mayor erroneously rejected those other candidates. This erroneous decision of the mayor gave a right to any burgess under the Municipal Corporations Act 1882 to question the whole election, and it also, I think, gave a right to any burgess to question the election of each and every one of the candidates elected. But those burgesses who have petitioned in this case have not petitioned against the whole return, and they have not petitioned, as I certainly think they could have done, against the return of each and every one of the elected candidates; what they have done is to petition against the return of three only of the candidates elected. Any other burgess might have petitioned against Harris, the fourth elected candidate, but none did so, and therefore to hold that, under the circumstances of this case, the election of Harris stands good, does not do any real injustice. It may be that every elector within the borough is now of opinion that Harris is a man who ought to be elected, and that everyone of them was in his favour at the time for presenting a petition, yet it is said that a petition cannot be presented against the return of the other candidates without questioning his. That would seem to be a strange result of the legislation on the subject, and I cannot think that that can be the law; let us examine the statute. The petition here is presented under the Municipal Corporations Act 1882, schedule 3, part 2, rule 14, which is as follows:—"The decision of the mayor shall be given in writing, and shall, if disallowing an objection, be final; but, if allowing an objection, shall be subject to reversal on petition questioning the election or return." That rule seems to me to provide for the questioning of the election—that is the whole election, or for the questioning of the return, that is the return of any particular person returned. According to the form of the petition before us it is a petition against the return of the three returned candidates who are made respondents upon the petition. That seems to me a petition clearly within the rule laid down by the statute. The objection really comes to this, that the return of not one of the three respondents can be questioned, although it is admitted that the election of each of them is bad and void, because the return of a fourth candidate is not questioned. Is there anything in the general law which says that all the candidates are responsible for one another? Certainly not.



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Certainly there is nothing in this Act of Parliament which says so. Many cases occur to one in which the return of one candidate may be good and the return of all the rest bad. Or suppose that each and every one of four candidates at an election has been guilty of bribery, and that some person or persons petition against three of them but not against the fourth; could it be tolerated that they should be heard to say, we admit that we have done that which will invalidate our election, but the fourth candidate has been as guilty as ourselves, and our return cannot be questioned because his is not? I cannot find anything in the statute which can be relied on to support any such contention, and that is in effect the contention of the appellants here. We cannot take any notice at all of Harris, for the reason that he is not before us. If we were allowed to say so, we can see that his return is bad; but we have no right to say so, we can express no judicial opinion at all about it. Therefore, I see no objection to the form of this petition, and I think that the judgment given by Mathew, J. in the court below was right, and that this appeal must be dismissed.

CORROX, L.J.—The able argument of this appeal has failed to convince me that the decision below was wrong. A petition has been presented against three out of four candidates who were elected at a municipal election, and the objection taken is that the petition is bad because it does not join the fourth candidate who was elected, whose name was Harris. Upon the true construction of the Municipal Corporations Act 1882, it is clear to my mind that the return of anyone may be questioned, or that the whole election may be questioned. I look first at sect. 87 of that Act. That section enacts that "A municipal election may be questioned by an election petition on the ground (a) that the election was, as to the borough or ward, wholly avoided by general bribery, treating, undue influence, or personation;" then sub-sect. (b), "that the election was avoided by corrupt practices." I pause to notice that the word used here is "avoided," apparently in contradistinction to "wholly avoided" in sub-sect. (a). Sub-sects. (c) and (d) are, "That the person whose election is questioned was at the time of the election disqualified, or that he was not duly elected by a majority of lawful votes." These sub-sections most clearly contemplate objections to the return of individuals. Next I come to sect. 88, sub-sect. 2 of which I find to be as follows: "Any person whose election is questioned by the petition, and any returning officer of whose conduct a petition complains, may be made a respondent to the petition." That recognises the same distinction. Then I come to sect. 91, sub-sect. 3, which provides that a petition presented against two or more may be treated as a separate petition against each. Therefore, it is clear to demonstration that this Act does contemplate, not only a petition to set aside the whole election, but also a petition questioning the return of an individual, or of individuals, without joining all. Indeed this is conceded when the nature of the objection is one personal to the candidate or candidates objected to; but it is said that here the nature of the objection is one that goes to the root of the whole election, that if it is good against the three candidates objected to, it is equally good against Harris;

and then it is very correctly argued that we cannot set aside the election of Harris when he is not before us. The answer to that ingenious argument is, that we are not asked to set aside the election of Harris, the petition does not ask it. It is true that what the petition does ask is to set aside the election of three out of the four candidates, on grounds that are equally applicable to the fourth; and it is true that if the fourth had been joined, the election would have been set aside, because all the elected candidates would have been disqualified; but even then the form of the petition would not have been for declaring the whole election void, though that would have been the result of it. This petition only asks for a declaration that the election of three out of the four candidates is void, and the question raised may be stated thus: Ought the court to abstain from so holding simply because there is another person whose election is open to the same fatal objection, but against whom no order can be made? I think not. I think the court must hold that the objection which has been taken to the election of those persons whose election is questioned is fatal. If the other elected candidate had been brought before the court in good time, the same order would have been made against him. In his case the time for questioning his election has expired, and he remains an elected town councillor for Daventry. I think the order appealed from was right.

LINDLEY, L.J.—I am of the same opinion. I think it is only necessary to study carefully the sections and rules of this Act of Parliament, which have been alluded to, in order to decide that it is competent for these petitioners to present a petition like this. They say: Four candidates have been elected, we object to the election of three of them, the fourth is politically our friend and we do not intend to quarrel with his return, our opponents may do that if they will. The opponents say: That is not the law, your objection to the three applies equally to the fourth, your political friend, and you must equally quarrel with his return. Now, I cannot find that laid down in the Act of Parliament; on the contrary, after carefully scanning its provisions, I come to the conclusion that it is left to every Burgess to present a petition against any of those to whose return he objects. The practical consequence is, that this petition is competent and right and in good form, and the decision below was therefore right. Those who object to Mr. Harris could successfully do so if they were not too late, but now they are out of time.

BRETT, M.R.—I intended to say that I think neither of the cases cited in argument is in point, because in each of those cases all the elected candidates were before the court.

*Appeal dismissed.*

Solicitors for petitioners, *Caister and Shearman*.

Solicitors for respondents, *Kingsford, Dorman, and Co.*

CT. OF APP.] GAS LIGHT, &amp;C., COMPANY v. VESTRY OF ST. MARY ABBOTTS, KENSINGTON. [CT. OF APP.]

*March 17 and May 4, 1885.*

(Before Lord COLERIDGE, C.J., Sir J. HANNEN, and LINDLEY, L.J.)

THE GAS LIGHT AND COKE COMPANY v. THE VESTRY OF ST. MARY ABBOTTS, KENSINGTON. (a)

*Highway—Repair of streets—Steam rollers—Injury to gas pipes—Statutory rights.*

*The roads and streets within the district of the defendants' authority were vested in the defendants by certain statutes which imposed upon the defendants the duty of repairing them, but did not prescribe any particular method of repair. The defendants used, as the most approved method of repair, both as regards the ratepayers and as regards the public, heavy steam rollers for the repair of the streets. The plaintiffs, a gas company, laid down under the surface of the said streets certain pipes for the purpose of supplying the streets and houses within the district with gas, as they were bound by statute to do. These pipes were laid sufficiently below the surface to support the ordinary traffic, and even ordinary methods of repairing the streets, without injury, but the steam rollers used by the defendants for the purposes of repair were so heavy as frequently to injure the plaintiffs' pipes.*

*Held, that the plaintiffs were entitled to an injunction to restrain the defendants from using steam rollers in such a way as to injure the plaintiffs' pipes.*

*Judgment of Field, J. affirmed.*

THIS was an appeal from a judgment of Field, J. The plaintiffs, a gas company, brought an action against the Vestry of St. Mary Abbots, Kensington, for damages for injuries sustained by the mains and pipes of the plaintiffs, laid under the streets within the authority of the defendants, by the negligent and improper use of steam rollers by the defendants in repairing the said streets. The plaintiffs also claimed an injunction to restrain the defendants, their servants, agents, and workmen, from using, or causing to be used, any steam or other roller in such a way as to fracture, damage, or injure the mains, pipes, or works of the plaintiffs.

Certain roads and streets within the parish of St. Mary Abbots, Kensington, were vested in the defendants, as the vestry of such parish, by various Acts of Parliament, including the Towns Improvement Act 1847 (10 & 11 Vict. c. 34), the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), and the Metropolitan Local Management Act 1862 (25 & 26 Vict. c. 102), and under those statutes the defendants were the surveyors of highways within their district, and were bound to maintain and repair the streets and roads within their district, but no particular method of repairing the streets was prescribed by the statutes. Under the surface of such roads and streets the plaintiffs had lawfully laid down certain gas mains and pipes and other works, under the powers contained in various Acts of Parliament, including among others the Gas Works Clauses Act 1847 (9 & 10 Vict. c. 15), and the Metropolis Gas Act 1860 (23 & 24 Vict. c. 125), and the plaintiffs were bound by sects. 14, 17, and 22 of the last-mentioned statute to lay pipes and supply gas to the householders along the streets, and also to light the streets of the district, and

for neglect of this duty penalties were imposed by the statute upon the plaintiffs.

For the purposes of convenient access the plaintiffs' pipes were laid at a depth of from twenty to twenty-four inches below the surface of the street, and this depth was found sufficient to enable them to bear without injury the ordinary traffic on the streets, and also ordinary modes of repairing the streets if the steam rollers used for that purpose were not of very great weight. It appeared, however, that about the year 1872 the defendants used a steam roller of fifteen tons in weight, and another steam roller of ten tons in weight, and these rollers, or others of a like weight, they continually used for the purpose of repairing the streets, believing that the use of such steam rollers was the quickest, best, and most economical mode of fulfilling their duty to repair. In consequence of the great weight of these rollers the plaintiffs' pipes frequently sustained fracture, and finally this action was brought.

The action was tried before Field, J., without a jury, in May 1884, and that learned judge gave judgment for the plaintiffs for 5l. damages, and granted an injunction in the terms prayed.

The defendants appealed.

Sir F. Herschell, Q.C. and Muir Mackenzie for the defendants.—The defendants were bound to repair the streets, and to use the best and most economical methods of repair known. This they have done, and if in consequence of performing this lawful act in pursuance of a duty cast upon them by statute they have done some injury to the plaintiffs, the plaintiffs can have no right of action in respect of such injury. It is true the plaintiffs have a statutory right to have their pipes in the streets, but that right must be subordinate to the rights of the defendants, whose duty it is to maintain the streets in a condition fit for use as such, and in whom the soil is vested for that purpose.

H. Davey, Q.C. and Webster, Q.C. (Stirling and Danckwerts with them) for the plaintiffs.—The defendants are liable unless they can point to some statutory authority enabling them to do what they have done. It is not enough to point to a general duty to repair the streets. Such powers must be used reasonably; and such a general duty to repair does not enable the defendants to use steam rollers of this abnormal weight. If so, what limit is to be placed on the methods of repair? When some one invents a steam hammer which will repair roads better and more economically than the steam rollers, but which will inevitably break all the gas and water pipes beneath, are the defendants then to be allowed to use it because it may be the best method of repair then known?

During the arguments the following cases were cited:

- Coverdale v. Charlton*, 40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104;
- Rolls v. Vestry of St. Southwark*, George, 13 L. T. Rep. N. S. 140; 14 Ch. Div. 785;
- Geddes v. Proprietors of Bann Reservoir*, 3 App. Cas. 430;
- Hill v. Metropolitan Asylum District Board*, 6 App. Cas. 193;
- Truman v. London, Brighton, and South Coast Railway Company*, 50 L. T. Rep. N. S. 89; 25 Ch. Div. 423;

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*Vernon v. Vestry of St. James, Westminster*, 44 L. T. Rep. N. S. 229; 16 Ch. Div. 449;  
*Fletcher v. Rylands*, 19 L. T. Rep. N. S. 220; 3 H. L. 330;  
*Powell v. Fall*, 43 L. T. Rep. N. S. 562; 5 Q. B. Div. 597;  
*Wallington v. Hoskins*, 43 L. T. Rep. N. S. 597; 6 Q. B. Div. 206.

*Cur. adv. vult.*

May 4.—The judgment of the Court was read by

LINDLEY, L.J.—The plaintiffs in this case seek an injunction to restrain the defendants from using steam rollers so as to injure their pipes, which are laid under the surface of the roads and streets in the defendants' district. Under certain statutes, to which it is not necessary particularly to refer, the roads and streets in question are vested in the defendants, and it is their duty to repair them. No particular method of repairing is prescribed, and, subject to the rights of other people, it may be taken that it is lawful for the defendants to adopt any mode of repairing which they think proper. It appears that since 1872 heavy steam rollers have been used for this purpose, and it is said, we will assume correctly, that their use is advantageous and beneficial both to the ratepayers who have to pay for repairing the streets, and to the public who use them; beneficial to the ratepayers in point of expense, and beneficial to the public because the metalling of the roads is better and more quickly consolidated by steam rollers than by any other known means. Under certain other statutes, to which it is not necessary particularly to refer, the plaintiffs, or their predecessors, have both before and since 1872 lawfully laid down gas pipes under the surface of the defendants' roads and street, and the plaintiffs are entitled to have those pipes there for the purpose of supplying gas to such persons as may desire to be so supplied, and it is material to bear in mind that, although the profits, not exceeding a certain amount, derived by the plaintiffs from the manufacture and supply of gas are divisible amongst the shareholders of the plaintiff company, yet the plaintiffs are bound to supply gas to persons who live in the streets along which their pipes are laid. Speaking generally, the plaintiffs' pipes are laid from twenty to twenty-four inches below the surface of the streets along which they are laid, and this depth is found sufficient to enable them to sustain without injury the ordinary traffic, light and heavy, along the street. The same depth is also sufficient to enable the pipes to remain uninjured by the ordinary modes of repair, if heavy steam rollers are not used. It appears, however, that the steam rollers used by the defendants are so heavy as frequently to injure the pipes of the plaintiffs over which the rollers pass, and this circumstance has given rise to the controversy which we have now to consider. It is obvious from the foregoing statement that the rights of the plaintiffs and of the defendants are to a certain extent conflicting. On the one hand, it is plain that the plaintiffs' right to lay their pipes and have them uninjured is subordinate to the right of the public to use the streets and to have them kept in repair; on the other hand, it is equally plain that the duty of the defendants to the public and their right as against the plaintiffs is to repair the streets and keep them fit for traffic. Now, there is no dispute that the defendants can perform their duty without

using steam rollers of such a weight as to injure the plaintiffs' pipes; but they say it is their duty and right to repair the roads in the most economical and best way, and to avail themselves of all improvements, regardless of the effect on the plaintiffs' pipes. Field, J. has held that this contention cannot be supported, and we are of opinion that his decision is correct. The authorities to which he referred, and particularly the *Metropolitan Asylum District Board v. Hill* (*ubi sup.*), show that an action lies for an injury to property, unless such injury is expressly authorised by statute, or is, physically speaking, the necessary consequence of what is so authorised. If, in this case, the defendants were expressly authorised by statute to use steam rollers of such a weight as necessarily to injure the plaintiffs' pipes, the plaintiffs would have no ground of complaint. The case would be one of *damnum absque injuria*. The same consequence would follow if the defendants were expressly authorised by statute to repair in some way which necessarily required the use of heavy steam rollers, or other machinery which could not be worked without injuring the plaintiffs' pipes; there again, although such rollers or machinery were not expressly mentioned, their use would be authorised by necessary implication, and the plaintiffs would be without redress. In this case there is no such statute, and it is not necessary to say more. But the conclusion thus arrived at on general principles only is, in our opinion, very much strengthened by those statutory enactments which empower the defendants to require the position of the plaintiffs' pipes to be altered for the public benefit, but which also compel the defendants to pay the expenses of such alterations. We refer particularly to 10 & 11 Vict. c. 34, s. 61; 18 & 19 Vict. c. 120, s. 98; and 25 & 26 Vict. c. 102, s. 73, which incorporates s. 52 of 57 Geo. 3, c. xxix. (local and personal). We pass now to consider the question whether the plaintiffs are entitled to an injunction, or only to damages, and if to an injunction in what form it should be. The particular instances in which injury to the plaintiffs' pipes by the use of the steam rollers was clearly proved were reduced to one; but we are satisfied by the evidence that there is very considerable danger of frequent injury, and considering that the defendants claim the right to inflict it, or in other words claim the right to use steam rollers of any weight, regardless of the consequences to the plaintiffs, we are of opinion that the plaintiffs are entitled to an injunction. As regards the form of the injunction, we are also of opinion that it is substantially unobjectionable; but we think it ought to be confined to steam rollers, there being no proof of injury by any other rollers, and no proof of any intention to use any rollers except steam rollers which are likely to do any harm. We also think that the words "properly laid" ought to be added, if the defendants wish it, after the words "main, pipes, or works of the plaintiffs." But these variations ought not, in our opinion, to affect the costs of the appeal, which ought to be dismissed with costs.

*Appeal dismissed.*

Solicitors for plaintiffs, *Bedford and Williams*.  
 Solicitors for defendants, *Pontifex, Hewitt, and Pitt*.

CHAN. DIV.] TEULIERE AND OTHERS v. THE VESTRY OF ST. MARY ABBOTTS, KENSINGTON. [CHAN. DIV.]

## HIGH COURT OF JUSTICE.

## CHANCERY DIVISION.

Aug. 6 and 7, 1885.

(Before PEARSON, J.)

TEULIERE AND OTHERS v. THE VESTRY OF ST. MARY ABBOTTS, KENSINGTON. (a)

*Metropolis Improvement Act (57 Geo. 3, c. xxix.), s. 20—Widening street—Part of building required—Power of vestry to take whole.*

*The K. vestry passed a resolution that the whole of the buildings and grounds of an orphanage adjoining C.-street prevented their carrying out an improvement consisting in widening the said street, and gave notice to the trustees to treat for the whole. The trustees contended that the vestry were not entitled to take more than they actually intended to throw into the street, and moved for an injunction to restrain the vestry from proceeding under their notice to treat. The orphanage consisted of buildings occupying about a quarter of an acre, and a garden occupying another quarter of an acre. The vestry required to throw into C.-street a strip about thirty feet wide. The exact amount which was so required was disputed, but it was admitted that it would be necessary to cut into and take part of the main building of the orphanage.*

*Held, that, the trustees being willing to sell part of their buildings, the vestry, whether or not they would have had power against an unwilling owner to take part of a building without the whole, could not compel them to sell the whole.*

On the 4th July 1883 the Kensington Vestry, acting under the Metropolis Improvement Act (57 Geo. 3, c. xxix.), duly passed a resolution:

That for the improvement of Church-street, Kensington, it is desirable to widen so much of the said thoroughfare as lies between Duke's-lane and Vicarage-gardens, and the vestry hereby adjudge that the houses, walls, buildings, lands, tenements and hereditaments, or portions thereof, respectively situate on the east side of Church-street, and coloured red and blue on the plan A annexed to the resolution, prevent the widening of the said street, and that the possession, occupation, and purchase of the said respective houses, walls, buildings, lands, and hereditaments, will be necessary for carrying out the said improvement, and that notices be therefore served on the several owners and occupiers of all such properties of whatsoever tenure, kind, or quality, for the purposes aforesaid, as provided by 57 Geo. 3, c. xxix.

The hereditaments coloured red on the plan included the whole of the buildings and garden of the St. Vincent's Orphanage. These occupied together an area of about half an acre, bordering on Church-street for about 130 feet. The main building of the orphanage did not extend to the edge of the street, but the space between was occupied with somewhat lower buildings, communicating with the main building, and used as a washhouse and for other purposes of the orphanage.

The vestry had not fixed by any resolution the exact distance by which the street was to be widened, but it was asserted and not denied that they would require so much as to compel them to cut into the main portion of the building.

On the 20th Aug. 1883 the vestry gave the usual notice to the trustees of the orphanage to treat for the whole of their property.

The trustees refused to convey the whole, insisting that the vestry could not compel them to sell more than the strip which they intended actually to throw into the street.

They brought this action on the 8th Sept. 1883, for an injunction restraining the vestry from proceeding under their notice to treat, and now moved for an injunction.

The Act of 57 Geo. 3, c. xxix., is intitled, "An Act for better paving, improving and regulating the streets of the metropolis, and removing and preventing nuisances therein." Sect. 80 provides as follows:

That for the improvement of the streets and public places in the parochial or other districts within the jurisdiction of this Act, and for the public advantage, it shall and may be lawful to and for the commissioners or trustees, or any other person having the control of the pavements of any parochial or other district, from time to time, and at all times hereafter, to alter, widen, turn, or extend any of the streets or other public places within any such parochial or other district (except turnpike roads), and to lengthen and continue or open the same from the sides of any streets or public places within such or any other parochial or other district, and to raise, level, lower, drain, ballast, gravel, or pave such new part or parts of any such streets or public places so altered, widened, extended, opened, or lengthened as aforesaid, and that if any houses, walls, buildings, lands, tenements, and hereditaments, or any part thereof, shall be adjudged by the said commissioners, or trustees, or other persons as aforesaid, to project into, obstruct, or prevent them from so altering, turning, widening, extending, lengthening, continuing, or opening the said streets or public places within the said parochial or other district, and that the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements, or hereditaments, will be necessary for that purpose, it shall and may be lawful to and for the said commissioners, or trustees, or other person as aforesaid, and that they shall have full power and authority to treat, contract, and agree, or to employ any person or persons to treat, contract and agree with the several owner or owners, occupier or occupiers, of all such houses, walls, buildings, lands, and hereditaments of whatever nature, tenure, kind, or quality, for the purposes aforesaid, and to pay for the same such sum and sums of money as shall be agreed upon by the said commissioners, or trustees, or other persons as aforesaid, and the owner or owners, occupier or occupiers thereof, out of the money to arise and be raised, and to be received by them either by virtue of any local Act or Acts of Parliament relating to such parochial or other district, or of this Act, and to pull down, use, sell, or dispose of such houses, walls, and buildings, and the materials thereof, and lay the sites thereof, and also such other lands, tenements, or hereditaments, or so much thereof as they the said commissioners, or trustees, or other persons as aforesaid shall think proper, into the said streets or other public places, and all such new parts of such streets or public places; and the owners and occupiers of houses and buildings, messuage and other hereditaments therein and adjoining thereto, shall be subject and liable to all the rates, assessments, powers, provisions, orders, clauses and things to be made by virtue of or contained in any local Act or Acts of Parliament relating to such parochial or other district, or by virtue of or contained in this Act, in the same manner as the present streets and public places included in any such local Act or Acts, or within the jurisdiction of this Act, and the owners and occupiers of houses or buildings, and messuages or other hereditaments therein and adjoining thereto.

Sect. 96 authorises the commissioners from time to time to sell and dispose of all or any of the freehold or leasehold estates, lands, houses, hereditaments, and premises which shall be conveyed to them in pursuance of the Act or otherwise, provided the said freehold or leasehold estates, &c., so purchased were first offered for sale to the respective person or persons of or from

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

CHAN. DIV.] TEULIERE AND OTHERS v. THE VESTRY OF ST. MARY ABBOTTS, KENSINGTON. [CHAN. DIV.]

whom the premises respectively were purchased by the commissioners. If such persons elect to purchase, the price, in case of difference, is to be ascertained by a jury.

*Montague Cookson, Q.C. and Theobald* for the plaintiffs.—The vestry have never yet determined how much they mean to widen the street. They must definitely decide on its width before they can possibly determine whether it is better to take the whole of this property or not. But the main question is whether the vestry can give notice to take the whole of a house when they only want a part; and, if so, how large a part they must want to enable them to do so. The case stood over for the decision of *Gard v. The Commissioners of Sewers* (52 L. T. Rep. N. S. 827; 28 Ch. Div. 487); but the point as to a house was left undecided. The court there decided that the commissioners could not take the whole of a piece of land when they only wanted part, and the notice of the vestry in this case is plainly within that case, so far as it relates to the garden behind the orphanage. As to the house, the adjudication required by the section has two branches. The vestry must first adjudge that part of the house obstructs or prevents the widening, and then, how much of it they ought to take. We cannot say that there could not be a case in which they might fairly adjudge that it was necessary to take the whole; but it is absurd to decide, as they have done, that the whole of this property prevents the widening of the street. We say that they cannot take the whole unless the part they want for the widening includes a vital part of the house, or they are obliged to take the whole in order to pull down the part they want. In *Thomas v. Daw* (15 L. T. Rep. N. S. 200; L. Rep. 2 Ch. App. 1) the exact point is not decided; but the Lord Chancellor's opinion is clear. He says the words "any part thereof" in the section are to be applied to houses as well as to land. This Act was passed merely for parochial purposes, and gives powers to numerous bodies, most of them wholly unknown; it cannot have been intended to give them powers which are practically unlimited. The powers of the vestry are not, as in *Galloway v. Corporation of London* (14 L. T. Rep. N. S. 865; L. Rep. 1 E. & Ir. App. 34), confined to scheduled lands.

*Cozens-Hardy, Q.C. and Methold* for the defendants.—The point has been avoided in all the cases cited; they are none of them in point. Sect. 80 of the Act makes a clear distinction between lands and houses. It empowers the commissioners, or other authority, to pull down the whole of the houses, then lay into the street so much of the sites as they think proper, not as they shall have previously adjudged to be necessary. There is nothing, therefore, in the argument that the vestry cannot take because they have not fixed the exact line for the width of the street. This is not a mere Act for the abatement of nuisances; it is the Act under which all the improvements in the streets of London have been made. It would be remarkable if the plaintiffs' contention prevails. In this case they ask 8000*l.* compensation if the vestry take only the slip, and only 14,000*l.* if the whole is taken. As to the garden, it is legally part of the house, and if the vestry took the house and left the garden, there would be no access to it. The Act gives an owner

no option to insist on the vestry taking the whole, and therefore makes the vestry the sole judges of the amount to be taken. The court will not interfere with the exercise of their powers unless there is *mala fides*:

*Stockton and Darlington Railway Company v. Brown*, 3 L. T. Rep. N. S. 131; 9 H. of L. Cas. 246.

PEARSON, J.—It is unnecessary for me to say that, if I had any hope that I should better understand this Act of Parliament after longer argument than I do now, I would hear further argument. I am not ashamed to say I do not clearly understand it; when the late Lord Chelmsford, Kindersley, V.C., and the Lords Justices of the present Court of Appeal have all found the greatest difficulty in construing this section, I may, I think, shelter myself under what they have said, and say that I find not less but even greater difficulty than they did in construing it. I am not going to read it because it has already been read, and I should not make matters clearer if I read it again. The question here is this: The vestry of St. Mary Abbots, Kensington, desiring to improve and widen Church-street, and acting under the Act of the 57 Geo. 3, c. xxix. which gives to them powers to widen streets within their district, have given notice to the trustees of the Orphanage of St. Vincent, which abuts upon Church-street, that they desire to take the whole of the orphanage for the purpose of widening the street. The orphanage is a large building running along Church-street for a distance of 133 feet and part of it, that is to say, the part which is used as a washhouse actually abuts upon the street, but what are called the main buildings of the orphanage are at some little distance from the street varying from 11 feet to 14 feet. Behind these buildings are other buildings, and behind these other buildings there are a chapel and garden standing, I think I was told, upon half an acre of land. The vestry have given notice that they require the whole of this property, including the garden. It is not alleged, nor could it be alleged with any fairness, that the whole of this property is wanted to be thrown into the site of the street when the street is widened. All that is wanted, so far as I can make out from the plans before me, does not exceed some 20 or 25 feet. I give credit to the vestry for intending to act with the greatest possible fairness towards the owners of this orphanage. I take it for granted that they have said to themselves: We want so much of these buildings, and a large portion of the buildings must come down. When that has come down, the portion of the orphanage not taken down will be so much less commodious for its present purposes, by the destruction of a large part of the building in which the children are now placed. Under those circumstances, it will only be reasonable to give notice to take the whole of the property, including the whole of the garden at the back. On the other hand, the trustees of the orphanage say: We do not require you to take the whole of this property; it will no doubt be inconvenient to us to be deprived of a portion of the house that we have at present, but we have so much ground behind that we can alter the premises when you have taken down part of the house and still make it suit our requirements. If it will not enable us to take in all the children that we take in at

present, it will, at all events, enable us to take in a considerable number, and we shall possibly be content to reduce the number of children we now take in. The resolution of the vestry is in these words: [his Lordship read it.] Then in the minute-book of the vestry there is a plan which shows the parts coloured red and blue, the part coloured red includes the whole of the property of the orphanage. Now, the owners of the orphanage being willing to sell so much of the buildings and the ground between the buildings and Church-street as are required by the vestry for the purposes of the improvements they are about to make, the question is, are the vestry entitled to take the whole, or must they be content to take the part of the buildings which they actually want, and which the owners are willing to sell. Looking at the section itself only, I should have been at sea as to how I ought to decide this case. But I am assisted by two decisions in the Court of Appeal. One is the decision in *Thomas v. Daw* (*ubi sup.*) by Lord Chancellor Chelmsford, and the other is a decision by the present Court of Appeal in *Gard v. The Commissioners of Sewers of the City of London* (*ubi sup.*); and by both of these I need not say I am bound. Baggallay, L.J., in dealing with this section, says: "Now in the first place what was the object of the 80th section? We are told by its introductory words that it was passed for the improvement of the streets and public places within the jurisdiction of the Act, and for the public advantage." Now one can hardly think it was for the improvement of the street, or for the public advantage, that more land should be taken than was wanted for the purpose of improving the streets, and these introductory words appear to indicate the intention of the Legislature." Then I am told by Lord Chelmsford, in his decision of *Thomas v. Daw*, that "This section is rather obscurely worded, but it appears to me to give the commissioners power, if they please, to take part only of a house or building which may project into, obstruct, or prevent them from altering or widening any street. The words 'or any part thereof' in the early part of the section clearly apply to houses and buildings as well as to lands. But it is said that those words are dropped as the section proceeds; that, in stating the persons with whom the commissioners are to treat, they are called the owners or occupiers of all such houses, walls, buildings, lands, and hereditaments, without these additional words; and that the commissioners are empowered to pull down, use, sell, or dispose of such houses, walls, buildings and the materials thereof, which it was said must mean the entire houses, &c., not only from there being no qualification of the general words, but from the distinction which is made in what immediately follows between houses and lands by the words 'and lay the sites thereof (that is of the houses), and also such other lands, &c., or so much thereof as the commissioners shall think proper, into the street or other public places.' I cannot help thinking, however, that, imperfectly as it may be expressed, the words 'or so much thereof' must be construed to apply to houses as well as to lands, otherwise this absurdity would follow, that the commissioners would be imperatively bound to lay the whole of the sites of the houses into the streets. It appears to me that the subsequent parts of the section do not affect

the preceding part so as to strike out altogether the words 'or any part thereof,' or to render them of no effect." Bowen, L.J., in *Gard v. The Commissioners of Sewers*, when commenting on that passage in Lord Chelmsford's judgment, says this: "Mr. Graham Hastings contends that they are necessarily bound to adjudicate the whole of this land to be necessary even if they only want a part, while the case of *Thomas v. Daw* on the other hand, reads into the latter part of the section, the words which occur in its earlier part, 'or any part thereof.' I do not like saying that they were dropped out *per incuriam*. I prefer to say that, in my opinion, the general words in the latter part of the section, though different from the general words in the earlier part of the section by the omission of these words 'or any part thereof,' are nevertheless so wide as to embrace in themselves the part as well as the whole. I admit that this construction is not clear, but it seems to me that the opposite construction is not clear. It would be a very strong thing to clothe the commissioners with an uncontrolled power of taking the whole of the property when they want only an infinitesimal part of it." Then Bowen, L.J. no doubt go on to say: "Our present decision only applies to lands, and it is not necessary for us to decide whether the same rule applies to a house. There may be this distinction between the two cases, that in the case of land nobody can reasonably say it is necessary to take the whole when they only want a part. But it may be that in the case of a house or building it may be necessary to take down all when they only want to use part for the improvements. That will be a question of fact in each case, and I must be understood as reserving myself perfectly free if that question arises hereafter for consideration." Now the use of the word "fact" there is to my mind very material. The Lord Justice does not say there, as he might have said, that the section authorises the commissioners to take the whole of the house, and not part of the house, but he says that in each case it is a question of fact, by which I understand him to mean that from the circumstances of the case you are to judge whether or not a part of the house may be taken, or whether the whole of the house must be taken. In the present case I have not the difficulty which I might have had if the vestry had offered to take part of this house, and the owners of the orphanage required them to take the whole. But, on the contrary, the vestry requiring for the purposes of their improvements only a part of the house, and the owners being willing to let them take that part—only so much as they want and no more—the question which I put to myself is this, Is not this the very case to which Bowen, L.J. refers when he says that in all cases of this kind "it is a question of fact in each case?" If it be a question of fact in each case, then I confess that I have no difficulty in deciding this case, because I think that the owners of the orphanage having so large a space of ground as they have beside the house, and being willing to sell part of the house, so much as the vestry require for the improvement, are entitled to say to the vestry, "We will sell you that part, but not only do we not require you to take the whole, but we forbid you to take the whole." It is to be noticed that in the present case there is nothing but a question of pounds, shillings, and pence between the parties, because



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the vestry can get everything they want for the purpose of widening Church-street and carrying out the improvements they contemplate, and the owners of the orphanage say they are willing that they should get it, in the way that the Act says they may get it, by giving notice to take, not the whole, but part of the house. Coming then to the best conclusion I can arrive at from the authorities which have been cited before me upon the construction of this very awkward section, I must grant an injunction restraining the vestry from acting upon the notice they have given in its present form, and from taking more than the part of the house which they require for the purpose of widening the street, and making the improvements they are about to make; the owners of the orphanage being willing to sell them that part, and not requiring them to take the whole. I must put that in, for I do not mean to decide that in any case hereafter, if the owners of the property should require the vestry to take the whole, the vestry would not be bound to do so. I express no opinion now of any sort or description.

Some discussion followed as to the form of the order, in the course of which his Lordship said:—I think, if the vestry were going to take so much of these buildings that what was left would be a mere wall or a staircase, and one or two kitchens, it would be unreasonable for them not to take the whole, or for the owners to make them pay for all damage by severance. As I understand the matter from the plans before me, a very substantial part of the house, or the larger part of it, will still be left. All that will be cut off from it, according to the evidence before me, will be a part of the house which the trustees say can be replaced, or at all events be reinstated in such a way as to enable them to use the other parts of the buildings as perfectly as they use them now. Therefore I think the vestry ought only to take that part which they actually want, the owners of the orphanage being willing to sell it.

Solicitors for plaintiffs, *Blount, Lynch, and Petre*.

Solicitors for defendants, *Pontifex, Hewitt, and Pitt*.

#### QUEEN'S BENCH DIVISION.

*Saturday, March 14, 1885.*

(Before MATHEW and SMITH, JJ.)

LLOYD v. LLOYD. (a)

*Game—Poaching—Act for Prevention of (25 & 26 Vict. c. 114), s. 2—Person seen by constable with rabbits in possession on highway—Flight of accused and pursuit by constable—Search of accused and seizure of rabbits 200 yards from highway—Accused and rabbits never out of constable's sight—Information and conviction under sect. 2—Validity of.*

*Where a constable sees a man on a highway having rabbits in his possession which the constable has good cause to suspect have been unlawfully searched for or pursued by such man, who, on catching sight of the constable, runs away across an adjoining field, and on being pursued by the constable throws down the rabbits in the field some 200 yards from the highway, and neither the man nor the rabbits have been lost sight of by the constable, the latter may then and there search*

*the man and seize the rabbits under sect. 2 of the Poaching Prevention Act (25 & 26 Vict. c. 114), and a conviction of the man under that section before justices is good and will be upheld.*

*So held by Mathew and Smith, JJ., distinguishing the cases of Clarke v. Crowder (L. Rep. 4 C. P. 638; 38 L. J. 118, M. C.) and Turner v. Morgan (33 L. T. Rep. N. S. 173; 44 L. J. 161, M. C.; L. Rep. 10 C. P. 587).*

In this case an information was laid by the respondent, a police constable, before justices in petty session, against the appellant, under sect. 2 of the 25 & 26 Vict. c. 114, under the following circumstances:—

Between five and six o'clock in the morning of the 20th Sept. 1884, as the respondent was standing on the highway at Burghley, he saw the appellant and two other men, all of whom he had good cause to suspect of coming from land where they had been unlawfully in search of game. One of the men had a bag slung over his shoulder, apparently containing rabbits. Upon catching sight of the constable the defendant (appellant) ran away across some fields, and the constable (the respondent) instantly followed in pursuit of him. Upon finding that he was being chased the appellant threw down the rabbits on the ground about 200 yards from the highway, but the constable did not lose sight of either the appellant or the rabbits from the first moment of seeing them on the highway till their seizure in the field about 200 yards off.

Before the justices it was contended for the appellant, that the appellant could not be convicted, inasmuch as the rabbits had not been actually seized on the highway, as it was required that they should have been to bring the appellant within the penal clause of the Act; but the justices were of opinion that the seizure was good within the terms of the statute, which (sect. 2) enacts that "it shall be lawful for any constable . . . in any county . . . borough, or place in Great Britain, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game . . . and having in his possession any game unlawfully obtained . . . and should there be found any game as aforesaid upon such person, to seize and detain such game . . . and such constable shall in such case apply to some justice of the peace for a summons to such person to appear before two justices in petty sessions, as provided by the 18 & 19 Vict. c. 106, s. 9;" and on conviction of the offence charged, the offender is to forfeit any sum not exceeding 5*l.*, &c.

The justices accordingly convicted the appellant, who thereupon appealed to the Queen's Bench Division of the High Court of Justice, and the cause now came on for argument accordingly.

*Anderson* for the appellant.—The justices were in error in convicting the appellant, who ought to have been discharged by them, and the summons and information dismissed. It is necessary under the statute that the game should be seized on the highway, which was not done in this case; and for that proposition, in addition to the terms of the Act itself, the cases of *Clarke v. Crowder* (L. Rep. 4 C. P. 638; 38 L. J. 118, Mag. Cas.) and

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.



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AUSTERBERRY v. CORPORATION OF OLDHAM.

[Ct. of App.]

*Turner v. Morgan* (33 L. T. Rep. N. S. 172; 44 L. J. 161, Mag. Cas.; L. Rep. 10 C. P. 587), are authorities.

*W. R. Smith*, for the respondent, *contra*.—The justices put the proper construction, and the only reasonable one, upon the 2nd section of the Act; for, if that is not so, and their decision be held to be wrong, it will follow that, upon a poacher laden with game, unlawfully procured, being met on the highway by a police constable, he will only have to step aside a yard or two off the highway, and so be enabled to defy the constable and the Act of Parliament together.

MATHEW, J.—I am of opinion that the justices took a correct view of the statute and of the facts of this case, and that the conviction of the appellant must be confirmed. The facts are, that the appellant was seen by the respondent, the police constable, on a public highway, in company with two other men, between five and six o'clock in the morning of the 20th Sept. last. The appellant was carrying a quantity of rabbits in a bag across his shoulders. Upon catching sight of the constable he started off and ran across a field, instantly and closely pursued and followed by the constable, by whom he was caught and stopped in the field, and the rabbits were found close by in the same field, on the spot where the constable saw the appellant throw down the bag containing them, and that spot being about 200 yards from the highway where he was first seen; the constable never having lost sight of him or the bag of rabbits from the time when he first saw him on the highway to the moment of his stopping him in the field. The Act of Parliament in question (25 & 26 Vict. c. 114), by sect. 2, enacts as follows: [His Lordship read the section as above set forth, and then proceeded:] Unless, therefore, the appellant was searched on the highway, and the game was also seized there, the justices would have no jurisdiction in the matter. The statute directs that the person stopped by the constable shall be searched on the highway, and that the game which may be found upon him shall be seized and detained by the constable. It is evident that it is intended that the search, seizure, and detention are to take place then and there, but it surely cannot be intended that the whole of these proceedings must necessarily take place upon and within the narrow limit of the highway itself; for, if it were, a poacher could easily evade the statute by throwing the game over a fence into an adjoining field. The cases cited by Mr. Anderson for the appellant are clearly distinguishable. In neither of them did the seizure take place at the same time as the search. In one of them, *Turner v. Morgan* (*ubi sup.*), no search had taken place; and in the other case, *Clarke v. Crowder* (*ubi sup.*), something had been seen, but the suspected man was not searched, and so the statute was not complied with. In the present case both the man and the game were seen by the constable on the highway, and neither the game nor the man was lost sight of until he was stopped close to the highway. The proposition put forward on behalf of the appellant, that the game should be taken from the poacher on the highway, is not supportable.

SMITH, J.—But for the two cases which have been cited before us on the appellant's part, I

should have had not the slightest doubt on the point that has been raised here. The Act of Parliament was passed for the purpose of preventing game that had been poached being carried into towns in the early morning. Sect. 2 of the Act says, "And should there be found any game as aforesaid upon such person, to seize and detain such game," &c. It would not be enough to search and let the person go, and to detain the game afterwards. In the case of *Hall v. Knox* (9 L. T. Rep. N. S. 380; 4 B. & S. 515; 33 L. J. 1, Mag. Cas.) it has been already decided that if the police constable sees rabbits fastened round the poacher's neck, that fact constitutes a sufficient search by the constable. Here the constable, in hot pursuit, stopped the man, and seized and detained the game, having never lost sight of either game or poacher from the time when he first saw them on the highway.

*Conviction affirmed.*

Solicitors for the appellant, *J. and C. Robinson and Wilkins*, agents for *Garrold and Matthews*, Hereford.

Solicitors for the respondent, *Hunt and Sons*, agents for *Symonds and Son*, Hereford.

## Supreme Court of Judicature.

### COURT OF APPEAL.

May 8, 9, and 11, 1885.

(Before COTTON, LINDLEY, and FRY, L.JJ.)

AUSTERBERRY v. CORPORATION OF OLDHAM. (a)

*Turnpike road*—*Private owners*—*Dedication to public*—*Tolls*—"Street"—"Highway repairable by the inhabitants at large"—*Public Health Act 1875* (38 & 39 Vict. c. 55), ss. 4, 150—*Covenant running with the land*—*Covenant to repair*.

*A joint-stock company having been formed for the purpose of raising capital to make a certain road, A., for value, by deed conveyed a piece of land in fee as a part of the site of the road to the trustees of a contemporaneous deed of settlement for the benefit of the company, which contained provisions for making and maintaining the road. In the conveyance the trustees covenanted with A., his heirs and assigns, that they, the trustees, their heirs, and assigns, would make the road and at all times keep it in repair, and allow the public to use it, subject to the payment of such tolls as the trustees might from time to time determine. The trustees duly made the road, and A. afterwards sold to B. certain land adjoining the land conveyed to the trustees, and the trustees sold the road to the corporation of the town in which it was situated, both parties taking with notice of the covenant to repair.*

*Held* (affirming the decision of the Vice-Chancellor of the Duchy of Lancaster), that the covenant did not run with the land, either at law or in equity; that *Tulk v. Moxhay* (2 Ph. 774) did not apply to covenants of this description, but only to restrictive covenants; and therefore B. could not enforce the covenant against the corporation.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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Cooke v. Chilcott (34 L. T. Rep. N. S. 207; 3 Ch. Div. 694) overruled.

Morland v. Cooke (18 L. T. Rep. N. S. 496; L. Rep. 6 Eq. 252) explained.

Holmes v. Buckley (1 Eq. Cas. Abr. 27) discussed.

*Certain persons who had formed themselves into a joint-stock company for the purpose of making a road, declared by deed that it should not only be enjoyed by them "for their individual purposes, but should be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road," subject to the payment of such tolls as might from time to time be demanded.*

*Held, that the road was not dedicated to the public, and was not a highway repairable by the inhabitants at large under sect. 150 of the Public Health Act 1875.*

*Seemle, there cannot be a dedication to the public by an individual of a road as a highway subject to a toll without the authority of the Crown or an Act of Parliament.*

IN the year 1837 the highway leading from Higginshaw to Lower Moor, in the borough of Oldham, being very circuitous, it was proposed that the owners of the property adjacent to it should construct a shorter and more direct road between those places, that they should sell the necessary strips of land for sums of money which were agreed upon, amounting to 173*l.* 19*s.* 10*d.*, and that the road should be constructed and maintained by an association or company of proprietors who were to be represented by trustees.

On the 3rd March 1837 a deed of settlement was executed to carry out this arrangement. The parties were Joshua Milne, John Milne, and Samuel Lees of the first part, James Milne and John Travis of the second part; the said James Milne and various other persons whose names and seals were comprised on the second schedule thereto, together with the other persons who should from time to time execute the deed, and whose names and seals should be comprised in the third schedule thereto, of the third part. It recited that the making of the proposed new road would be of great public advantage; that the several parties thereto, being willing at their own expense to carry out the undertaking, had agreed to form amongst themselves a joint-stock company, under the style of the Higginshaw and Lower Moor Road Company, and to raise capital for the purchase of land for the formation of the road and making and maintaining the same; that it had been agreed that the said Joshua Milne, John Milne, and Samuel Lees should be the trustees in whose names the land necessary for the road should be purchased, and that the road when completed should not only be appropriated, used, and enjoyed by the parties thereto "for their individual purposes, but (subject as therein-after mentioned) should be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road;" that contracts had been entered into by or on behalf of the said company for the purchase of the necessary lands for a total sum of 173*l.* 19*s.* 10*d.*, and proper conveyances had been prepared and were awaiting execution for vesting such lands in the said Joshua Milne, John Milne, and Samuel Lees, who were to stand possessed thereof upon

the trusts thereafter declared, and that the business of the said company should be carried on subject to the provisions thereafter contained. It was then witnessed and agreed that the said Joshua Milne, John Milne, and Samuel Lees, and the survivor and survivors of them and the heirs of such survivor, should for ever thereafter stand possessed of the lands intended to be granted to them upon the trusts therein-after declared. And it was further witnessed and agreed that the said parties thereto and all other persons who should thereafter become proprietors as thereafter mentioned, should, whilst holding shares in the capital of the said company, be, and they were thereby united into a company for making and maintaining the said road, and should be and continue the proprietors thereof under the name of The Higginshaw and Lower Moor Road Company; that for the purpose of making and maintaining the road and other general purposes attending the same a capital of 1600*l.* should be raised in 32 shares of 50*l.* each; that the number of shares held by each person should be written opposite his or her names at the time of his or her executing the deed; that the said 173*l.* 19*s.* 10*d.* should be paid out of the capital of the company for the purchase of the land necessary for the road as aforesaid, and that the remainder of the money to be received by the said company, whether by way of capital or profits, or otherwise, should be applied by the trustees in paying the costs of the present deed, of the conveyances, and of the establishment of the said company, and that the remainder of the capital should be applied in making and afterwards maintaining in repair the said road pursuant to the specification, ground plan, and cross section contained in a schedule of even date, and in setting up the necessary toll-gates. The line of the road was then described, and provisions were made for the erection of tables of tolls to be fixed from time to time by a majority in value of the company at a meeting for the purpose; "that no person or persons (except such person, and for the purposes only as are mentioned in the said several conveyances of the said land so purchased by the company as aforesaid), shall be allowed to travel upon, use, or enjoy any part of the said road, or pass through any such toll-gate, side-bar, or chain, to be erected or set up as aforesaid, without having previously paid such toll as may from time to time be demanded of him, her, or them pursuant to the table of tolls for the time being authorised by the said company to be demanded and taken as aforesaid;" for payment of tolls by the parties to the deed; that the trustees should apply the tolls in payment of the current expenses of the company, "and in repairing and keeping in repair the said road," and in discharge of the principal and interest of any moneys borrowed on the security of the tolls, and then in payment of the dividends declared to the proprietors of the company. Then followed various provisions as to meeting, rights of voting, the keeping of the company's books, calls on and forfeiture of shares, declaration of dividends, the appointment of new trustees by the shareholders, variation or modification of any clauses in the deed, and enrolment of this or any future deed of settlement by the trustees if deemed expedient.

The schedule of even date referred to in this

deed was signed by the parties to the deed and the owners of the land which was to be conveyed as the site of the road. It contained a specification describing the construction of the road, and there was a plan showing its exact position and the land through which it was to run, with the owners' names. Amongst these names was that of John Elliott, the plaintiff's predecessor in title, and it appeared that he owned the land on both sides of the road.

By an indenture, dated the 3rd April 1837, John Elliott conveyed his piece of land to the trustees. The parties were Elliott of the one part, and the said Joshua Milne, John Milne, and Samuel Lees of the other part; and in consideration of the sum of 14*l.* 11*s.* 8*d.* paid to him by the said Joshua Milne, John Milne, and Samuel Lees, Elliott granted and released unto the said Joshua Milne, John Milne, and Samuel Lees, their heirs and assigns, the plot of land therein described, being part of certain lands belonging to Elliott, called Higher Moor Field, and which said plot of land was therein expressed to be intended to form part of the said intended road from Higginshaw to Lower Moor, together with liberty to enter upon the adjoining lands of Elliott for making and completing the said road, and to erect on the said plot of land toll-gates, and demand and take the tolls mentioned in any table of tolls put up at any such toll-gate before any horse, beast, cattle, cart, waggon, or carriage (except as hereinafter mentioned), should be permitted to pass through such toll-gate, and except for mines and minerals, "and also except such rights and privileges of passing toll free over the said line of road for certain purposes, as is hereinafter mentioned and expressed." To hold the said plot of land, liberties, powers and privileges unto and to the use of the said Joshua Milne, John Milne, and Samuel Lees, their heirs and assigns for ever, for the ends, intents, and purposes therein in that behalf expressed and declared of and concerning the same:

Provided always, and it is hereby agreed and declared by the said parties to these presents, and each of them the said Joshua Milne, John Milne, and Samuel Lees, for himself severally and respectively, and to and for his several and respective heirs and assigns, doth covenant and agree with the said John Elliott, his heirs and assigns, by these presents in manner following (that is to say), that they, the said Joshua Milne, John Milne, and Samuel Lees, their heirs or assigns, or some or one of them shall, and will within the space of three years now next ensuing, at their or his own costs and charges, convert, make, and form, and fence off, in a good, workmanlike, and proper manner, the whole of the said plot of land, hereditaments, and premises hereby granted and released, into a road or way to form part of the said line of road from Higginshaw to Lower Moor aforesaid, and in like manner make and form the remainder of the said line of road, which, when so finished, shall be of the length, width, dimensions, and construction, and made of such stone and other materials, and in such manner as is set forth and expressed, and as drawn and laid down or delineated in the specification ground plan and cross section contained in a certain schedule or writing bearing date the 3rd day of March last past, and since the date and execution hereof signed by the said several persons, parties to these presents, and by several other persons, owners of other lands over which the said intended line extends; and also that the said line shall, from and immediately after the expiration of the said term of three years (subject nevertheless to such tolls for horses, cattle, beasts, carts, and carriages, passing thereon as may by the said Joshua Milne, John Milne, and Samuel Lees, their heirs, and assigns, be fixed and determined upon) be used by the public; and shall and

will for ever hereafter be kept open and used as and for a road for the use of the public (subject as aforesaid); and also that they, the said Joshua Milne, John Milne, and Samuel Lees, their heirs and assigns, shall and will from time to time, and at all times hereafter, keep and maintain the said road, and every part thereof, in good repair, order, and condition, except such part thereof as hereinafter is mentioned.

It was then provided that no toll should be demanded or taken from Elliott, his heirs or assigns, lessees, tenants, or occupiers, for any horse, beast, cattle, or carriage laden with materials for repairing the fences or drains thereinafter covenanted to be kept in repair and maintained by Elliott, his heirs or assigns, or his or their tenants or occupiers of the lands adjoining the said plot of land thereby granted, nor for any horse, &c., or carriages passing over the said line of road for any purpose connected with the occupation of the said lands called Higher Moor Field for farming or agricultural purposes only or relating to the cultivation thereof. And Elliott covenanted that he, his heirs or assigns, or the tenants or occupiers of the lands adjoining the said plot of land thereby granted would at all times keep in repair and maintain the fences and ditches on each side of so much of the said road as passed over the lands belonging to Elliott, and also keep the drains thereof in repair.

Elliott was not a member of the company and never executed the trust deed. In May 1837 the other landowners executed similar conveyances of the land belonging to them which was required for the new road. At this time the land through which the road passed had been and was used for agricultural purposes.

The trustees took possession of the land conveyed to them, and the road was duly made and called Shaw-road. Tolls were charged upon traffic passing over the roadway, but it was free to foot passengers, and the trustees for the time being maintained the road out of the tolls until it was purchased by the corporation of Oldham.

After the completion of the road Elliott and the other owners of the land adjoining it from time to time erected houses abutting on it, until the road lost its agricultural character and became absorbed in the town of Oldham. The plaintiff had subsequently purchased Elliott's land, and alleged that the money had been expended in building these houses on the faith of the covenants in the above mentioned conveyance, and the provisions of the trust deed with the full knowledge and acquiescence of the persons for the time being entitled to Shaw-road, such persons being the predecessors in title of the defendants, the corporation of Oldham; and that the access afforded by Shaw-road was essential to the proper use and enjoyment of the houses.

In 1865 the Oldham Borough Improvement Act (28 & 29 Vict. c. cccxi.) was passed, sect. 27 of which contained the following provisions "with respect to the road or street called Shaw-road." That the corporation might purchase and take all private rights of way and other rights in, over, or affecting the said road or street, and all rights of levying tolls in respect of traffic thereon, and the interests of all persons in any tolls so levied. That for the purposes of such purchase and taking, all the rights and interests aforesaid should be deemed to be lands within the meaning of the Act and any Act incorporated therewith.

That on the completion of such purchase and taking all the rights and interests aforesaid should be absolutely extinguished, and the corporation should remove all gates, bars, &c., and thenceforth the said road or street should be and continue a street open to the passage of the public, and should be subject to all the provisions relative to the sewerage, draining, levelling, and paving, or otherwise completing streets not being highways repairable by the inhabitants at large. That the powers of compulsory purchase conferred on the corporation by this section should not be exercised after the expiration of five years after the commencement of the Act, and that nothing in the Act should empower the corporation to purchase or take any estate or interest in the soil of the said road or street.

By an indenture, dated the 21st April 1884, in consideration of 580*l.*, Elliott conveyed to J. T. Austerberry, the present plaintiff, in fee simple the lands called Higher Moor Fold, and all other the lands of him, Elliott, adjoining Shaw-road, together with the houses and buildings thereon, and the appurtenances. The plaintiff had notice of the conveyances relating to Shaw-road, and alleged in his evidence that the fact that it was the duty of the trustees to keep the road in repair materially influenced him in making the purchase. The plaintiff afterwards built several houses on the property, and paid the usual tolls when using the road.

Shaw-road was kept in repair by the trustees until the passing of the Oldham Improvement Act 1880 (43 & 44 Vict. c. cxlvii.) That Act referred to sect. 27 of the Act of 1865, and recited that the corporation had not exercised their powers under that section within the time limited by that Act, and that a transfer of Shaw-road to them without compulsion had been agreed on for the sum of 6000*l.* By sect. 62 it was provided that

Nothing contained in the Act of 1865, or in this Act, shall exclude, limit, or affect the right of the corporation to exercise the powers conferred upon them by sect. 150 of the Public Health Act 1875, as regards the road or street within the borough called Shaw-road.

Sect. 63 provided that with respect to Shaw-road the following provisions should take effect, namely:

(1.) On the corporation paying J. M. Cheetham, William Taylor, and C. E. Lees [the then trustees of the deed of settlement, and the defendants in the present action] or two of them, or to the survivor of them, out of the borough fund or borough rate, or out of moneys which the corporation are by this Act authorised to borrow for the purpose, the consideration money aforesaid; and on a copy of this Act being produced to the Commissioners of Inland Revenue, stamped with such an *ad valorem* stamp as would be required by law to be impressed on a deed of conveyance of Shaw-road by them or him to the corporation, then, and in that case, but not sooner or otherwise, all the rights, interests, property, and things comprised in sect. 27 of the Act of 1865, as subsisting at the time of the vesting thereof under this section, and the soil of Shaw-road shall by virtue of this section vest absolutely in the corporation and their successors, for all the estate and interest therein of Joshua Milne Cheetham, William Taylor, and Charles Edward Lees, and each of them, their and each of their heirs, executors, and administrators, and of all persons and bodies claiming through or under them.

(2.) The receipt of the said trustees for the consideration money paid to be a good discharge.

(3.) The persons to whom payment is so made shall hold the money received by them, subject to payment

and discharge of all debts and liabilities (if any) properly payable thereout, or chargeable thereon, in trust for such persons as are at the time of payment beneficially interested in Shaw-road, and according to the proportions or respective amounts of the interests of those persons.

(4.) On the vesting aforesaid taking effect, all rights and levying tolls in respect of traffic on Shaw-road, and the interests of all persons in any tolls so levied, shall be by virtue of this section absolutely extinguished.

In Nov. 1880 the corporation paid the 6000*l.* referred to in the Act to the trustees, and Shaw-road became absolutely vested in the corporation as owners, and they then removed the toll-gates, and no further tolls were levied.

In 1881 the corporation, acting under the powers conferred by sect. 150 of the Public Health Act 1875, caused notices to be served on Austerberry and the other owners and occupiers of premises fronting on Shaw-road, requiring them to sewer, level, flag, channel, pave, and complete the road within a specified time. The plaintiff and the other owners failed to comply with the notices, and the corporation then did the work themselves, and summoned the owners before the justices to recover the expenses which had been apportioned on the several frontages. Orders were made for payment of the various sums, but pending an appeal, no further steps had been taken to enforce the orders.

On the 4th July 1883 the corporation duly declared Shaw-road a public highway, pursuant to sect. 152 of the Public Health Act 1875, by which it is provided that, upon such declaration being made with regard to any "street," "the same shall become a highway repairable by the inhabitants at large."

The plaintiff resisted the claim of the corporation, on the ground that he and the other persons served with the notices had no such interest in Shaw-road as to render them liable under the Public Health Act 1875, or otherwise, for the work done by the corporation; that Shaw-road was not a "street" within the meaning of that Act, but it was and always had been a road repairable by the owners thereof, and that the corporation, on behalf of the ratepayers or inhabitants at large, having become the owners, the road thereupon became "a highway repairable by the inhabitants at large;" that the corporation, having purchased the road with notice of and subject to the provisions of the trust deed and the conveyances to the trustees, were estopped from making any claim against the plaintiff and other adjoining owners on account of any expenses incurred in relation to the road and necessary for the maintenance thereof, and thus evading their liability as assigns of the grantees under the conveyances and trust deed, or in respect of covenants running with the land purchased by the corporation. The plaintiff also contended, in the alternative, that if the corporation were entitled to be repaid their expenditure, or any part thereof, as being necessary for the maintenance of Shaw-road in good repair, such right constituted a "liability" within the meaning of the provisions of sect. 63, subsect. 3 of the Oldham Improvement Act 1880, and that such expenditure was properly payable out of the purchase moneys in the hands of the trustees, and that the plaintiff and the other adjoining owners were entitled to have such purchase moneys, or a sufficient part thereof,

applied in satisfaction of the claim of the corporation by way of indemnity or otherwise.

The plaintiff then commenced this action on behalf of himself and all other such owners against the corporation and the trustees, in order to ascertain the rights of the owners of the property fronting and adjoining Shaw-road, and claimed a declaration that the corporation were not entitled to recover from the plaintiff and the adjoining owners any sums or charges for the bedding or paving of or execution of repairs upon Shaw-road, or other works necessary for keeping the road in good repair; an injunction restraining the corporation from proceeding further upon the orders made by the justices, the plaintiff submitting to any order which the court might make in the present action for the purpose of finally determining all questions between the parties; in the alternative a declaration that the trustees were liable to indemnify the plaintiff and such other owners against the said charges out of the purchase money paid to them, to have the trusts of that money executed by the court, accounts thereof directed, and to have provision made thereout to answer such indemnity, or to satisfy the claim of the corporation as a "liability" within the meaning of the Oldham Improvement Act 1880, sect. 63, and damages and costs.

By their statement of defence the corporation alleged that at the time the trust deed and conveyances were executed, the land which was the site of Shaw-road and the adjoining lands were agricultural lands of small value, and that the covenants and provisions in such deeds with reference to the work to be done were only applicable to the road and neighbourhood as existing at that time, and that owing to the subsequent entire change in the character of the neighbourhood consequent on the increase in the population, the erection of buildings and improvements within the township and borough of Oldham, and otherwise, such covenants and provisions at the time of the purchase of the road by the corporation ceased to be applicable or to have any binding effect, and had in fact wholly lapsed; that the plaintiff purchased with full knowledge (though the plaintiff denied this) that under the Oldham Borough Improvement Act 1865, sect. 27, the corporation were empowered to purchase all rights over Shaw-road within a period of five years; also that the plaintiff had purchased with notice of the liability to the payment of tolls in respect of Shaw-road, and that the covenants and provisions relating to the maintenance and repair of the road, and the liability of the trustees thereunder had wholly lapsed and ceased to be binding; that the work executed by them in making Shaw-road under their statutory powers was entirely different from that provided for by the said covenants and provisions, which had become wholly inapplicable and inoperative; that at the time they purchased Shaw-road it was not a highway repairable by the inhabitants at large; but was liable to be paved, sewered, and put into thorough repair under the provisions of the Public Health Act 1875 at the expense of the adjoining owners; that even if the covenants in the said conveyances were binding, the plaintiff and the other owners had forfeited all right to relief thereunder by laches and delay in standing by and permitting the Oldham Acts of 1865 and

1880 to pass into law without objection, or making no objection to the notices served on them by the corporation, and on permitting the corporation to execute the work without contesting their right to do so. They then submitted that if the covenants and provisions were binding on the trustees, and if the moneys due from the plaintiff and the other adjoining owners to the corporation constituted "debts and liabilities" within the meaning of sub-sect. 3 of sect. 63 of the Oldham Act of 1880, then that the same were payable to the plaintiff and the other owners out of the purchase money in the hands of the defendants, the trustees, and not by the corporation.

The action was heard by the Vice-Chancellor of the County Palatine of Lancaster on the 30th April 1884, and was dismissed with costs. The plaintiff appealed. The notice of appeal was served upon the corporation only.

*Henn Collins, Q.C. and Maberly* for the appellant.—The questions to be decided are (1) whether there has been such dedication to the public of this road as to make it a "highway repairable by the inhabitants at large" within sect. 150 of the Public Health Act 1875; and (2) if it is not such a highway, whether the covenant to repair (either as to its benefit or burden) runs with the land. Shaw-road is a "street" within sect. 150 of the Public Health Act 1875, and according to the definition given in sect. 4 of that Act and *Taylor v. Corporation of Oldham* (35 L. T. Rep. N. S. 696; 4 Ch. Div. 395). Then the trust deed and the conveyances constituted it a turnpike road, dedicated to the public or with a public right of user:

*Northam Bridge and Roads Company v. The London and Southampton Railway Company*, 6 M. & W. 428-438.

A road dedicated to the public, though tolls are imposed, is a common highway, and, except in special cases, is repairable by the inhabitants at large:

*Reg. v. Inhabitants of Lordsmere*, 15 Q. B. 689.

Even before the Highway Act 1835 (5 & 6 Will. 4, c. 50) any road dedicated to the public became by common law repairable by the inhabitants at large; and, if tolls were taken, they were held to be only an auxiliary fund which could be devoted towards that expense:

*Re v. The Inhabitants of Netherthong*, 2 B. & Ald. 179.

Shaw-road is therefore "a highway repairable by the inhabitants at large" within sect. 150 of the Public Health Act 1875, and must therefore be dealt with as a "highway" within sects. 144 to 148 of that Act. [LINDLEY, L.J.—In the case referred to, the turnpike roads were constituted under Acts of Parliament. Is there any authority that an individual, or body of individuals, can, without the sanction of the Legislature, dedicate a road to the public subject to tolls? There is no direct authority; but in *Northam Bridge and Road Company v. London and Southampton Railway Company* (ubi sup.), Lord Abinger said that the question whether a road was a turnpike road or not was not to be determined merely by reference to 13 Geo. 3, c. 84 (the earliest general Turnpike Act), or any other Act of Parliament. Here there is an absolute dedication to foot-passengers without tolls. [FAY, L.J. referred to Viner's Abr. tit. "Toll Traverse."] But if this

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is not a highway repairable by the inhabitants at large, the corporation have taken the road with all the obligations imposed on the trustees, through whom they claim, to maintain and repair the road. The benefit and burden of the covenants contained in the trust deed and conveyances run with the land:

*Cooke v. Chilcott*, 34 L. T. Rep. N. S. 207; 3 Ch. Div. 694;  
*Aspen v. Seddon*, 34 L. T. Rep. N. S. 906; 1 Ex. Div. 496;  
*London and South-Western Railway Company v. Gomm*, 46 L. T. Rep. N. S. 449; 20 Ch. Div. 562;  
*Spencer's case*, 5 Rep. 16a; 1 Sm. L. C. 8th edit. p. 68;  
*Holmes v. Buckley*, 1 Eq. Cas. Abr. 27;  
*Morland v. Cook*, 18 L. T. Rep. N. S. 496; L. Rep. 6 Eq. 252;  
*Western v. Macdermott*, 15 L. T. Rep. N. S. 641; L. Rep. 1 Eq. 499; 2 Ch. App. 72;  
*Milnes v. Branch*, 5 M. & S. 411;  
*Nicoll v. Fenning*, 45 L. T. Rep. N. S. 738; 19 Ch. Div. 258;  
*Tulk v. Moshay*, 12 L. T. Rep. O. S. 469; 2 Ph. 774.

They also referred to

*Haywood v. Brunswick Permanent Benefit Building Society*, 45 L. T. Rep. N. S. 699; 8 Q. B. Div. 403;  
*Rickards v. Bennett*, 1 B. & C. 223-235;  
*Nutter v. Accrington Local Board*, 40 L. T. Rep. N. S. 802; 4 Q. B. Div. 375;  
*Glen on Highways*, pp. 28, 29;  
*Gunning on Tolls*, pp. 36, 37.

*Cookson, Q.C. and Pankhurst* for the corporation.—The plaintiff ought to have appealed from the decision of the justices to the Local Government Board, as provided by sect. 268 of the Public Health Act 1875. As he did not give notice of objection to the notice to level, &c., served on him by the corporation, he is estopped from showing that the road in question is not a highway repairable by the inhabitants at large:

*Reg. v. Livesey*, 22 L. T. Rep. N. S. 470.

[COTTON, L.J.—We only call upon you with reference to the question whether the benefit and the burden of the covenant run with the land.] The covenants refer only to an agricultural road, and are inapplicable to the present road, which is now a street in a town. There is no authority that such a covenant as this runs with the land at law. The appellant must show that the burden of the covenant is on the defendants, and that he is entitled to the benefit. The benefit of the covenant does not run with the land of which the plaintiff is owner, and it is merely a collateral covenant, or at all events is partly collateral and partly incident; it does not wholly touch or concern the land:

*Spencer's case*, 5 Rep. 16a; 1 Sm. L. C. 8th edit. p. 68.

In *Western v. Macdermott* (*ubi sup.*) the covenant was a negative covenant; besides the burden of such a covenant does not run with the land. *Cooke v. Chilcott* (*ubi sup.*) is virtually overruled by *Haywood v. Brunswick Permanent Benefit Building Society* (*ubi sup.*). In *London and South-Western Railway Company v. Gomm* (*ubi sup.*) it was held that the doctrine of *Tulk v. Moshay* (*ubi sup.*) only applies to restrictive covenants, and not to covenants to do acts relating to the land. The cases cited by the other side are not cases of covenants *simpliciter*, but of implied grant. In *Morland v. Cooke* (*ubi sup.*) the covenant was that a rentcharge should issue

out of the land for the repair of a sea wall, so that the covenant was a distinct term annexed to the land. *Holmes v. Buckley* (*ubi sup.*) was a somewhat similar case. In *Keppell v. Bailey* (2 My. & K. 517) it was held that a covenant to do certain acts did not run with the land. The plaintiff must be taken to have had notice that under the Oldham Improvement Act 1865 the corporation had power to purchase the road, and that if they did so this covenant would be extinguished. He ought, therefore, to have taken steps to have protected himself, but did not do so, even under the provisions of sect. 63 of the Act of 1880, and he is now too late:

*Wake v. The Mayor, &c., of Sheffield*, 12 Q. B. Div. 142.

*Collins, Q.C.* in reply.—If the burden of a covenant runs with the land at all this is a case in which the thing to be done is so connected with the land that it must run with it. If it is held that the burden of this covenant does not run with the land taken by the corporation, then it is equivalent to holding that in no case can such a covenant run except as between landlord and tenant. In a case where the nature of the covenant is such that it is capable of being for the benefit of the land of the covenantee, the benefit of it may run with the land. And if the benefit may so run, why not the burden? On the face of the covenant it is for the benefit of the land in respect of which the appellant is sued. The road runs through the appellant's land, and is necessary for access to it, and he has a large frontage on to the road. A covenant to keep that road open and in repair must be a covenant for the benefit of his land, and certainly does touch and affect it. It has been held that the burden and benefit of a covenant both run:

*Cooke v. Chilcott* (*ubi sup.*);  
*Holmes v. Buckley* (*ubi sup.*).

The former case is not overruled by *Haywood v. Brunswick Permanent Building Society*, for Lindley, L.J. there said (45 L. T. Rep. N. S. 702; 8 Q. B. Div. 411) that the circumstances of that case were wholly different from the one then before him, and that he should be sorry to overrule it. He also referred to

*Gale on Easements*, 5th edit. p. 545;  
*Rider v. Smith*, 3 T. R. 766.

COTTON, L.J.—This is an appeal by the plaintiff against the decision of the Vice-Chancellor of the County Palatine, who did not grant the relief which he sought. The nature of the case is this: The plaintiff is the owner of land lying on two sides of what is now a street in Oldham; and he had a notice from the corporation under the 150th section of the Public Health Act 1875 to do certain work, which, if the road or street is within that section, they are entitled to require to be done, in the nature of paving and sewerage the street. He did not do it; then they executed the work, and sought to recover from him in the way pointed out by the Act his proportion of the expense which they had incurred in paving and sewerage the road or street, part of which divided his property. He contended before the Vice-Chancellor unsuccessfully, and has contended on appeal that for various reasons the corporation had no power to put in force against him sect. 150 of the Public Health Act 1875, and the consequential powers given by that Act in respect



of work done under that section. That was, of course, saying "you have no right at all as against me to claim any part of this money;" but there was also a subsidiary point. He contended that if he was wrong on the first point, yet they were only entitled to claim from him the expense of part of the work which they had done, on the ground that under the deed which I shall have to refer to, the corporation were bound to bear the remainder of the expense under a covenant entered into by their predecessors in title. Now, the point first argued was as to the general power under sect. 150 of the Public Health Act 1875, which provides that, "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriage-way, footway, or any other part of such street is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting" on such street, require that work to be done; and if it is not done then they can do it themselves. Now, of course, if Shaw-road is not a street within this section, the corporation have no power at all to give that notice, or to do the work with the consequential result of being able to claim from the plaintiff any proportion of the expense. Now, one point urged on behalf of the plaintiff was this: It was admitted that it was a street, but it was said that the 150th section only applies to streets not being highways repairable by the inhabitants at large, and that this street was "a highway repairable by the inhabitants at large;" and that before it became vested in the corporation it had been a turnpike road—a highway—and, therefore, being a highway, was repairable by the inhabitants at large. Well, is that so? Now, it appears that this street was originally made as a matter of private venture by persons who formed themselves into a joint-stock company. There was a line of road agreed upon, which would cut off a great angle, and make a very much shorter line of access than had existed previously; and apparently the land-owners on the line of that contemplated new road joined together and formed a joint-stock company in order to make this road, and to put upon it bars, which they did not allow people to pass unless they paid money. It was said that that alone made it a turnpike road. I will not enter into the question as to whether that made it a turnpike road, because certainly that is not the question we have to deal with. It did not make it a turnpike road in the sense of a turnpike road made such by Act of Parliament, and which by Act of Parliament is dedicated to the public; or rather, a road which by Act of Parliament—although there is no expressed dedication—is constituted a public highway, subject only to the obligation imposed by the Act of payment to the trustees of the road of certain tolls. But the question we have to consider is simply this: was the road at the time when the corporation acquired it under the Act which has been referred to, a road, whether turnpike or not, repairable by the inhabitants at large? That, in this case, in my opinion, simply depends upon this further question—was it really dedicated to the public so as

to make it a public highway? The Vice-Chancellor considered that on the true interpretation of the 150th section the road was not repairable by the inhabitants at large, and that, if it was repairable under the trust deed out of the tolls, it was not within the exception mentioned in the section. I do not give any decision upon that question, because in my opinion this road was never dedicated to the public in such a way as to become a public highway, repairable as such by the inhabitants at large. Now, I have mentioned how it was that this road came to be formed, and we have before us the deed of settlement of the company of proprietors. That mentions the object of making this road, and says that the parties had agreed to raise the necessary capital, and that the road when made is not only to be enjoyed by them "for their individual purposes, but (subject as hereinafter is mentioned) shall be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road." It was contended that those words dedicated it to the public, and it became then a public highway, and that then the consequence would be that it would be repairable by the inhabitants at large. But though there are the words, "shall be open to the use of the public at large," there are also the words "subject as hereinafter is mentioned," and we must look to see what is "hereinafter mentioned." We find this: "that no person or persons (except such persons and for the purposes only as are mentioned in the said several conveyances of the said land so purchased by the company as aforesaid) shall be allowed to travel upon, use, or enjoy any part of the said road, or pass through any such toll-gate, side-bar, or chain, to be erected and set up as aforesaid, without having previously paid such toll as may from time to time be demanded of him, her, or them, pursuant to the table of tolls for the time being authorised by the said company to be demanded and taken as aforesaid." Now there is an exception, and that is this, that the proprietors who conveyed their land for the purpose of giving the site for this line of road reserved for themselves by covenant on the part of the trustees a right to use the road as a road for agricultural purposes free of toll; that is, for carts to pass for any purpose of agriculture connected with their land, free of toll; but subject to that they and everybody else can only use it if they are willing to pay a toll, and it is not a fixed toll, but the "tolls for the time being authorised by the said company to be demanded, and taken as aforesaid." Now I here give no opinion as to whether there can be a dedication by an individual of a road as a highway subject to a toll without the aid of an Act of Parliament. Authorities were cited containing some passages apparently to the effect that it might be done. I do not think it necessary in this case to give any opinion upon that point, though I certainly doubt, and I do not in any way encourage the idea that an individual without any authority from the Crown, and without the authority of an Act of Parliament, can be said to dedicate a road to the public when it can only be used on payment of a toll; but undoubtedly, if this is a highway, it would be an infringement of prerogative to stop the Queen's subjects on it and demand toll from them, either in consequence of any repairs which



might be done or any improvements which might be made. If it is once a highway there can be no question of toll after that. Whether originally a highway could be dedicated to the public, or a road could be dedicated to the public, so as to become a highway subject to a toll to be paid to the man who dedicates it, I give no opinion, because it has not been really fully discussed. But here the case is very different; it is not that all the public are to use the road, but only such persons are to use it as are willing to pay this toll; "that no person or persons shall be allowed to travel upon, use, or enjoy any part of the said road, or pass through any such toll-gate, side-bar, or chain to be erected and set up as aforesaid without having previously paid such toll," and it is not a fixed toll, but it is "such toll as may from time to time be demanded from him, her, or them, pursuant to the table of tolls for the time being authorised by the said company, to be demanded and taken as aforesaid." So that this company—formed for the profit of the individual shareholders—because the deed of settlement shows that they contemplated realising a profit and making a dividend—is from time to time to charge such tolls as they may think fit, not merely such as may be necessary for the purpose of keeping up the road, but for the purpose of keeping the road open, as a source of profit to them as well as a matter of convenience to those members of the public who might be willing to pay such tolls as they might from time to time fix. They might increase them from time to time, and there is no limit, except their own interest, placed on the tolls; and though it is true that, as far as it was a footpath, there never has been any toll, yet under that deed of settlement they were at liberty, if they thought fit, to charge a toll on that footpath as well as any other part of the road. However, down to the time when the corporation got this road, they did not charge anything for the footpath; but there was nothing, as I say, to prevent them from doing so. In my opinion, that being so, there was no such dedication to the public as to make this a public highway, and consequently it does not come within the exception of sect. 150 of "a highway repairable by the inhabitants at large." Then comes this other point. Assuming that this corporation had the power to act under sect. 150, it was said that when the land forming the portion of the road about which this question arises was originally purchased from a Mr. Elliott, he being one of those over whose land the new road went, there was a covenant by the trustees who bought on behalf of the joint stock company to preserve and maintain it as a road. The covenant was by those trustees with John Elliott, his heirs and assigns, that they should within the space of three years, at their own cost, make and form and fence off in a good and workmanlike manner the road; and then it goes on to prescribe the mode of making the road, and "that the said line shall from and immediately after the expiration of the said term of three years (subject, nevertheless to such toll for horses, cattle, beasts, carts, and carriages passing thereon as may by the said Joshua Milne, John Milne, and Samuel Lees—who are the trustees—their heirs and assigns from time to time be fixed and determined upon) be used by the public, and shall and will for ever hereafter be kept open and used as and for a road for the use

of the public"—and those words here are material—(subject as aforesaid) "and also that they, the said Joshua Milne, John Milne, and Samuel Lees, their heirs and assigns, shall and will from time to time, and at all times hereafter, keep and maintain the said road and every part thereof in good repair, order, and condition." Now, it is said that that covenant having been entered into by the trustees, the corporation as purchasers from them are now subject to that covenant. The corporation bought this road under an Act of Parliament which was passed in the year 1880. I do not think it necessary in the view I take of this case to go in detail into that Act of Parliament, but sect. 63 gives the power of purchase. There had been a previous Act of Parliament which had given them the right to enter into a contract with the trustees for the purchase of this road; they had not done that, and then sect. 63, with respect to this road, which is called Shaw-road, gave them this power, that on their paying to the trustees out of the borough funds, or the moneys borrowed, the consideration money which they were to pay, and, on a copy of this Act being produced to the commissioners of Inland Revenue (duly stamped), "then, and in that case, but not sooner or otherwise, all the rights, interests, property, and things comprised in sect. 27 of the Act of 1865" (that was the previous Act), "as subsisting at the time of the vesting thereof under this section, and the soil of Shaw-road, shall by virtue of this section vest absolutely in the corporation and their successors for all the estate and interest therein" of the trustees. It seems by the immediately preceding section that this Act contemplated that probably the corporation might have power to exercise the rights given by sect. 150, but in the view which I take of this case I shall not enter minutely into that question, or as to the general effect of this Act of Parliament with regard to the question in dispute. But it is said, on behalf of the appellant, here is this covenant with the trustees; the corporation are their successors under that Act of Parliament, taking all the estate and interest of the trustees in Shaw-road, and, that being so, they must be bound by the covenant; it is a covenant the burden and benefit of which run at law, or at least in equity, they having taken with notice, which undoubtedly they did, and if not enforceable at law, it is a covenant which could be enforced in equity, and the consequence must be that they cannot claim under the Public Health Act 1875 the expense of repairing this road, or, at any rate, they cannot claim from the plaintiff the full amount, but only such proportion as would meet the amount that would have been required to put the road in the state of repair required by the covenant with Mr. Elliott, through whom the plaintiff claims. Now, as to enforcing this covenant in equity, I will deal with that point first. In my opinion, if this is not a covenant running at law, there can be no relief in respect of it in equity; it is not a restrictive covenant; it is not a covenant restraining the corporation or the trustees from using the land in any particular way, at least so far as this case is concerned. If either the trustees or the corporation were intending to divert this land from the purpose for which it was conveyed, that is from being used as a road or street, that would be a very different question; then one would have to

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consider this, how far, having regard to that Act of 1880, the equitable right would travel, because undoubtedly where there is a restrictive covenant, the burden and benefit of which do not run at law, courts of equity do restrain anyone who takes the property with notice of that covenant from using it in a way inconsistent with the covenant. But here the covenant, which is attempted to be insisted upon on this appeal is a covenant to lay out money in doing certain work upon this land; and, that being so, in my opinion—and the Court of Appeal has already expressed a similar opinion in a case which was before it—that is not a covenant which a court of equity will enforce; it will not enforce a covenant not running at law when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor to spend money, and in that way to undertake a burden upon themselves. The covenantor must not use the property for a purpose inconsistent with the use for which it was originally granted; but in my opinion a court of equity does not, and ought not to enforce a covenant binding only in equity in such a way as to require the successors of the covenantor himself, they having entered into no covenant, to expend sums of money in accordance with what the original covenantor bound himself to do. The case principally relied upon by the appellant was one before Vice-Chancellor Malins. That was the case of *Cooke v. Chilcott*. Now, undoubtedly, the Vice-Chancellor did decide that case on the equitable doctrine, and said that he would enforce the covenant, but that is an authority which in my opinion was not right on that point. In the subsequent case of *Haywood v. The Brunswick Permanent Benefit Building Society* (both Lindley, L.J. and myself were members of the court which decided that case) we expressed our opinion against *Cooke v. Chilcott* being a correct development of the doctrine established by *Tulk v. Moxhay*, or for which *Tulk v. Moxhay* was an authority. Then there was another case before the late Lord Romilly, of *Morland v. Cook*, which was relied upon; but that was really a case not turning upon that doctrine, because it was this: There was a deed of partition of land, all of which was below the sea level, and was protected by a river or sea wall, and a covenant was entered into by the different parties to pay their proportion of the expense of repairing the sea wall, whoever should do it; and that covenant was enforced for and against the successors of those who were parties to the deed. But in that case it appeared that there was, according to the view of the Master of the Rolls, a common law liability, independently of that covenant, to repair the sea wall, so that it would be very different from the case of creating a new liability. The covenant there was framed in such a way as to create a grant by the different persons who took, on partition, portions of the property of a rentcharge out of their lands, in order to provide for the expense. The covenant was in this form: They covenanted for themselves, &c., "severally and respectively, in manner following, that is to say, that the charges, damages, and expenses of or attending the keeping and maintaining the walls and gutts of or belonging to the said lands, fresh marsh lands, hereditaments and premises hereby granted and released, or intended so to be, in good order and

repair, shall be borne and paid by them (naming them), their respective heirs and assigns, out of the said lands and hereditaments hereby divided in proportion, and by an acre-scut to be from time to time for that purpose made thereon and payable thereout in the same proportions in ready money." So, although in terms it was a covenant, it was a covenant by these parties that their proportion of the expense should be paid out of their land by an acre-scut, and be payable thereout in the same proportions in ready money. That is, therefore, really a grant by each of the parties of a rentcharge of so much money as would be equivalent to his proportion of the total expense of repairing that wall. Those, I think, were the principal cases which were relied upon. As to the case of *Holmes v. Buckley*, although that was a case which came from equity, yet I apprehend it was not decided on the ground taken in *Tulk v. Moxhay*; therefore, I do not think it necessary on this part of the case to refer to that decision. Therefore, in my opinion, if the plaintiff here cannot say he is entitled at law to sue on the covenant, he cannot have any relief on the equitable doctrine of *Tulk v. Moxhay*. Then, is there a covenant enforceable at law here? Two things must be considered on this point—the burden of the covenant, and the benefit of the covenant; and unless the plaintiff can show, he being an assign of the original covenantee, that he is entitled to the benefit of the covenant, and unless he can show also that the corporation, being assigns of the original covenantor, are subject to the burden of the covenant, he cannot establish in this court any covenant which can be enforced at law. If the plaintiff fails in either of these two points he fails on this part of the case. As I think my learned brethren will consider more particularly the question whether this burden runs with the land, I do not propose to enter into this part of the case. If I had to do so I ought to give my opinion upon the debated point whether the burden of a covenant can properly run with the land; and for that purpose I should like to consider the authorities which are supposed to lay down the proposition that it can, before I gave any opinion on the subject; but I in no way say that the burden of a covenant can be so annexed to the land as to run properly with the land. But does the benefit of the covenant run with the land in the present case? Now, in order that the benefit may run with the land, the covenant must be one which relates to or touches and concerns the land of the covenantee. Here undoubtedly what was to be done was not to be done on the land of the covenantee at all, but simply to be done on the land of the purchasers from him—these trustees—and when we look at the particular form of covenant entered into with him, it is clear that it was not pointedly with reference to his land that this covenant was entered into, it was a covenant that this strip of land should be kept as a road for the use of the public. Of course that was insufficient to dedicate it as a public highway so as to make it repairable by the parish, for it was only a matter of covenant as between him and the purchasers from him. Looking at the terms of the covenant, it is rather a covenant for the benefit of such of the public as might be willing to use this road, not a covenant having a direct reference to the land, or the enjoyment or the benefit of the land of the

covenantee, the predecessor in title of the plaintiff here. There was undoubtedly a reservation to the covenantee, which was for the benefit of his land and the occupiers of it in relation to his right to cross this road in respect of and for agricultural purposes without paying tolls; but it is conceded that this right or easement, or whatever it was, is gone, and here we are dealing with a covenant in which the public is constantly referred to, not the owners and assigns of the land. The words are, "shall and will for ever hereafter" (that is, the road) "be kept open and used as and for a road for the use of the public." That shows this, that, although the covenantee thought it would benefit himself and the other owners of the adjoining land to have a road which they as members of the public might use, this covenant is not a covenant which was made and entered into in such a way as that it relates to or touches and concerns the land of the covenantee. In my opinion, therefore, the plaintiff fails to make out that the benefit of this covenant can be said so to run with the land as to enable him, as the assign of the covenantee, to maintain this action. That being so, I think I need hardly go through many of the cases; but some of them, perhaps, one ought to mention. *Holmes v. Buckley* is one. It is doubtful whether that case was decided on the ground that the covenant ran with the land, because there the land of the plaintiff was nothing but the easement of a watercourse; and it is suggested that that decision really must not be looked upon as an authority that the benefit of the covenant would run with such an easement; but I should think myself that the watercourse must have been used to convey water to adjoining land of the plaintiff, and probably it was in respect of that land that the covenant was said to run with the land. However, I will not enter further into that case, because one of my learned brethren will do so more fully; but even if that is an authority as to the burden or a benefit of the covenant running with or against the land, one can see it has no application to the point on which I decide this case, because there the watercourse must undoubtedly have been for the benefit of the adjoining land of the grantee. Then as to the other case of *Morland v. Cook*, I have explained what the case really is, and although Lord Romilly did decide that that covenant would run with the land, I do not think, having regard to the explanation which I have given, one need consider that an authority which ought to trouble one either as regards the benefit or burden of the covenant; but, as regards benefit, a covenant for the keeping up of a sea wall which would prevent the land in question, owned by the plaintiff, from being flooded, from being drowned, was undoubtedly a covenant with reference to the benefit to be enjoyed by the land by the keeping of the sea out. Then *Western v. Macdermott* was another decision of Lord Romilly, and he did express his opinion that there the covenant ran with the land, but there the covenant was one which was much more pointedly and directly for the benefit of the plaintiff or the predecessor in title of the plaintiff, because it was a covenant not to build on adjoining land, the evidence being that it was not for the benefit of mere members of the public other than the owner of the adjoining land, but to prevent the adjoining land being made less commodious by the erection of buildings on the

land of the covenantor. Then there is the case of *Cooke v. Chilcott*, which was before Malins, V.C., where he likewise expressed an opinion that the covenant ran with the land. He did not base his opinion on the cases I have mentioned, but it was a case where there was very little, if any, difficulty as regards the benefit of the covenant touching and relating to land of the plaintiff, because it was to erect a pump and pump water from the land of the defendant's predecessor in title to the land of the plaintiff's predecessor in title, and there was reference to the benefit of the land, which showed that that was the object of the covenant. As to whether it was right to express any opinion as to the burden running with the land I say nothing, but there is no authority which can in any way interfere, when fairly regarded, with the opinion which I express, that the covenant in the present case was neither in terms nor in its obvious sense such as to be a covenant relating to, or touching and concerning, the land of the plaintiff's predecessor in title. So, in my opinion, this point that there is a covenant on which the plaintiff can sue the corporation at law is one which cannot be maintained, and so far as this case depended on that, in my opinion the appeal fails. If one had been of opinion that either at equity or at law the plaintiff could have relied on this covenant as against the corporation, it would have been necessary to consider what would have been the effect of the 268th section of the Public Health Act 1875, which points out what is to be done if a person charged considers that he has been charged too much; but, as I decide this case on the other point, that neither in equity nor law can the plaintiff successfully rely on this covenant, I think it is not necessary to enter into the question as to how far that section would prevent him from arguing the contention before us that what he has been called upon to pay should be reduced by striking off such proportion of this expense as is attributable to repairs which ought to be done by the trustees under the deed of covenant.

LINDLEY, L.J.—The controversy in this case has arisen in this way: There is a road called Shaw-road, in Oldham, and the defendants, who are the Corporation of Oldham, have recently paved, flagged, sewered, and repaired it. The plaintiff has some land adjoining the road, and the corporation have sought to charge him with what would be, under ordinary circumstances, his share of so making the road, paving, and draining it. He says that the corporation have no right to charge him with any of that expense; but if they have, they have no right to charge him with the whole of it. Now, the first point, whether they have a right to charge him with any of it, depends upon the question whether this Shaw-road is or is not "a highway repairable by the inhabitants at large" within the meaning of sect. 150 of the Public Health Act. Mr. Austerberry maintains that it is a highway repairable by the inhabitants at large. The Vice-Chancellor has expressed a doubt whether that expression in sect. 150—"highway repairable by the inhabitants at large"—is synonymous with all highways; whether it does not mean highways repairable by the inhabitants at large primarily, and whether the turnpike roads, and so on, which are primarily repairable by the public, though they may be repairable at common law by the inhabitants

at large, are within that expression. I think there is some doubt about that, but it is unnecessary to decide that question for the reasons that have been mentioned at length by Cotton, L.J., and to which I will very shortly refer. I think it is very doubtful, but it is unnecessary to decide, whether it is possible to dedicate to the public a highway subject to a toll. I do not say it is not, but I am very far from saying that it is. But whatever doubt there may be upon that point, which, if we had to decide, I should like to investigate further, it appears to me impossible to hold that a highway is dedicated to the public subject to a toll which may fluctuate from day to day. This highway was constituted under a trust deed giving the trustees a power to levy tolls if they liked, and to change them whenever they liked; and it appears to me quite impossible not to see that that is not a dedication to the public—it is liberty to such of the public as choose to pay the toll to use the road, that is all. I cannot come to the conclusion that the road was ever dedicated to the public. That appears to me to be the short answer (I need not go further into it) to that first point; and in my opinion this road is within sect. 150 of the Public Health Act, and upon the first point the corporation is right. But then arises another and a totally different point. The plaintiff says: "You, the corporation, have bought or acquired this road under an Act of Parliament which places you in the position of, and in no better position than, those from whom you got it; you acquired it from certain trustees, and those trustees covenanted with my predecessors in title to keep this road open for the public, and to repair it. You are bound by that covenant to repair, and I am in a position to enforce against you that covenant." First, it seems to have been thought that that covenant was so worded as to cover everything which the corporation had done—I mean by "everything" the metalling, and paving, and sewerage; but when the covenant is looked at it is seen that it is not extensive enough to cover that; and, therefore, whatever may be the merits of the case, the corporation must be right as to a great portion of the charges made against the plaintiff. But, then, there is the covenant which extends (to use a short word) to repairing, and the plaintiff says that at all events to the extent to which the corporation have incurred expense in repairing the road, to that extent they are bound to exonerate him by virtue of that covenant. That gives rise to one or two questions of law. The first question which I will consider is, whether that covenant runs with the land, as it is called—whether the benefit of it runs with the land held by the plaintiff, and whether the burden of it runs with the land held by the defendants, because, if the covenant does run at law, then the plaintiff, so far as I can see, would be right as to this portion of his claim. Now, as regards the benefit running with the plaintiff's land, the covenant is, so far as the road goes, a covenant to repair the road; what I mean by that is, there is nothing in the deed which points particularly to that portion of the road which abuts upon or fronts the plaintiff's land—it is a covenant to repair the whole of the road, no distinction being made between the portion of that road which joins or abuts upon his land and the rest of the road; in other words, it is a covenant simply to make and maintain

this road as a public highway; there is no covenant to do anything whatever on the plaintiff's land, and there is nothing pointing to the plaintiff's land in particular. Now it appears to me to be going a long way to say that the benefit of that covenant runs with the plaintiff's land. I do not overlook the fact that the plaintiff as a frontager has certain rights of getting on to the road, and if this covenant had been so worded as to show that there had been an intention to grant him some particular benefit, in respect of that particular part of his land, possibly we might have said that the benefit of the covenant did run with this land, but when you look at the covenant, it is a mere covenant with him, as with all adjoining owners, to make this road, a small portion of which only abuts on his land, and there is nothing specially relating to his land at all. I cannot see myself how any benefit of this covenant runs with his land. But it strikes me, I confess, that there is a still more formidable objection as regards the burden. Does the burden of this covenant run with the land so as to bind the defendants? The defendants have acquired the road under the trustees, and they are bound by such covenant as runs with the land. Now we come to face the difficulty: does a covenant to repair all this road run with the land—that is, does the burden of it descend upon those to whom the road may be assigned in future? We are not dealing here with a case of landlord and tenant. The authorities which refer to that class of cases have little if any bearing upon the case which we have to consider, and I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed, amount to either a grant of an easement, or a rentcharge, or some estate or interest in the land. A mere covenant to repair, or to do something of that kind, does not seem to me, I confess, to run with the land in such a way as to bind those who may acquire it. It is remarkable that the authorities upon this point, when they are examined, are very few, and it is also remarkable that in no case that I know of, except one which I shall refer to presently, is there anything like authority to say that a burden of this kind will run with the land. That point has often been discussed, and I rather think the conclusion at which the editors of the last edition of Smith's Leading Cases have come to is right, that no case has been decided which does establish that such a burden can run with the land in the sense in which I am now using that expression. The case of *Holmes v. Buckley* (1 Eq. Cas. Abr. 27) looks a little like it at first; but the observation to be made on that case I think is this: in the first place it is quite plain that there the plaintiff had a cause of action; he was entitled to an injunction of some sort to restrain the defendants from interrupting his watercourse. The right of the plaintiff to enforce specifically the covenant to repair, or rather to cleanse the watercourse, is obscure, and we have not got the decree which was pronounced, and I confess that, having only that short note of it which is to be found in *Equity Cases Abridged*, I fail to understand the exact grounds of that decision, if it was a decision specifically enforcing that covenant to cleanse. I doubt whether it was a decision to that effect, but the case is too loosely

reported to be a guide on the point. Now, *Morland v. Cook* (*ubi sup.*), another case in which it was said that the covenant ran with the land, is intelligible on this ground—that there was there that which amounted to the creation of a rentcharge for the repair of the sea wall, which was in question. That is intelligible enough, and if the covenant in the present case amounted to anything of the kind, of course the observations I am now making would not be applicable. The case before Malins, V.C. of *Cooke v. Chilcott* has been so shaken that I cannot rely upon it as an authority at all. I think the Vice-Chancellor did intimate an opinion that the covenant there would run with the land. I confess I doubt the correctness of that opinion. He decided the case upon another point, and upon that other point only has it been followed. There is no other authority that I am aware of that such a covenant as this runs with the land, unless it is *Western v. MacDermott*, where the Court of Appeal did not sanction the notion that the covenant in that case ran with the land, although the covenant was a purely restrictive covenant. I am not aware of any other case which either shows, or appears to show, that a burden such as this can be annexed to land by a mere covenant, such as we have got here; and in the absence of authority it appears to me that we shall be perfectly warranted in saying that the burden of this covenant does not run with the land. After all it is a mere personal covenant. If the parties had intended to charge this land for ever, into whosoever hands it came, with the burden of repairing the road, there are ways and means known to conveyancers by which it could be done with comparative ease; all that would have been necessary would have been to create a rentcharge and charge it on the tolls, and the thing would have been done. They have not done anything of the sort, and therefore it seems to me to show that they did not intend to have a covenant which should run with the land. That disposes of the part of the case which is perhaps the most difficult. Now the other point was this: that even if it did not run with the land at law, still, upon the authority of *Tulk v. Moshay*, the defendants having bought the land with notice of this covenant, take the land subject to it. Mr. Collins very properly did not press that upon us, because after the two recent decisions in the Court of Appeal in *Haywood v. The Brunswick Permanent Building Society* and *The London and South-Western Railway Company v. Gomm* that argument is untenable. *Tulk v. Moshay* cannot be extended to covenants of this description. It appears to me therefore, I confess, that upon all points the plaintiff has failed, and that the appeal ought to be dismissed.

Fry, L.J.—I have very little to do in this case except to express my assent and concurrence with the conclusion of my learned brothers. Upon the question of dedication, I think it plain that there has been no dedication to the public of the road in question. I doubt whether there can be a dedication of a road to the public with a levy of a toll, unless under a grant from the Crown; but that point is one which it is not needful now to decide. In the present case what is relied upon as a dedication is the language used in the deed of settlement; but I regard that as a mere convention between the parties who associated them-

selves together for a private enterprise, and covenanted that they would open the road to the public subject to a toll to be varied from time to time, with an eye, no doubt, to the dividends which they were to declare amongst the shareholders. I consider that they no more dedicated the road to the public than a company formed for the purpose of carrying on a theatre or a pleasure garden dedicates the theatre or the pleasure garden to the public because they agree amongst themselves that they will admit the public, subject to the payment of a toll. Upon the second point I have not much to add. It appears to me that the questions are three. In the first place, did the benefit of this covenant run with the land—the land of Mr. Elliott? Upon that point my opinion is perhaps not quite as confident as that of my learned brothers. I am rather more inclined to think that the road connecting the land with the public highway was so far an incident to the use and occupation of the remainder of Mr. Elliott's land that it might be conceivable that it came within the principles of covenants relating to things incident to the land; but, at the same time, I do not desire to express any difference of opinion upon that. But upon the point whether the burden of the covenant ran with the land of the covenantors, I am clearly of opinion that it did not so run; and I share the doubt which has been expressed by my learned brothers whether in any case, except that of landlord and tenant, the burden of covenants of this description does ever run with the land. There is one case which appears to me very closely parallel to the present case. I think that the most favourable way of stating the case of the present appellant is to hold that there was the grant of an easement by the covenantors to Mr. Elliott of a right of way over the land of the covenantors, with a covenant by the covenantors that they would maintain the land, subject to the right of way, in repair as a road. Now, putting the case in that manner, it is extremely like the circumstances which occurred in the case of *Brewster v. Kidgill*, which is best reported in *Modern Reports*, vol. 12, p. 166. That was a case which came before Lord Holt and the King's Bench, and was evidently very elaborately argued. There one Brewster, who was seised in fee of a manor, in consideration of 800*l.* granted a rentcharge in fee of 40*l.* per annum, and on the back of the deed was indorsed a memorandum declaring it to be the true intent and meaning of that deed, "that the grantee and his heirs shall for ever hereafter be paid the said rentcharge without any deduction or abatement of taxes, charge, or payment out of, for or concerning the said rent, or the said manor or lands charged herewith." The question then arose whether the memorandum was really part of the grant of the rentcharge, or a covenant collateral to the grant. Lord Holt conceived it to be a collateral covenant; the other judges of the King's Bench thought that it was part of the grant. They all agreed in the view that if it was a part of the grant it ran with the land; but that if it was a covenant to pay it did not run with the land. Now what Lord Holt said upon that point is this (12 Mod. 170): "I make no doubt but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted; but that

covenant should run with the rent against the assignee of that land, I see no reason. If this rent was granted so to be paid, it would be another matter; but here is only a covenant, and no words amounting to a grant, and therefore there can be no relief in this case against the terretenant, but," his Lordship added, "in equity;"—I will consider that point hereafter—"and, therefore, for this point I do not see how the plaintiff can have his judgment." The learned judges differed on the question of construction, but they do not appear to have differed on the point of law which Lord Holt discussed. There remains, therefore, only the question whether there is any relief in equity in a case of this description where there is none at law. The point is not pressed upon us by the appellant. I do not think it is arguable after the recent decisions. A covenant of this description requiring the outlay of money upon the land is not a covenant which, if it does not run at law, runs at equity by reason of any doctrine such as that of *Tulk v. Moxhay*. I agree, therefore, that this appeal must be dismissed with costs.

Solicitors for the plaintiffs, *Field, Roscoe, and Co., for Henry Wrigley, Oldham.*

Solicitors for the defendants, *Chester and Co., for H. Booth, Oldham.*

July 15 and 16, 1885.

(Before COTTON, LINDLEY, and BOWEN, L.JJ.)

NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD. (a)

*Local board—Resignation of members—Number less than quorum—Transaction of business by—Filling up vacancies—Lapse of board—Acts done by irregularly constituted board—Building line—Right to prescribe after commencement of building—Injunction to pull down buildings—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 4, 7, 155, 158; schedule 1, part I., rules 2, 9; schedule 2, part I., rule 65; schedule 2, part II.*

On the 1st April 1884 a local board, consisting of nine members, was duly elected.

On the 1st May seven members of the board resigned.

On the 29th May the two remaining members of the board elected three other members, and on the same day the same two members and the three new members elected four other members, thus making up the full number of nine.

The board thus constituted, purporting to act under sect. 155 of the Public Health Act 1875, prescribed a building line to be observed in the re-erection of schools by the defendants.

Subsequently, three new members of the local board were duly elected by the ratepayers, and the board thus constituted commenced proceedings to restrain an infringement by the defendants of the prescribed building line.

By rule 2 of schedule 1, part I. to the Act, "no business" shall be transacted at any meeting of the local board unless at least one-third of the full number of members be present thereat.

Held, that the election of new members was "business" within the meaning of rule 2 of sched. 1, part I., and that the election by less than a quorum of three members, and the subsequent election of four members, were invalid; but that

the proceeding of the improperly constituted board in prescribing a building line was rendered valid by rule 9 of schedule 1, part I.

Held also, that the board had never ceased to exist as a corporation, and, therefore, that the board existing when the action commenced could maintain such action.

The decision of Pearson, J. reversed.

Observations as to the circumstances which will cause a local board to "lapse" within the meaning of schedule 2, part I.

Semble, that rule 9 of schedule 1, part I., would not be an answer to a quo warranto information.

Quære, whether the same rule would validate business transacted by less than a quorum with persons not members of the board.

A school board having determined to pull down their school and erect a new school on the same site, which abutted on South-lane, in Aug. 1884 sent plans of the intended new school to the local board. The local board objected to their plans, and in Nov. 1884 the school board sent in fresh plans. The local board objected to these plans also, on the ground that they infringed the bye-laws of the local board, inasmuch as the annexes to the main building were beyond the line of the new street which the local board intended to form by widening South-lane, and which line the local board supposed they had the power to define under the bye-laws and sect. 158 of the Act.

The bye-laws referred to applied only to dwelling-houses, and required a new street (which South-lane was not) to be of a certain width.

The school board, having been advised that the bye-laws and sect. 158 did not apply, pulled down their old building, and on the 6th Jan. 1885 sent to the local board plans which were substantially the same as those sent in Nov. 1884.

On the 12th Jan. the school board had laid some of the foundations of their main building.

On the 22nd Jan. the local board, acting under sect. 155 of the Act, prescribed a building line, which was so drawn that, although the main building of the new school would be within the line, the annexes would be beyond it.

On the 23rd Jan. notice of the resolution prescribing this line was served on the school board.

The school board subsequently erected their annexes according to the plans and beyond the line.

Held, that the school board had not been misled by the local board into the belief that the latter did not intend to prescribe a line, that the local board were therefore not acting inequitably in exercising their powers under sect. 155, and that an injunction must be granted to compel the school board to pull down the buildings so far as they extended beyond the prescribed line.

*Slee v. Corporation of Bradford* (8 L. T. Rep. N. S. 491; 4 Gif. 262) and *Corporation of Folkestone v. Woodward* (27 L. T. Rep. N. S. 574; L. Rep. 15 Eq. 159) distinguished.

THIS action was commenced on the 21st May 1885, the plaintiffs, by the indorsement on their writ, claiming an injunction to restrain the defendants from rebuilding their schools at Newhaven, so far as they fronted South-lane, in such a manner as to contravene or extend beyond the building line prescribed by the plaintiffs in a notice delivered on the 23rd Jan. 1885, and shown on a plan delivered to the defendants in Feb. 1885, and that the defendants might be ordered



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to pull down and remove any walls, erections, foundations, or works which had been already begun or erected by them beyond such building line.

On the 12th June the plaintiffs moved before Pearson, J. for an interim injunction in the terms of the writ.

A preliminary objection was taken that, at the time when the building line was fixed, there was not a quorum of the local board competent to act, and this was the only point argued before Pearson, J.

It appeared that on the 1st April 1884 the local board, which consisted of nine members, was duly elected.

On the 1st May 1884 seven members of the local board resigned.

On the 29th May the two remaining members of the board elected three other members, and at an adjourned meeting, held the same day, at which the five members were present, four other persons were elected members.

These nine members, purporting to act as the local board, on the 22nd Jan. 1885 passed a resolution prescribing the building line above mentioned.

*Cookson, Q.C. and Corrie Grant* in support of the motion.—By rule 2 of schedule 1 (part I.) to the Public Health Act 1875 (38 & 39 Vict. c. 55), “no business shall be transacted at any meeting” of a local board, “unless at least one-third of the full number of members be present thereat, subject to this qualification, that in no case shall a larger quorum than seven members be prescribed.” In the first place, we contend that the election of new members is not “business” within the meaning of this rule. But if electing members is business, a case like this, where by resignation or otherwise the number is reduced below one-third, is provided for by rule 9 of schedule 1 (part I.), which is as follows: “The proceedings of a local board shall not be invalidated by any vacancy or vacancies among their members, or by any defect in the election of such board, or in the election or qualification of any members thereof.” To construe the Act the other way would lead to confusion. That it was intended that a board might legally act, notwithstanding the disqualification of some members, is shown by rule 70 of schedule 2 (part I.), which imposes penalties on persons acting as members when disabled or disqualified, but the same rule goes on to provide that all acts of such persons, if done previously to the recovery of the penalty, “shall be valid and effectual to all intents and purposes.” The power to fill up vacancies is given by rule 65 of schedule 2 (part I.), which provides that “any casual vacancy occurring by death, resignation, disqualification, failure duly to elect members, or otherwise, in a local board, shall be filled up by the local board out of duly qualified persons within six weeks, or within such further time as the Local Government Board may by order allow.” The board still exists though only two members may remain, and a quorum of three was not necessary for the election of new members. If it were, there would be no power to fill up the proper number of members, except in the case of a lapse of the board, when, by rule 2 of schedule 2 (part II.), the owners and ratepayers of the district may elect a new board.

*Cozens-Hardy, Q.C. and Ashton Cross* for the defendants.

PEARSON, J.—There is no dispute that the original election of the nine members of the local board in April 1884 was a good and valid election. Nor is there any dispute that on the 1st May 1884 seven members of that board retired. Only two members of the board were left, and they were incapable of acting, for by rule 2 of schedule 1 (part I.) to the Public Health Act 1875 no business is to be transacted unless at least one-third of the full number of members are present. The full number of this board was nine, and the quorum required, therefore, was three. By the resignation of seven members the board became reduced to such an extent that it was impossible to have a quorum of the board, and the two members who were left were unable to transact any business. The counsel for the plaintiffs say that, although these two members were unable to transact any business, they had the power of electing new members of the board, inasmuch as, in the case of a casual vacancy, the members of the board are to elect members. I am of opinion that the election of new members of the board was as much “business” within the meaning of rule 2 of schedule 1 (part I.) as any other matter that could by possibility be brought before them. If, instead of seven members retiring, four members only had retired, so as to leave five members of the board, I should still come to the conclusion that the presence of three members was necessary to elect a new member of the board, and I come in like manner to the conclusion that, inasmuch as there were only two members of the board, the board could transact no business at all. However, on the 29th May, the two members of the board who were left did appoint three members, and that made five, and at an adjourned meeting held on the same day the five members elected four more. It is now said that they thus completed the full number of the board. The question I have to determine is, whether they have legally done so, or whether all their proceedings were absolutely null and void. It is said that the proceedings were good by virtue of rule 9 of schedule 1 (part I.). [His Lordship read the rule, and continued:] This case certainly does not come within the words of the rule with regard to “any defect in the election of such board,” because I conceive that applies to the original election of the whole board. The question is whether there was any board on the 29th May, and I am of opinion that there was no board on that day. I consider that under the circumstances the board had then lapsed. The whole board had been reduced to below the quorum required by the rules. The remaining members could do no business of any sort or description, and, if the opinion I have formed is correct, they could not add to their number so as to constitute a board with a quorum. I think, therefore, there was no board on the 29th May, and that being so, there is no proceeding of a local board to which rule 9 could apply, for there really was no board at all. I think, therefore, that all the proceedings on the 29th May were absolutely invalid; that the board had lapsed altogether; that the proper proceeding at that time would have been to have had a new election of a new board by the ratepayers under rule 2 of schedule 2 (part II.). I think, there-



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fore, that all the proceedings were absolutely null and void, and amongst others that which settled the building line. The motion must therefore be refused with costs.

The plaintiffs appealed.

*Cookson, Q.C.* and *Corrie Grant* for the appellants.—In the first place, the election of members is not "business" within rule 2 of schedule 1 (part I.) to the Public Health Act 1875. [Bowen, L.J.—It is not pleasure.] There is no express power to resign membership, but resignation is recognised in rule 65 of schedule 2 (part I.). "Business" must mean such business as is prescribed by the Act, e.g., contracts with persons who are not members of the board. Serious inconvenience would ensue if all persons dealing with the board had to look through the past proceedings of the board to see whether the existing board was capable of acting. Suppose there had been invalid voting papers for three successive years. Assuming the election of members is "business," the defect in the elections is cured by rule 9 of schedule 1 (part I.), which provides that the proceedings of the board shall not be invalidated by vacancies or by any defect in the election of any members. The board still remains, though some of its members have resigned.

*Cozens-Hardy, Q.C.* and *Ashton Cross* (called on only as to whether the defect was cured by rule 9).—Rule 9 must be read with the other rules. No doubt the board is for many purposes in the position of a corporation, but the word "board" is sometimes used to mean the members of the board. The answer to the argument of inconvenience is, that in case of lapse provision is made for the election of new members by schedule 2 (part II.). If two members could not legally appoint three the subsequent proceedings of the five were invalid, and also of the nine members.

*Cookson* in reply.—Schedule 2 (part II.) only applies in the case of a total lapse of the board.

At the conclusion of the arguments on the question decided by *Pearson, J.* the main question involved in the action was argued, the hearing of the appeal being treated, by consent, as the trial of the action.

It appeared that the school board, having determined to pull down their old building and erect a new school on the same site, which abutted on South-lane, in Aug. 1884 sent plans of the new schools to the local board.

The local board objected to the plans, and in Nov. 1884 the school board sent in further plans.

The local board objected to these plans also on the ground that they infringed the bye-laws of the local board, inasmuch as the annexes to the main building were beyond the line where the new street in lieu of South-lane would commence, and which line the local board supposed they had power to define under sect. 158 of the Act. The bye-laws referred to applied only to dwelling-houses, and required a new street (which South-lane was not) to be of a certain width.

The school board having been advised that, as South-lane was not a new street, sect. 158 of the Public Health Act 1875 (which enables a local board to remove buildings erected in contraven-

tion of a bye-law) did not apply, on the 5th Jan. began to pull down their old building.

On the 6th Jan. the school board sent in to the local board plans which were substantially the same as those sent in Nov. 1884.

On the 12th Jan. the works had so far progressed that the school board had begun to lay the foundation of their new building.

On the 22nd Jan. the local board passed a resolution defining a building line under sect. 155 of the Act, which provides that when any house or building situate in any street in an urban district has been taken down in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation, shall be erected. Notice of the line prescribed was given to the school board on the following day.

The building line prescribed was so drawn that, although the main building of the school would be within the line, the annexes (lavatories, &c.) would project beyond it.

Although the school board had then begun the main building they had not commenced the annexes, but after the line had been thus prescribed they partially erected the annexes so as to extend towards South-lane beyond the prescribed building line.

The present action was therefore commenced.

*Cookson, Q.C.* and *Corrie Grant* for the appellants.—The board being competent to act, prescribed a building line on the 23rd Jan., under sect. 155 of the Act. This line has not been regarded by the defendants, and the injunction ought to be granted to restrain them from infringing it.

*Cozens-Hardy, Q.C.* and *Ashton Cross* for the defendants.—The plaintiffs were too late in prescribing a building line under sect. 155, after a building had been begun according to a plan which, if carried out, would infringe the building line subsequently laid down. When the owner of a factory, being desirous of rebuilding, submitted plans to a town council and local board, and the plans having been approved, pulled down his factory and proceeded to rebuild it according to the plans, and the town council, acting under sect. 35 of the Local Government Act 1858—which related to buildings to be erected—then required the owner of the premises to set them back, the court granted an injunction restraining the council from interfering with the erection of the factory according to the approved plans:

*Sles v. Corporation of Bradford*, 8 L. T. Rep. N. S. 491; 4 Giff. 282.

In another case a temporary church, fronting to a road within the borough of Folkestone less than forty feet wide, having been pulled down with a view to erecting a permanent church, the corporation gave notice of a resolution passed by them, that the road on which the church abutted must be not less than forty feet wide; but there was no statement that the additional width was to be gained on the side on which the church abutted, and the street might have been widened on the opposite side without removing any buildings. Afterwards, when the foundations of the new church had been put in, the corporation prescribed a line of building which came within the limits of the church as designed; and it was held by

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Malins, V.C., that the corporation were too late, and could not interfere with the erection of the church as designed:

*Corporation of Folkestone v. Woodward*, 27 L. T. Rep. N. S. 574; L. Rep. 15 Eq. 159.

The same principles ought to be applied to a case like this, where the board have seen the plans, and have not prescribed a line until building according to the plans has been commenced.

*Cookson* in reply.—The mere laying of walls, after plans have been sent in which were not submitted with reference to the building line at all, is not sufficient to bring the case within the principles of the decisions cited. The plans were submitted merely to show that the structural arrangements met the bye-laws and satisfied domestic requirements.

COTTON, L.J.—This is an appeal from the decision of Pearson, J., who did not enter into the merits of the case, but decided that the defects in the constitution of the plaintiff board were an answer to the action. After the argument, and before we had intimated any opinion, the parties agreed that this should be treated as the hearing of the action, and, of course, the judgment which we make must be prefaced by a statement of that consent of the parties. The plaintiffs claim to be the local board of the district of Newhaven, and the defendants are admittedly the school board for the same district. What the defendants are proposing to do is to erect a school building; but part of the building which they propose to erect, and which to some extent they have erected, is beyond the line which the plaintiffs have purported to prescribe under sect. 155 of the Public Health Act 1875. This action was instituted in order to prevent the defendants from making their building project beyond that line. As part of it has been put beyond that line, of course the judgment, if it is in favour of the plaintiffs, will necessitate the pulling down of part of the building. The part of the building in question is only some annexes, consisting of lavatories, lobbies, and other similar places. In Jan. 1885 a resolution was passed fixing a building line which would prevent any portion of the new school building from projecting beyond the main wall of the building. If, therefore, that building line was well prescribed, the defendants are in the wrong. But various objections were taken to the rights of the plaintiffs to act, and the only objection which Pearson, J. considered, the case being before him on an application for an interlocutory injunction, was that, at the time when the plaintiffs purported to prescribe the building line, there were no persons or corporations capable of acting and giving any direction on behalf of the local board. On that ground, Pearson, J. refused to make any order. The first matter to be considered is, whether that objection is well founded. This local board was to consist of nine members. Rule 2 of schedule 1 (part I.) to the Public Health Act 1875 provides that "no business shall be transacted at any meeting unless at least one-third of the full number of members be present thereat." There was hardly any discussion about the meaning of that rule. It was almost conceded, and my opinion is, that the true construction of the rule is, that the quorum must consist of one-third of the prescribed number of members

who are to constitute the board, and that would be in this case three. Shortly after the election of some new members of the board, seven of the persons constituting the board resigned, and left two members only to be the board. Rule 65 of schedule 2 (part I.) provides that when there is a vacancy between the periods of the annual elections, the local board shall select or elect a sufficient number of persons duly qualified to make up the number of the board. The two remaining members purported to act under that power, and took to themselves seven other persons to make up the number of nine. The defendants have taken the objection that no business at all could be done by the board, there being only two duly elected members remaining, that the taking or selection of these seven persons was "business" within the meaning of rule 2 of schedule 1 (part I.), and that the election of the seven was therefore void. The first point to be considered is, whether the taking additional members was "business" within rule 2 of schedule 1 (part I.) In my opinion, it was. It is very true that it is not the business which a full board has to transact, but it is business of the board which has to be done for the purpose of filling up vacancies so as to constitute the board with the proper number of members. In my opinion, therefore, if rule 2 of schedule 1 (part I.) were the only rule which we had to regard, this objection would be fatal to the plaintiffs' case. But we must look at the other rules, and in particular we have to consider whether rule 9 of the same schedule does not apply. The first words of that rule are as follow: "The proceedings of a local board shall not be invalidated by any vacancies among their members." In my opinion, that part of the rule was intended to provide that a quorum might act, although the number of members of the board was reduced below the full number defined or required. The rule continues, "or by any defect in the election of such board." That, I think, does not apply to this case; it seems to refer to the election of the board as a whole. But then we come to these words, "or in the election or selection or qualification of any members thereof." Now I understand Pearson, J. to have come to the conclusion that this does not help the plaintiffs, because "thereof" means "of the board;" that there was no board here, and that therefore this rule did not apply. I cannot agree with that. We talk of the board in two senses. The local board is a corporation; it is incorporated under the Act. But from the imperfection of language we use the word "board," not only to describe the corporation, but to describe the persons, the corporators, who are acting in the exercise of the powers given to the board. And, in my opinion, "board," as used in rule 9, means the corporation. Although the number of the members of the corporators was reduced to two, yet the corporation had not come to an end; it still existed, though in such a state that, having regard to rule 2, there were not sufficient members duly appointed to deal with the matters which might have to be dealt with. In my opinion, therefore, as regards the validity of the acts done by the board, rule 9 cures the defect arising from the fact that the persons elected or selected to fill up the vacancies were chosen by two person

who, not being a quorum, were not competent to fill up the vacancies. Therefore, in my opinion, we cannot consider what had been done by the board, although irregularly constituted, as being ineffectual. Let us consider what the object of the 9th rule is. At first one is inclined to think that it was only intended for the protection of persons dealing with the board, but in my opinion, if we look carefully at it, we shall see that it goes much further, and that there is good reason for its doing so. When these local boards are once constituted they have to regulate various matters in the districts for which they are appointed; and it appears to me that the rule was intended to prevent the consequences which would arise if the proceedings of a board, whose duty it is to give directions as to various important matters, could be impeached, as having been done without authority, because the board was irregularly constituted. It would throw a district into great confusion if, where steps had been taken by a quorum of the persons acting as a board, the objection could afterwards be taken that the election of certain members was wrong, and that there was not in fact a duly qualified board. We may take this case as an example of the results. I do not like to construe Acts of Parliament by considering only what will be the results of one construction or the other; but we cannot wholly disregard the consideration of the state in which this place would be if all the acts which have been done for a year by the persons assuming to act as the board were to be held inoperative on account of this defect in filling up the vacancies. I do not at all think that, if two members purported to pass resolutions in exercise of the powers given to the board, the defect would be cured by rule 9, for only the statutory quorum can do business; but, in my opinion, when a proper quorum of the persons who are acting, *de facto*, as members of the board passes resolutions, rule 9 does prevent any objection being taken to those resolutions, or to the action taken in consequence of them, on the ground that if the matter was investigated it would turn out that the election of some of the members of the board was not a good election in law. In my opinion, therefore, the acts of the board, though irregularly constituted, must be taken as good acts, for the board here are not appearing as individuals, but as a corporation acting for the benefit of all the inhabitants of the district of Newhaven. Then we come to the merits, into which Pearson, J. did not enter. It appears that the school board determined to pull down an old school and build a new one, and in Aug. 1884 they sent plans to the local board, as then constituted and purporting to act. Objections were taken to those plans. In October further plans were sent in, and objections were taken to them. Those objections were founded on this, that the board, as then advised, considered that the plans were in violation of some of their bye-laws. It is not immaterial that the bye-laws to which the local board referred—and which they acted on on the assumption that South-lane was a new street, which it was not—require that the new street shall be of a certain width. The school board were advised, some time early in January if not before, that the reasons given by the local board for their objections to the plans were not good reasons, and that, inasmuch as South-lane was not a new street, the

powers of sect. 158 of the Public Health Act 1878 could not be exercised by the local board if the school board went on with their building notwithstanding the objection to the plans. The school board, therefore, apparently on the 5th Jan., began to pull down their building for the purpose of reconstructing it. Then, on the 6th Jan. they seem to have sent to the plaintiffs plans which were substantially, if not in all respects, the same as those which had been sent in November. After this they went on with their building in such a way that on the 12th Jan. they had begun to lay the foundations of the new building. On the 22nd Jan. the local board passed a resolution defining, under sect. 155, the building line, which was so laid down that, although the main building of the school would be within it, the annexes which I have mentioned would project beyond it. Those annexes, however, had not at that time been begun. The question is, Can the plaintiffs insist upon their objection, and ask the court to give effect to it? It was suggested, although it was not much argued, that sect. 155 does not in such a case give power to the board to lay down a building line. Sect. 155 is as follows: "When any house or building situated in any street in an urban district, or the front thereof, has been taken down in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith." As I understand the objection, which was not strongly urged, it was this: that the house or building had in fact been commenced before the plaintiff board purported to prescribe the building line, and that therefore there was not, under the Act of Parliament, any power of prescribing it. In my opinion that objection cannot prevail. If that part of the building which, as it was planned, would interfere with the building line, had been substantially begun before the local board had prescribed the building line, probably there would have been no power under this section to prescribe a line which would interfere with such building; but that is not the case here. On the 22nd Jan. nothing had been begun which went beyond the line then fixed, and that being so, it would, in my opinion, be wrong to say that the power given by this section is gone. Is the power gone as regards prescribing the line of the front because a man has begun to build back buildings which are not an essential part of the house? In my opinion that cannot be so. In my judgment, where a building is taken down for the purpose of being rebuilt, the line of any portion of that building may be prescribed before that particular portion is commenced, unless what has already been done necessarily involves, as a matter of construction, a projection beyond the building line which the local board may afterwards prescribe. It was urged by the defendants that the plaintiffs knew from the plans that the defendants had commenced a building to which they intended to have an addition which would go beyond the building line which the plaintiffs prescribed; but to my mind, where the addition is not necessarily incident to the structure already begun, that is not an argument for saying that the power given by the Act is gone, but merely an argument in equity to show

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that there are equitable circumstances which prevent the local board from exercising the power. The substantial question to my mind is this, whether the circumstances are such as to raise an equity preventing the plaintiffs from prescribing a line which prevents the completion of the building in accordance with the plans according to which the defendants intended to build, and which had already been laid before the plaintiff board. That is a matter of considerable nicety. It was argued that, because the objections given by the plaintiffs were inoperative under sect. 158, therefore the plaintiffs had lost their right to interfere in another way with the completion of the plans which had been laid before them. I think that we have nothing to do with sect. 158; the question is, whether what was done by the plaintiffs led the defendants reasonably to suppose that there would be no objection to any portion of their new building coming beyond the line which had been laid down by the plaintiffs. It would, of course, be contrary to equity to allow the plaintiffs, though a public body, to claim an injunction against the defendants, if the defendants had incurred expense in consequence of acts of the plaintiffs which led them reasonably to believe that the plans, so far as frontage went, would not be objected to. But how is that made out? The objections of the plaintiffs to the plans went on wrong grounds. They objected to the plans twice, and on the second occasion gave a reason, viz., that the proposed buildings violated certain bye-laws. These were bye-laws which, assuming South-lane to be a new street, would require the width of the new street to be such that the annexes could not be constructed. South-lane was not a new street, and the objection therefore was put on a wrong ground, but it was an objection which amounted to this, that the local board required that the new buildings should not extend so far towards South-lane as the school board proposed. How, then, can it be said that the defendants have been in any way misled by the conduct of the local board? It is true that the ground alleged by the local board to enable them to insist on the widening of the space between the buildings of the defendants and the other side of the road was not a legal ground; but they pointed out, although on a wrong legal ground, that they desired to have the buildings thrown back further than was shown on the plan. In my opinion, therefore, it cannot be said that the defendants were in any way misled by the conduct of the plaintiffs into assuming that the plaintiffs would not raise any objection on the ground that they were going to prescribe the line. The plaintiffs were advised, after a time, that the bye-laws would not help them. They then took the course of acting under sect. 155, and as, in my opinion, the defendants cannot say they were misled or induced to act as they have done by any belief, caused by the action of the plaintiffs, that the plaintiffs did not object to the side of those building in question projecting as far as it would do if the defendants carried out their plans, I think that no equity arises against the plaintiffs. The cases which were referred to, and which seem to me to have little bearing upon the present case, were either cases of approval of plans which had been given, or of no dissent to such plans. The court held that, under those

circumstances, the persons building were justified in coming to the conclusion that the board did not object to the line of frontage as shown by those plans, and that therefore they could not exercise the power of prescribing a line. But that has no bearing on a case where the plaintiffs have stated their objection to the projection of the building beyond the line upon which they now insist, although they objected on grounds which they could not legally enforce. In my opinion therefore it cannot be said here that the plaintiffs, having the legal power to prescribe a line beyond which the buildings should not go, have by their conduct given any equity to the defendants to insist that they shall not exercise that power. Judgment therefore must be given to pull down the annexes, which, as I understand, have been put up and completed. I should add that, in my opinion, the result would have been different if the completion of these annexes, in the position shown by the plans, had been essentially necessary to the completion of the building which had been begun before the time was prescribed; but it is sworn to—and, on looking to the plans, one cannot doubt the accuracy of the statement—that, although it may cause some inconvenience and a little expense, the school can, without difficulty, be provided, although in a different place, with the conveniences which were intended to be provided for by these annexes. Then one comes to the question of costs, which may be an unfortunate one for the ratepayers of Newhaven. As the plaintiffs succeed, they must have their costs from the defendants.

LINDLEY, L.J.—I also am of opinion that the school board in this case are entirely wrong, and have been wrong from the beginning to the end. The object of this litigation is to compel the school board to pull down certain portions of their building which project beyond a building line which was fixed, right or wrongly, *de facto*, on the 22nd Jan. 1885. There is no doubt that the line was fixed—I will consider presently whether it was validly fixed—and there is no doubt that portions of the school project beyond that line. These facts being beyond controversy, the points which require consideration are these: First, was that line fixed by proper authority? Secondly, was it fixed in sufficient time? Thirdly, supposing it was fixed by proper authority and in sufficient time, were the defendants misled by the plaintiffs in such a way as to render it inequitable for the plaintiffs to insist upon the pulling down of these buildings? Lastly, can the present plaintiffs sue, supposing that the old board could not? As regards the authority by which the building line was fixed, the case stands in this way. In April 1884 there was a local board, properly constituted, and consisting of nine members. Nine being the full number of members, three members were a quorum. It seems that in May 1884, the board being then properly constituted, seven members resigned, leaving only two. These two members on the 29th May elected three others, and those three others, with the two who appointed them, appointed four others, making a total of nine. The building line to which I have referred was prescribed by the local board thus constituted, and it is said that, inasmuch as two were less than a quorum, the appointment by them of three additional members was wrong, and invalid, and good for nothing;

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that the appointment by those five of the additional four was equally invalid, and that there was not, when the building line was prescribed, any quorum of the board capable of prescribing it. There is, no doubt, a difficulty upon that point, a difficulty which, as it strikes me, it is in the highest degree unbecoming on the part of the school board to raise, because with the full knowledge of all the facts they have been negotiating with the local board upon the footing that that board was properly constituted. But I pass that over, as it cannot deprive the school board of the legal right to take the objection, however ungracious it may be to take it. But is the objection valid? It appears to me that rule 9 of schedule 1 (part I.) applies to a case of this kind. The words of that rule are very wide. [His Lordship read the words, and continued:] Now what is the object of such a rule? It is obviously to prevent such objections as are raised in this case. It only becomes useful in cases where there are defects in the election, or selection, or qualification, of members of the board, and it appears to me to render valid the proceedings of the local board in all dealings between the local board on the one side and persons dealing with them on the other, subject to this, that I doubt whether it applies as between the local board and the members who are improperly appointed. I mean to say that, although it is worded widely, I doubt whether it would be an answer to a *quo warranto* information. But in all dealings between the board and other people, it appears to me that the proceedings of the board are rendered valid. I was very much struck by the argument of Mr. Cozens-Hardy, that the object of this rule was to protect people dealing *bond fide* with the local board without notice of irregularity. Of course, it was intended to provide for such cases, but the question is whether it is confined to such cases. I do not think that it is; it appears to me to render the acts of the board valid notwithstanding any defect in the election of any of its members. I think, therefore, that whatever irregularity there was in the constitution of the board in May 1884, this rule would make the election of the three who were elected in 1885 perfectly valid. It appears to me to extend not only to protect people dealing *bond fide* with the board, without knowledge of the disqualification, but also to protect the ratepayers, whose guardians and trustees the local board are. I therefore come to the conclusion that the fixing of the building line was a proceeding which is rendered valid by rule 9. Then we come to the next question, whether that building line was fixed within the proper time. That depends upon the true construction of sect. 155 of the Public Health Act 1885. I quite agree with the view taken and expressed by Cotton, L.J., that the building line must be fixed before the new building is erected; and it must be fixed, as far as I can judge, before any substantial part of that new building which transgresses the line is put up. If then the main wall of these buildings had been put up before the building line was fixed, so as to project beyond the building line, I should say that, on the true construction of sect. 155, the building line was fixed too late. But the main wall of this building did not project beyond the building line, and the parts which do project had not been begun when the line was prescribed. It appears

to me, therefore, that, looking at the strict legal rights of the parties, the building line was prescribed in due time. But that does not quite exhaust the case, because the defendants may have been induced by the plaintiffs to commence their building, and to put up the main wall of it, in the belief that they would be allowed to complete their building according to the plans which were communicated to the plaintiffs; and if that were so, the plaintiffs could not claim an injunction. It therefore becomes necessary to consider whether any such defence as that is open to the defendants. After looking at the correspondence, and at what was done, it appears to me that no such defence is open to them. From August 1884 to January 1885 there had been communications between the local board and the school board about these new schools. Plans had been sent in as early as August by the school board for the approval of the local board. Those plans were objected to—I care not for the moment why. Some new plans were sent in in October. They were again objected to. It is said, and truly, that they were objected to for invalid reasons. But when we come to look closely to see what those two bodies were negotiating and disputing about, I find that it is this: The local board were struggling to get a wider street; they objected to the plans which were sent in in October on the ground that the intended schools did not admit of this street being so wide as they wished; and they were under the erroneous impression that they could validly object to the position of the school under certain bye-laws; but the substance of their objection was that they were struggling for a wider street, and this the school board perfectly well knew. The school board were advised that the objections taken to their plans were based upon bye-laws which did not apply, and that the objections were invalid. But when we come to consider whether they were misled by the plaintiffs, it appears obvious to me that they were not misled at all, but knew perfectly well that the plaintiffs were struggling to get these schools set back, and would, if they could, compel them to be put further back. Knowing that, and without waiting for any reasonable time to ascertain the view which the plaintiffs would take, the defendants put in the foundations of their main wall and commenced building. That being so, it is impossible, as it appears to me, for the school board to say with the slightest truth that they were in any way misled by the plaintiffs. On the contrary, I think that they were trying to go ahead until it was too late for the plaintiffs to obtain an injunction. That disposes of one of the important points in the case. I pass to the only other point, which is quite a subordinate one. It struck me at one time that, although rule 9 would validate the acts of the old board, at the same time the defendants might say to them: "Suppose we cannot dispute your building line, still you are not able to enforce it, for you are not a duly constituted board." It struck me at first that this was rather a formidable objection; but it appears to me to be entirely got rid of when we know that in April of this year a fresh election took place, and that we are now dealing not with the persons who, though not duly constituted, fixed this building line, but with a board which has a quorum of three, the propriety of whose election, it appears to me, having regard to the

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operation of rule 9, cannot now be questioned. Whatever doubt there may be about the operation of rule 9 on the old board, I cannot conceive that it does not validate the election of those three persons appointed at the subsequent date. It appears to me, therefore, that every ground relied upon by the defendants fails. They have been wrong from the very beginning, and I regret that it is possible that the costs of this litigation may fall upon persons who ought not to bear it—I mean the unfortunate ratepayers.

BOWEN, L.J.—The first question to which I propose to address myself is the question which was decided by Pearson, J. Was there here a defect in the constitution of the board, advantage of which defect can be taken by the defendants? Here was a board of nine, with a statutory quorum of three. Seven resigned, leaving less than the statutory quorum. Now the statutory quorum is settled by rule 2 of schedule 1 (part I.). [His Lordship read the rule, and continued:] The two members who were left out of the nine nevertheless proceeded to elect others in the place of the seven who had disappeared. We have at the outset to consider whether that was a valid act or not. I think it is pretty clear that it was not a valid act, because the election of members in the place of those who went out was "business" of a most important kind. If that is not "business to be transacted," I do not know what it would be, or how you would describe it on the agenda paper. But, supposing the Act to be invalid, then comes the question whether it is validated by rule 9 of the same schedule. The plaintiffs contend that, though this was an irregular proceeding, nevertheless the fixing the building line was a proceeding of the local board which, if invalid, was only invalidated by reason of a flaw in the selection of the members, and that, therefore, it is validated by rule 9. Pearson, J. has not accepted that view, and the whole of his judgment depends upon this proposition, that there was no local board at all; that rule 9 of the schedule only applies to proceedings of the local board, and if there was no local board, then, of course, there were no proceedings to which it could be applied. Now, was there any local board at the time when the building line was attempted to be fixed? This seems to me to be a most difficult question of construction. A local board, by sect. 4 of the Public Health Act 1875, is defined to be a board constituted either "in pursuance of the Local Government Acts before the passing of this Act, or in pursuance of this Act." Then sect. 7 incorporates the local board, so constituted, and makes it a corporation with perpetual succession and a common seal. But the draftsman of the Act seems not to have fixed his attention on the great question of the way in which he should deal with the possible question of dissolution of the local board. At common law a corporation could be dissolved either by loss of all its members, or by loss of a material part of them where there was no power of renewal. It has been said—although it is not necessary to discuss the question—that a parliamentary corporation might be dissolved and vanish into thin air. The only case I have been able to discover in which the question has been at all ventilated is the case of the *Borough of Helleston* (2 Douglas' Election Cases, 1). But no absolute rule can be laid down in the case of statutory corporations;

their incidents must depend on the statutes which form them, and in the present case we must consider, upon the terms of the Act, under what circumstances a local board ceases to exist. Turning to schedule 2 (part II.), which deals with lapses of local boards, the puzzling thing is that it does not speak of the dissolution of the local board, but of the "lapse" of a local board, which is an ambiguous word, and may mean the lapse of all the powers of the local board, or may mean the cessation of corporate members, without extinction of the corporation, or may be used in a popular sense, as denoting extinction of the corporation itself. And when you come to consider the language of schedule 2 (part II.), rule 2, which speaks of the "powers, rights, duties, property, and liabilities of the lapsed board" attaching to the new board, that is a provision for devolution of property from a body which by sect. 7 of the Act has perpetual succession. It is a most difficult question, to my mind, whether in this particular instance there has been a lapse, or, if there has been a lapse, what it is. I cannot say more than that, on considering it to the best of my ability, I am not satisfied, and the statute has certainly not made it clear, that, if the number is below a quorum, the corporate body is to be taken to be extinct, so that there is no longer a local board. Supposing that there was a local board still existing, and that the whole board had been re-elected by the ratepayers, they would be a duly constituted board. The invalidity of their proceedings in fixing a building line could only arise from the two members having selected members when they had no power to do it, so that the members selected were not properly selected. If that is so, I think that rule 9 of schedule 1 (part I.) cures the defect, assuming, as I do, that the statute does not make it clear that there is a dissolution of the corporate body and a vanishing into space of the local board. The judgment of Pearson, J. depends upon the assumption that there was no local board, and I am not satisfied that his assumption was correct. I am sorry not to be able to express a more confident opinion. The preliminary objection having been disposed of, we come to the merits, and we have to consider the construction of sect. 155, and the point which has been taken by the school board, that it was too late for the local board to complain that there was an infringement of sect. 155 even if there was such an infringement. [His Lordship read sect. 155 and continued:] The first observation that occurred to me is pretty obvious, that there must be some prescribed line to be violated before there is or can be a violation of it, and that the local board cannot complain of a line being crossed which was never laid down until after the buildings had been erected. In this particular instance no part of the buildings which lie beyond the prescribed line was commenced until after the line had been prescribed. I think, however, that, upon the true construction of the section, it would be too late to prescribe a line if what was already done in the way of building necessarily involved the crossing of the prescribed line. But that cannot be said to be the case here, because the erection of the building, which was commenced and the foundations of which were laid before the time when the line was prescribed, did not necessarily involve the crossing the line afterwards, though it was shown upon



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the plans delivered to the local board that it was intended to erect buildings beyond the line. Upon that arises the question whether there is any equity which prevents the local board from exercising the powers of the Act. I think that, if the local board, knowing that what was intended to be done was the erection of a building which if finished would go beyond the line which they intended to prescribe, abstained from prescribing the line, it would be unjust to allow them to prescribe a line after standing by and letting the school board build under the impression that no line would be prescribed. The case then resolves itself into this question of fact. Have the local board, by their conduct, or by their silence, or by their action in this matter, given the school board grounds for thinking, when they began their building, that no line would be prescribed? I did not think that a clear case until my attention was called to the notices of objection, which, though bad for the purposes of sect. 158, still are part of the conduct of the parties, and must be looked at in order to see whether there is anything in the conduct of the local board which renders it unjust that sect. 155 should be insisted upon. Those notices of objection would not entitle the local board, under sect. 158, to pull down the building, or to enforce penalties against those who went on in defiance of them; but, nevertheless, they tend to throw considerable light upon what was in the mind, so to speak, of the two boards during these negotiations and down to the time when the building was begun. I think they show that the school board knew, or ought to have known, or might have known, that it was the intention of the local board to resist to the utmost the erection of the building in such a way that the street would be narrowed. I do not think it can be said, therefore, that the local board gave the school board reasonable ground for thinking that no line would be prescribed. Upon the whole I think the equity suggested fails, that the statute does apply, and that the plaintiffs are entitled to judgment.

*Appeal allowed.*

Solicitors for plaintiffs, *Wood, Bird, and Wood*.  
Solicitors for defendants, *Speechly, Mumford, and London*.

*Friday, Nov. 6, 1885.*

(Before Lord ESHER, M.R., COTTON and BOWEN, L.JJ.)

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APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Parliament—Franchise—County vote—Occupiers list of voters—Description of qualification—Power of amendment—"Tenement"—"Dwelling-house"—Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28 (13).*

*In the occupiers list of voters for a parish the nature of the qualification of a voter was described in the third column as "Tenement and garden," and in the fourth column the description of the qualifying property was stated as "Part of bailiff's tenement." The voter was an inhabitant occupier of a dwelling-house, and entitled to be described as such. The revising barrister amended the list by striking out the words "and garden"*

*and inserting the word "dwelling-house," so as to alter the description in the third column to "Dwelling-house tenement."*

*Held, that the amendment was one "for the purpose of more clearly and accurately defining" the qualification, which the revising barrister was entitled to make under 41 & 42 Vict. c. 26, s. 28 (13), and therefore the name of the voter was rightly retained on the list.*

CASE stated by the Revising Barrister for the Northern Division of the County of Dorset:—

Henry Charles Dashwood, a person named on the list of voters for the parish of Sturminster Newton, duly objected to the name of James Ayles being retained in the occupiers list of voters for the parish of Hammoon in the said division. The following were the facts established by the evidence:—The said James Ayles was thus entered in the occupiers list of voters for the parish of Hammoon in the said division as published by the overseers:

Name of Voter in full, Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Ayles, James ...	Hammoon	Tenement and garden.	Part of Bailiff's Tenement.

The said James Ayles occupied a dwelling-house and garden only in the said parish of the annual value of less than 10*l*. The appellant duly served the respondent James Ayles with a notice of objection, alleging "that the nature of the qualification was wrongly described." The names of thirteen other persons in the parishes of Hammoon and Manston, whose names and qualifications are set out in the first and second schedules, were objected to under similar circumstances by the same objector. It was proved before me that the respondents were inhabitant occupiers of dwelling-houses and entitled to be so described in the lists, and that it was wholly a mistake of the overseers, and I decided that I had power under sub-sects. 12 and 13 of the 28th section of 41 & 42 Vict. c. 26, or otherwise, to expunge the words "and garden" from the third column, and to prefix the word "dwelling-house," making the nature of the qualification in the third column read "Dwelling-house tenement," and I retained the name of the said James Ayles and of the said thirteen other persons in the said list; and I must further add that similar mistakes were frequent in the lists which I was frequently requested on the part of the clerk of the peace to amend, which, if *ultra vires*, I ought not to be asked to do, for the symmetry or convenience of printing the lists. Due notice of appeal from my decision was given, and I ordered the appeals in all the aforesaid-mentioned cases to be consolidated.

The Divisional Court reversed the decision of the revising barrister, Lord Coleridge, C.J. and Grove, J. being opposed to the view adopted by the majority of the court in *Ford v. Hoar* (*ante*, p. 607; 53 L. T. Rep. N. S. 44; 14 Q. B. Div. 507), to which Cave, J. adhered. Leave to appeal was given.

By the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28 (13):

Except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be, nor shall the revising

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.



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DASHWOOD v. AYLES.

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barrister be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same.

*Crump, Q.C.*, for the claimant, in support of the appeal.—This was an imperfect description of the nature of the qualification, and so comes within sub-sect. 13 of sect. 28 of the Act of 1878, by which the revising barrister shall not "be at liberty to change the description of the qualification as it appears on the list, except for the purpose of more clearly and accurately defining the same." This was for that purpose, and no more, and so was clearly allowable.

*J. Alderson Foote* for the respondent.—The amendment could not lawfully be made, for its effect was to alter the description of the qualification. The words "tenement," and "dwelling-house" have entirely different significations, the former being applicable to the occupation, and the latter to the habitation franchise. This appears from the different statutory provisions relating to the franchise:

2 & 3 Will. 4, c. 45, s. 20;  
80 & 31 Vict. c. 102, ss. 3, 6;  
48 & 49 Vict. c. 3, s. 5;  
48 & 49 Vict. c. 15, sched. 2, form 1.

The present case is governed by the decision of this court in *Foskett v. Kauffman* yesterday (see 80 L. T. 25). He also referred to

*Friend v. Towers*, 48 L. T. Rep. N. S. 973; 10 Q. B. Div. 87.

Lord ESHER, M.R.—In the case which we decided yesterday (*Foskett v. Kauffman*) we held that there must be some limit to the power of amendment possessed by revising barristers, but we all think that the power should be as large as is consistent with the ordinary rules of construction. Where the power to amend exists the revising barrister ought not to amend unless he thinks it is fair as between the objector and the voter that he should do so. The only question here is, whether the revising barrister had power to amend, because what he did shows that he thought he could fairly, as between the objector and the voter, exercise the power of amendment, provided he had such power. Now, if this entry in the list is to be taken as a description of the qualification in a county by reason of the occupation of land or any other property which is not a dwelling-house, that would be different from a qualification by reason of the occupation of a dwelling-house, and if that were so the decision in *Foskett v. Kauffman* would be conclusive that the amendment could not be made, for its effect would be to alter the nature of the qualification. But if this entry could be read, not as meaning a qualification by reason of the occupation of land, but as an inaccurate description of a dwelling-house, then there is nothing in the statute to prevent the amendment from being made. The question therefore depends upon the true construction of the entry in the list, and we must take the whole entry together in order to arrive at a conclusion. Now, the entry appears to me to show that James Ayles did occupy part of a house as a dwelling-house, for it shows that he occupied part of the bailiff's house. I think it was meant to use the word tenement in an ordinary sense; that is, to use the word to describe a small house. If that is so, I think the revising barrister was entitled

to make the amendment, for I think it was open to him to come to the conclusion that the entry was intended to mean that the claimant was qualified as a voter by reason of the occupation of part of a house. If that is so, the inaccuracy of the description does not prevent the revising barrister from having power to make the amendment, and we cannot say that he was wrong in amending. I think, however, that the proper amendment to have made would have been to strike out the words "tenement and garden" in the third column, and insert the word "dwelling-house" instead. The result is, that the appeal will be allowed.

COTTON, L.J.—I am of the same opinion. I think the revising barrister had power to amend the list by inserting the word "dwelling-house," but at the same time I think it would have been better if he had also struck out the word "tenement." Under sub-sect. 13 of sect. 28 of the Act of 1878 (41 & 42 Vict. c. 26) he had power to alter the description of the qualification for the purpose of more clearly defining the same, and that is what he has done in this case. The words used in the entry were "tenement and garden," and, in my opinion, tenement may include and describe dwelling-house. There are two qualifications—inhabitant occupancy, and occupation of a tenement of 10l. annual value—and the question is whether the one intended was expressed so accurately as to define it. There is a power in the barrister to alter the description of the qualification so as to make it more accurate. The legal meaning of the word tenement is anything that may be held. But Blackstone says in his Commentaries: "The word tenement is of still greater extent, and though in its vulgar acceptation it is only applied to houses and other buildings, yet in its original and legal sense it signifies anything that may be holden:" (book 2, part 1, cap. 1.) The vulgar meaning of the word which Blackstone alludes to still exists, and common people use the word tenement in the sense of a building or dwelling house. The word used being capable of being referred to different franchises, it required to be altered so as to define more accurately what was intended; and when it appears that it was intended to be used in the sense of a dwelling-house, it would be going too far to say that to alter the word to dwelling-house would be to introduce a new qualification, the truth being that it only defines more accurately the qualification stated. I agree, however, with the Master of the Rolls that the proper amendment to make would have been that which he has suggested.

BOWEN, L.J. concurred.

*Appeal allowed.*

Solicitors for the appellant, *Field, Roscoe, and Co.*

Solicitors for the respondent, *Gregory, Rowcliffe, and Co.*, for *Trevor Davies, Sherborne.*

[CT. OF APP.]

MINIFIE v. BANGER—*Ex parte* HARRIS.

[CT. OF APP.]

Friday, Nov. 6, 1885.

(Before Lord Esher, M.R., Cotton and Bowen, L.JJ.)

MINIFIE v. BANGER. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Parliament—Franchise—County vote—Occupiers list of voters—Description of qualification—Power of amendment—"Tenement"—"Dwelling-house"—Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28 (13).*

*In the occupiers list of voters for a parish the nature of the qualification of a voter was described in the third column as "Tenement and garden," and in the fourth column the description of the qualifying property was stated as "School-yard." The voter was an inhabitant occupier of a dwelling-house, and entitled to be described as such. The revising barrister amended the list by striking out the words "and garden" and inserting the word "dwelling-house," so as to alter the description in the third column to "Dwelling-house tenement."*

*Held, that the amendment was one "for the purpose of more clearly and accurately defining" the qualification which the revising barrister was entitled to make under 41 & 42 Vict. c. 26, s. 28 (13), and therefore the name of the voter was rightly retained on the list.*

THIS was an appeal from the judgment of Lord Coleridge, C.J. and Grove and Cave, JJ., reversing the decision of the revising barrister for the northern division of the county of Dorset, who had amended the occupiers list of voters. The third column stated the nature of the qualification for a county vote as "Tenement and garden." The fourth column gave the local description of the qualification as "School-yard." Looking at the schedule of the names of a number of voters in a similar position, it appeared that more than one qualification was described as in School-yard, and others in places called by such names as "Cat-lane," "Bridge," "High-street," &c. It was proved that the voter occupied a house and garden of the annual value of less than 10*l*. The revising barrister amended the word "tenement" into "dwelling-house," and allowed the vote. The objector appealed. The Divisional Court allowed the objection, holding that the barrister had no power to make the amendment, but gave leave to appeal from their decision.

There were thirty-three claims depending on the result of the appeal.

*Crump, Q.C.*, for the voter, in support of the appeal.

*J. Alderson Foote* for the respondent.

LORD ESHER, M.R.—Looking at columns 3 and 4 of the list, and considering all the circumstances of the case, I cannot say that the revising barrister might not fairly come to the conclusion that the word "tenement" in the third column might mean a dwelling-house, and therefore I am of opinion that he was entitled to make the amendment which he has made. I wish, however, to state that our decision must not be taken to mean that in every instance where the word "tenement" is used in the third column of the list the description can be amended.

COTTON and BOWEN, L.JJ. concurred.

*Appeal allowed.*

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

Solicitors for appellant, *Field, Roscoe, and Co.*  
Solicitors for respondent, *Gregory, Rowcliffe, and Co.*, for *Trevor Davies, Sherborne.*

Wednesday, Dec. 9, 1885.

(Before Lord Esher, M.R., Cotton and Bowen, L.JJ.)

*Ex parte* HARRIS. (a)

*Landlord and tenant—Lodgers' Goods Protection Act 1871 (34 & 35 Vict. c. 79)—Declaration by lodger.*

*By the Lodgers' Goods Protection Act 1871 (34 & 35 Vict. c. 79), s. 1, where a superior landlord levies or authorises a distress on the goods of a lodger for rent due to the superior landlord by his immediate tenant, the lodger may make and serve a declaration in writing "setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained, or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord," whereupon by sect. 2 a magistrate's order may be made for the restoration of the goods.*

*A declaration under this Act did not state that the person making it was a lodger, and did not state whether any rent was due to the immediate landlord or not. At the hearing before the magistrates it appeared that none was due.*

*Held, that the declaration was sufficient, and the magistrates had jurisdiction to make an order for the restoration of the goods.*

THIS was an application for a rule for a *certiorari* to bring up and quash an order of justices made under the following circumstances:—

A person named William Beven was tenant of certain premises, and was in arrear with his rent. The landlord, Mr. Harris, put in a distress for rent. Some of the goods seized were claimed by Clara Beven, who served a written notice on Mr. Harris under the Lodgers' Goods Protection Act 1871 (34 & 35 Vict. c. 79), s. 1.

The notice was in the following words:

To Samuel Harris, Esq.—I, Clara Beven, of Castle Fields, Shrewsbury, in county of Salop, dressmaker, do hereby declare that Wm. Beven has no right of property or beneficial interest in the furniture, goods, and chattels, of which an inventory is hereunto annexed, but that such furniture, goods, and chattels are my property. [Inventory.] Dated this 3rd Sept. 1885.—CLARA BEVEN.

Mr. Harris refused to give up the goods claimed in the notice, and Clara Beven applied to two magistrates under sect. 2 of the Lodgers' Goods Protection Act 1871, for an order for the restoration of her goods. At the hearing it appeared that no rent was due from Clara Beven, and an order was made. The superior landlord applied *ex parte* to a divisional court for a rule for a *certiorari* to bring up and quash the order as having been made without jurisdiction, on the ground that the notice was insufficient. The Court refused a rule.

*Attenborough*, for Mr. Harris, the superior landlord, renewed the application in the Court of

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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**Appeal.**—The notice was insufficient in not stating that the applicant was a lodger. It ought also to have stated that no rent was due. The Lodgers' Goods Protection Act 1871 (34 & 35 Vict. c. 79) is imperative on this point, for by sect. 1 the notice must set forth "whether any and what rent is due, and for what period, from such lodger to his immediate landlord." The magistrates, therefore, had no jurisdiction to make the order.

Lord ESHER, M.R.—It is not necessary in the present case to decide whether, if the declaration had omitted some of the particulars mentioned in the statute, and had therefore been insufficient, the magistrates would have had jurisdiction to make an order, for in my opinion the declaration here is entirely sufficient. The first objection raised is, that the declaration does not state that the person making it is a lodger, but the section, while prescribing what is to be set forth, contains no provision that this fact need be stated. The second objection is, that the declaration does not contain a statement that no rent was due from the person making it. Whether it is necessary to state this or not must depend on the words of the statute. By sect. 1 a lodger whose goods are seized for rent due from his immediate landlord may serve a written notice "setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord." I think these words mean that the declaration must state what rent, if any, is due, and for what period, from the person making the declaration to the immediate landlord; but I do not think they mean that it must state that no rent is due, if in fact none is due. If the declaration does not state that any rent is due, this is the same thing as stating that none is due. If it were proved that rent was in fact due, the declaration would be incorrect, and the application would necessarily fail, not on the ground of want of jurisdiction, but on the ground that it was not supported by the evidence. For these reasons we cannot grant a rule.

COTTON and BOWEN, L.JJ. concurred.

*Rule refused.*

Solicitor for appellant, Needham, for Richard Urry, Shrewsbury.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

Friday, Oct. 30, 1885.

(Before Lord COLERIDGE, C.J., GROVE and CAVE, JJ.)

TANNER (app.) v. CARTER (resp.).

BANKS (app.) v. MANSELL (resp.). (a)

*Parliament—Borough voter—Inhabitant occupier—Cambridge and Oxford boroughs—Rooms in college—Break of residence—Reform Act 1832 (2 & 3 Will. 4, c. 45), s. 78—Cambridge Award Act 1856 (19 & 20 Vict. c. 17, local Act), s. 24—Representation of the People Act 1867 (30 & 31 Vict. c. 102), s. 3, sub-sect. 2—Municipal Corporation Act 1882 (45 & 46 Vict. c. 50), s. 257, sub-sect. 3—Registration Act 1885 (48 Vict. c. 15), s. 15.*

*By sect. 3, sub-sect. 2, of the Representation of the*

(a) Reported by F. A. ORALSHAM, Esq., Barrister-at-Law.

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*People Act 1867, in order to be entitled to be registered as a parliamentary voter for a borough, it is necessary to be on the last day of July in any year, and during the whole of the preceding twelve calendar months to have been, an inhabitant occupier, as owner or tenant, of a dwelling-house within the borough.*

*At revision courts held in the boroughs of Cambridge and Oxford, objections were duly taken that undergraduates had no right to be placed on the register. The revising barristers allowed the objections in both cases.*

*Held (affirming the decisions of the revising barristers), that, although sect. 78 of the Reform Act 1832 had been repealed by sect. 15 of the Registration Act 1885, and thus a special disqualification as to University voters had been removed, as there was a compulsory absence on the part of the students from their rooms in college during a portion of the year, whereas the law, which was equally applicable to all voters, required an unbroken residence for a whole year, there was neither actual nor constructive occupation by the students during the year, and they were therefore not entitled to the franchise as inhabitant occupiers.*

THESE were two appeals from the decisions of the revising barristers for the boroughs of Cambridge and Oxford respectively, refusing to allow the names of the appellant, undergraduates to be retained on the occupiers lists as parliamentary voters in respect of their occupation of rooms in college at their respective Universities. Substantially the same questions were raised in both cases, and for the convenience of the court they were argued together.

The case was stated by the Revising Barrister for the borough of Cambridge, as follows:—

At a court held to revise the lists of voters for the borough of Cambridge, Albine Carter duly objected to the name of Joseph Robson Tanner being retained in the list of parliamentary voters for the said borough of Cambridge as an inhabitant occupier of a dwelling-house within the said borough. The following facts were established by the evidence. The appellant is a student attached to one of the colleges in the University of Cambridge. He is of full age, and has occupied a set of rooms in college for the qualifying period at a yearly rental, payable by three terminal payments. The rates are paid by the college, and are charged to the appellant with the rent. The rooms are furnished and kept in internal repair by the appellant.

There is no express agreement with respect to the hire of the rooms. The rooms have an outer door opening on to a common staircase. There are two keys to this door, one in the possession of the appellant, the other in the custody of the college servant, called a bed-maker, who attends to the rooms. By the latter key the college authorities obtain access to the rooms when required. The appellant is required to employ the college servants to attend upon him in the rooms. The rooms form part of the college buildings, which are approached from the street by an outer gate, of which the college authorities have the control. The appellant is not permitted to go out or to bring friends into college by this outer gate after 10 p.m. The appellant is subject to the discipline of the college. It is a breach of such discipline

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for a student of the college to remain out of college after midnight. Students are not permitted to reside in or to visit their rooms during the vacations, which extend to about half the year, without the express permission of the college authorities. During such vacations the rooms are occasionally used by the college authorities for visitors for short periods without the express consent of the students. When used for long periods such consent is usually obtained.

Students are liable to be removed from the rooms, without notice, for misconduct or breach of the rules of the college. No married student is permitted to reside in the rooms with his wife.

By the Cambridge Award Act 1856 (19 & 20 Vict. c. 17, local Act) it is provided by sect. 24 that,

As respects college property the whole thereof shall be deemed to be in the occupation of the college, although parts may be exclusively occupied by individual members or students.

It was contended by the respondent that by reason of this enactment there could be no occupation of college property by students. Secondly, that the appellant was not an inhabitant occupier as tenant of a dwelling-house within the meaning of sect. 3, sub-sect. 2, of the Representation of the People Act 1867.

It was contended by the appellant that such occupation was rendered unnecessary in the case of the appellant, by reason of the proviso contained in sect. 15 of the Registration Act 1885. Secondly, that the appellant was an inhabitant occupier as tenant of a dwelling-house within the said borough within the meaning of sect. 3, sub-sect. 2, of the Representation of the People Act 1867.

The names of 509 other persons were objected to under similar circumstances.

The revising barrister decided that, by reason of the proviso contained in sect. 15 of the Registration Act 1885, the Cambridge Award Act did not prevent the appellant being registered as a parliamentary voter in respect of his occupation of the said rooms; but that the appellant was not an inhabitant occupier as tenant of a dwelling-house within the meaning of sect. 3, sub-sect. 2, of the Representation of the People Act 1867, and that such occupation was not rendered unnecessary in the case of the appellant, by reason of the proviso contained in sect. 15 of the Registration Act 1885, and he expunged the names of Joseph Robert Tanner and of the said 509 other persons from the said list accordingly.

*Henn Collins*, Q.C. for the appellant Tanner.—Sect. 15 of the Registration Act 1885 expressly repeals sect. 78 of the Reform Act 1832, and by the same section the disability imposed by sect. 24 of the Cambridge Award Act 1856 has likewise been removed. This the revising barrister has held, and against this part of his decision there is no appeal. It must now be shown that the claimants satisfied the conditions either of the Reform Act 1832, or of the Representation of the People Act 1867. The Registration Act 1885 was intended to remove any disability, and it is clear that the Legislature had it in their minds to enfranchise the students, for they have repealed the disabling sections of the other Acts. The Legislature evidently considered it desirable that occupants of rooms in colleges should be enfranchised, and

indeed must have considered that they were enfranchised, or why should disabilities have been removed? The claimants have occupied their rooms for a year, and *prima facie* that is sufficient. The revising barrister seems to have thought them not tenants because there was no express agreement in respect of the hire of the rooms; but no agreement as to hire is necessary. It is true that there is a common key to sets of rooms, and that the college gates are locked at night; but that is not sufficient to preclude the franchise. This is often the case. At the Burlington Arcade for instance, the exclusion of visitors on the part of the lessor has been held not to defeat the tenancy of the occupant; it is merely a matter of discipline. The question here is one of inhabitancy. It is true that the students are not allowed to reside in vacations without permission, but the case found, as a fact, an occupation for the whole year. The main point to be considered appears to be whether there is or is not a tenancy, and it is submitted that there is a tenancy constituted by the letting and receipt of rent. The permission to remain up during the vacation is very readily granted, and that shows that the mere restriction of occupation during the vacation without leave does not interfere with tenancy or inhabitant occupancy. In *Barnes v. Peters* (L. Rep. 4 C. P. 539) it was held that the undergraduates were not lodgers, because their rooms were dwelling-houses within the meaning of the Representation of the People Act 1867, and the occupier was therefore not entitled to vote for the borough as a lodger in respect of such rooms. Bovill, C.J. there held that they would have been entitled to vote as occupiers but for sect. 78 of the Reform Act 1832, which section is now repealed. There it was taken as a fact that the undergraduates occupied the whole year, though they did not reside during the whole year.

*Moulton*, Q.C. and *Cockerell* appeared for the respondent Carter, but were not called upon.

The case for the claimant at Oxford University raised substantially the same questions. The notice of objection given by the respondent against the appellant alleged (1) that the claimant had not occupied, either as owner or tenant; (2) that he had not occupied for twelve months to the 15th July; (3) that he had not been an inhabitant occupier for twelve months to the 15th July; (4) that he had not resided either in the city or within seven miles thereof for six months next previous to the 15th July; (5) that by reason of sect. 257, sub-sect. 3, of the Municipal Corporation Act 1882, he was not entitled to be enrolled as a burgess or citizen of the city of Oxford. The revising barrister found, amongst other facts established by evidence, that rates were paid for the whole year by the undergraduates, either directly or indirectly, and in some colleges, where the value of the rooms permitted, the inhabited house duty as well. That at the end of each term the undergraduate was required to vacate his rooms; and, in the same way, when the term began he was required to return to them. During vacation an undergraduate could not reside in his rooms without permission, but he was allowed to keep in them his furniture and personal effects, and, in that sense, to occupy them. The tenure of an undergraduate's rooms was subject to good behaviour

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and the requirements of discipline, of which the college authorities constituted themselves the sole judges.

The revising barrister held, as a matter of law, that the claimant was not on the 15th July last, and had not during the whole of the preceding twelve months, been an inhabitant occupier as "owner or tenant" of any dwelling-house within the borough, as required by the Representation of the People Act (30 & 31 Vict. c. 102), s. 3, sub-sect. 2. He also held, on the authority of *Durant v. Carter* (29 L. T. Rep. N. S. 681; L. Rep. 9 C. P. 261), that he had not been an "inhabitant occupier" of a dwelling-house within the borough for the whole of the twelve months preceding the 15th July last, within the meaning of the Act above referred to, viz., 30 & 31 Vict. c. 102, s. 3, sub-sect. 2. He further held that sect. 15 of the Registration Act 1885, whatever might be its effect upon sect. 78 of the Act of 2 & 3 Will. 4, c. 45, had no effect upon sect. 257, sub-sect. 3, of the Municipal Corporation Act 1882, which provides that nothing in that Act shall entitle any person to be enrolled a citizen of the city of Oxford by reason of his occupation of any rooms, chambers, or premises in any college or hall of the University. He therefore held that the claimant was not entitled to have his name retained on the occupiers lists.

*Crump, Q.C.* (with him *H. Young*) for the appellant Banks.—It is submitted that a great distinction exists between the case of an undergraduate of an academical institution like a college at the University, and that of officers in the army, who, on entering the military service, are bound by its regulations, which are law. In the latter case, there is no question of discretion, and a man when he accepts service accepts a service governed by law. The law says he shall not leave his station, and that is a hard, binding law, which a man knows will affect him. The Legislature obviously intended undergraduates to have the franchise, and they knew the position of students perfectly well; they knew their status, and determined to remove by statute the disqualifications imposed by the Reform Act 1832: but this provision would be absurd if there was no qualification. I accept sect. 15 of the Registration Act 1885 on the footing that Parliament, with a full knowledge of the status of the undergraduate, removed the existing disqualification, and therefore enfranchised him. When the undergraduate enters the University, he has assigned to him rooms for which he pays the whole year. The rent paid is applicable to the whole year, and therefore there must be a tenancy for the whole year. During the whole year he leaves his books, furniture, and effects in his rooms, and although not physically present, there is a constructive tenancy thereby created. It is a mere academical restriction, that as academical instruction is not going on during vacation the undergraduate should not be in residence during that period. All these restrictions are merely disciplinary, and do not affect the tenancy. If the view taken by the revising barrister is accepted by the court as correct, it must follow that if a lease contains a restrictive covenant that the lessee shall not inhabit the house for three days in the year, he will lose his right as a parliamentary voter. For these reasons the decision of the revising barrister ought to be reversed.

*Asquith*, for the respondent Mansell, was not called upon.

LORD COLERIDGE, C.J.—In these two cases very interesting questions might have been raised, questions which have been treated as of great importance, but in the present instance the point is clear. By the Reform Act 1832 special disqualifications were imposed upon occupiers of college rooms; these special disqualifications were removed in terms by the Registration Act 1885, sect. 15. In the case of Cambridge the Cambridge Award Act 1856, sect. 24, imposed an additional restriction, but this clause has also been in effect repealed by the recent Act. The Registration Act 1885, in providing that no members of the Universities shall be precluded from voting in respect of rooms in the Universities by reason of the disabling clause contained in the Reform Act 1832, has left undergraduates in the same position as regards the general law of the land as the rest of the community. The disqualifying Act has simply been repealed, and the law requiring an unbroken residence for a year applies equally to all persons. That is the general law of the country. In the case of Fellows the recent enactment may have a greater operation than in that of undergraduates if they reside the whole year. But the mere removal of the disability does not place the undergraduates in a better position. He who by special legislation was heretofore prevented from voting has now, by the general law of the land, obtained the right to vote; the special disqualification in his way has been removed, but no other legislation has been suspended in his favour. The undergraduate must have resided during the statutory period, and the question is, has he so resided for a year in his rooms? It is clear that he has not done so, for the general rule is that he only resides half the year; it rests entirely with the college authorities whether he is to be allowed to remain in his rooms during the vacation or not, and in the absence of the undergraduate the college authorities may do what they choose with his rooms. It is clear that, whether by law or by contract, the undergraduate, as a person, cannot show that he has complied with the parliamentary incident of his tenure; the condition precedent he has not fulfilled, because, by the laws of the Universities, he cannot comply with the necessary qualifications imposed by the Legislature. In the case of *Barnes v. Peters* (L. Rep. 4 C. P. 539) the undergraduate was permitted to, and did, reside the whole year. Under the present state of the law, if he did reside the whole year and otherwise fulfilled the parliamentary conditions, then he would be entitled to vote. In these cases the essential condition precedent has not been fulfilled, and therefore the appellants are not qualified for the franchise.

GROVE, J.—I am of the same opinion. The revising barrister for Cambridge finds that the appellant is of full age, and that he has occupied a set of rooms in college for the qualifying period at a yearly rent, payable by three terminal payments, so that *prima facie* he is properly and legally entitled to vote. Obviously the occupant was the student occupying. But students are not permitted to reside in their rooms during the vacations without leave expressly granted by the college authorities, and leave could not be given generally. It appears to me that such absence is

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compulsory, subject only to permission. The rule is prohibitory, and interferes with the residence. The case, therefore, cannot be distinguished from that of officers in the army who are absent on duty and cannot return. In both cases there is compulsory absence from the rooms during a portion of the year, and in the case of the undergraduate an implied contract to be permitted to leave his books and effects in his rooms must be taken to be part of the tenure. The Act says "shall inhabit twelve months," and it seems a contradiction in terms to say that a man occupies as an inhabitant twelve months, when he contracts to be there only six months. The point appears to my mind to be too clear for argument.

CAVE, J.—I am of the same opinion. I agree that it is impossible to attach more weight to the removal of the disqualification in respect of undergraduates than in the case of any other electors. The only question is, whether the claimants come within the definition of inhabitant occupiers for the necessary period of twelve months. It is admitted that the residence is for only six months. Undoubtedly constructive residence has been held to exist, but the principle is that a man is said to be constructively resident when he has a house, and the power to return to it at his option, and without the consent of anyone. This is not so in the case of the undergraduate. There is no distinction, to my mind, between his case and that of a man who puts it out of his power to return to his house at his mere option. He is then no longer constructively resident. The undergraduate has impliedly agreed with the authorities not to return without permission, and it is out of his power to return without having obtained such permission; he cannot then be said to be constructively resident. In my opinion, therefore, the revising barristers were right, and the appeals must be dismissed.

#### Decisions affirmed.

Solicitors for the appellant Tanner, Foss and Ledsam, for J. E. L. Whitehead, Cambridge.

Solicitors for the respondent Carter, Dean and Nash, for Gunn and Mathew, Cambridge.

Solicitors for the appellant Banks, Stretton and Hilliard, for Challoner and Son, Abingdon.

Solicitor for the respondent Mansell, G. D. Dudley, Oxford.

Friday, Oct. 30, 1885.

(Before Lord COLERIDGE, C.J., GROVE and CAVE, JJ.)

ADAMS (app.) v. FORD (resp.). (a)

*Parliament — Occupation franchise — Industrial trainer of workhouse — Sole and exclusive use and occupation of rooms by virtue of employment — Restrictions — Master living in the same house — Representation of the People Act 1884 (48 Vict. c. 3), s. 3.*

*The industrial trainer of a workhouse at Exeter, during the whole of the qualifying period, had lived in and had the sole and exclusive use and occupation of two rooms set apart for him in the workhouse. The master resided in the same building and held the keys, and it was his duty to report the trainer to the guardians if he remained out of his rooms after nine at night; but*

(a) Reported by F. A. CHAILSHAM, Esq., Barrister-at-Law.

*the master had no power to suspend or dismiss him. The guardians also had a board-room in the building.*

*The revising barrister had expunged the trainer's name from the occupiers list of parliamentary voters for the city of Exeter.*

*Held (reversing the decision of the revising barrister), that the claimant inhabited a dwelling-house by virtue of his office, service, or employment, and that such dwelling-house not being inhabited by any person under whom he served in such office, service, or employment, he (the claimant) was by virtue of sect. 3 of the Representation of the People Act 1884 entitled to be registered as a voter.*

THIS was an appeal from the decision of the Revising Barrister for the city of Exeter, refusing to allow the name of the appellant to be retained on the occupiers list as a parliamentary voter for the borough of Exeter, on the ground that he (the appellant) had not occupied as owner or tenant the property described in the said list for the requisite period of twelve months. The appellant's name had been duly objected to by the respondent.

The following facts were proved:—

1. The name of the appellant appeared on the said list in the following form:

Name of Voters in full, Surname being first.	Place of Abode.	Nature of Qualification.	Name and Situation of Qualifying Property.
Adams, John ...	Union Work-house, Okehampton-road.	Dwelling-house.	Okehampton-road.

2. The appellant is an industrial trainer, appointed, paid, and employed by the guardians of the poor for the parish of Saint Thomas the Apostle.

3. As part of his salary the appellant is allowed and permitted to have the exclusive use and occupation of two rooms, namely, a sitting-room and bedroom situate in the main building of the workhouse, and during the whole of the qualifying period he separately occupied the said rooms as a dwelling, by virtue of his employment as industrial trainer at the said workhouse.

4. The guardians reserve another room in the main building of the workhouse, which they use as a board-room.

5. The master of the said workhouse (also appointed, paid, and employed by the said guardians of the poor) resided in other rooms, situate in another part of the said workhouse building.

6. By the Poor Law Orders it is the duty of the master of the workhouse to receive from the porter the keys of the workhouse at nine o'clock every night, and to deliver them to him again at six o'clock every morning, or at such hours as shall from time to time be fixed by the guardians.

7. The appellant could not stay out of his rooms after the hour of nine o'clock in the evening without the permission of the master of the workhouse. If he did stay out without such permission, the master would have no power to suspend or dismiss him, but would report the matter to the guardians, who would deal with it either by reprimand or dismissal. Save in this respect the appellant was not subject to the orders or control of the master of the said workhouse.

It was contended by the objector that the ap-

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pellant was a lodger of the rooms allotted to him, by reason of the master of the workhouse (his official superior) residing in another part of the same building, and controlling the appellant in his right of ingress and egress to and from the said premises.

It was contended on behalf of the appellant that he, having inhabited the rooms in question, and having had the separate use and occupation of the same for the necessary period by virtue of his office and employment, and his employers (the guardians of the poor) not having inhabited the said rooms or the said main building of the workhouse, was by virtue of sect. 3 of the Representation of the People Act 1884 an inhabitant occupier of a dwelling-house as tenant.

The revising barrister decided that the residence of the master of the workhouse (the official superior of the appellant) was, in law, the residence of his employers (the guardians of the poor), and the fact that the appellant had no right to stay out of his rooms after nine o'clock at night without the permission of the master, and being liable to be reported if he did so, was an exercise of control sufficient in law to prevent his being an occupying tenant of a dwelling-house within the meaning of the Representation of the People Act, and he expunged the name of the appellant from the occupiers list of parliamentary voters for the said city.

*Footnote for the appellant.*—The revising barrister ought to have allowed the claim. Neither the guardians of the poor nor the master of the workhouse exercise any control over the person of the claimant, but only over his premises, and there is no finding that anybody has a right to enter these. As to his not being allowed to remain out after nine o'clock at night without the permission of the master, that is merely a disciplinary regulation; even if he does remain out without such leave after that hour, there is no physical impossibility of his returning. The only consequence would be that he would be liable to be dealt with by the guardians, who might exercise their powers of reprimanding or dismissing him. As to the fact that the master of the workhouse resides in the same building, that is not sufficient to exclude the present claim, for the master is not a person under whom the claimant serves. He serves under the guardians of the poor; this the revising barrister found as a fact, and it cannot be said that the workhouse is the residence of the guardians by the mere fact of their reserving one room in the main building as a board-room for the transaction of business.

The Hon. *Bernard Coleridge* for the respondent. —The fact that the claimant's official superior lives in the same house, the whole workhouse being one separate and distinct building, and not subdivided into sets of dwelling-houses as in the case of barracks, is sufficient to exclude the present claim. The claimant occupies his premises under restrictions, by reason of which he is under the master of the workhouse, who is his official superior. It is the duty of the master to watch over the claimant, and to report him for breach of duty or the like, and it is conceived that the claimant serves under him as his superior. For these reasons it is submitted that the decision of the revising barrister ought to be upheld.

Lord COLERIDGE, C.J.—I confess that I am unable to feel any doubt that the revising barrister was wrong. The appellant claims under sect. 3 of the Representation of the People Act 1884, which enacts that, where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant. Now, it is already sufficiently established that dwelling-house is not necessarily a separate dwelling-house, nor yet a portion of a dwelling-house structurally severed from the main building; but the word dwelling-house is satisfied by part of a dwelling-house of which a person has the sole and exclusive possession. There is no doubt that the claimant inhabits by virtue of his office, but he does not inhabit a dwelling-house so as to enable him to vote if the dwelling-house is also inhabited by a person under whom he serves; he is therefore entitled to the franchise unless he is deprived of it under the latter part of the enactment. But all that appears is, that the master lives in the house, as also does the industrial trainer, and it is true that he is in a certain very limited sense his official superior. But the only superiority he has is that he has the duty of reporting to the guardians if the industrial trainer is out without permission after nine o'clock at night; he has no power to suspend or dismiss him; all he can do is to report to the common employers and superiors of both, namely, the guardians. The master, it seems clear to me, does not inhabit the whole house, nor is he a person under whom the trainer serves in his office, service, or employment. Again, the board of guardians occupy only so much of the house as is necessary for them to transact their business, and it is plain that they do not inhabit so as to exclude the claimant. I think, therefore, that on both grounds the revising barrister came to a wrong conclusion.

GROVE and CAVE, JJ. concurred.

*Appeal allowed.*

Solicitor for the appellant, *S. D. Hamilton*, for *J. W. Friend*, Exeter.

Solicitors for the respondent, *J. E. Fox and Co.*, for *H. and B. J. Ford*, Exeter.

Friday, Oct. 30, 1885.

(Before Lord COLERIDGE, C.J., GROVE and CAVE, JJ.)

MAGARRILL (app.) v. OVERSEERS OF WHITEHAVEN AND PRESTON QUARTER (resps.). (a)

Parliament—Borough voter—Parochial relief—Disqualification—Reform Act 1832 (2 & 3 Will. 4, c. 45), s. 36.

*The claimant, an able-bodied pauper, having applied to the relieving officer for work, was set by the taskmaster to stone-breaking, for which he was paid out of the funds forming part of the parochial funds for the relief of the poor. The guardians were unable to sell the stone at a remunerative rate.*

(a) Reported by F. A. ORYSHNIK, Esq., Barrister-at-Law.



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BAKER (app.) v. THE TOWN CLERK OF MONMOUTH (resp.).

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*Held, that the payments made by the guardians to the claimant constituted parochial relief, and that therefore, under sect. 36 of the Reform Act 1832, he was disqualified from being registered as a voter.*

THIS was an appeal from the decision of the Revising Barrister for Cumberland and Westmoreland, refusing to allow the name of the appellant to be retained on the register of voters for the borough of Whitehaven on the ground of parochial relief.

The case stated that James Magarrill, married man with three children, applied to the relieving officer for Whitehaven for work. The relieving officer gave Magarrill a ticket headed "Whitehaven Union. Number on relief list, 19. Page on application book, 159. Eighth week of quarter ending Midsummer 1885. To Mr. Robert Wilson, taskmaster to Whitehaven Guardians. Please allow James Magarrill, aged 32, of 83, Newtown, to break four bushels of stones per day," directing him to take the ticket to the taskmaster of the union, who set Magarrill to stone-breaking. Magarrill in the course of his employment brings back the ticket at the end of the day and obtains one shilling and threepence, which one shilling and threepence is paid by the relieving officer out of the funds forming part of the parochial funds for the relief of the poor. This employment continued for six weeks, during which time there was great distress in the district. The stones to be broken were collected by Magarrill, under the supervision of the taskmaster, and brought to a yard in Whitehaven, hired expressly by the guardians, and there broken. The guardians have advertised these broken stones for sale, and the only offer they have received is one shilling and sixpence per ton, which would only recoup them for money spent in the operation. The guardians are bound by Out-door Relief Regulation Order, article 6, which prohibits the allowing relief to an able-bodied male pauper out of the workhouse unless he be set to work and kept at work by the guardians as long as he continues to receive relief. The guardians are paying rent for the yard. The board act upon the principle that every payment made by them to paupers assumes the form of relief, not of wages, and consequently must be measured by the wants of the applicant, and not by the quantity of work done. In conformity with this principle the able-bodied pauper who has more than two children receives threepence per day more than others for each child above that number.

*Asquith* for the appellant.—It is submitted that the money paid by the guardians to the claimant was paid by way of wages for work done, and that money so received does not constitute receipt of parochial relief so as to disqualify under sect. 36 of the Reform Act 1832. The guardians employed him and paid him wages at a certain fixed rate. The question is, was this parochial relief so as to disqualify? The principle to be deduced from *Kemp's case* (Perry & Knapp's Election Cases, p. 128) would seem to be, that under similar circumstances there is not necessarily a disqualification, though the vote in that case was held bad. There it was found that the claimant's ordinary wages would have nearly doubled what he received from the guardians. He also referred to

*Taylor's case*, 1 Power, Rodwell, & Dew Election Cases, p. 156;

*Harrison v. Carter*, 35 L. T. Rep. N. S. 511; 2 C. P. Div. 26; 46 L. J. 57, C. P.

No counsel appeared on the other side.

LORD COLERIDGE, C.J.—There is no doubt that the revising barrister was right. It is no part of the duty of the guardians to provide stones for roads, but it is their duty to find work for able-bodied persons to whom they grant relief. This they have done. It is found that they employed the claimant at a rate unremunerative to themselves. As far as the ratepayers are concerned, they have received nothing in return for the relief, but it was given not as a measure of the work's value, nor as a fair price, but according to the claimant's need and the number of his children. The guardians cannot give relief without work; but the relief given has no reference to the value of the work, and probably is far beyond it. In this case there was a receipt of parochial relief so as to disqualify. The appeal must therefore be dismissed.

GROVE and CAVE, JJ. concurred.

*Decision affirmed.*

Solicitors for the appellant, *Helder and Roberts* for *E. Atter*, Whitehaven.

Friday, Oct. 30, 1885.

(Before Lord COLERIDGE, C.J., GROVE and CAVE, JJ.)

BAKER (app.) v. THE TOWN CLERK OF MONMOUTH (resp.). (a)

*Parliament—Borough voter—Receipt of alms—Disqualification—Reform Act 1832 (2 & 3 Will. 4, c. 45), s. 36.*

*The occupier of an almshouse belonging to a private charity, regulated under a scheme approved by the Board of Charity Commissioners, claimed to be registered as the occupier of a dwelling-house. The scheme provided that the almshouses should be for the occupation of twenty alms people, being poor single persons of good character, who should have resided in the town or borough of Monmouth without having received any parochial relief during the period of not less than two years next preceding the time of their appointment, and who, from certain causes, should be unable to maintain themselves by their own exertions. The appointment was to be for life, unless removed for misconduct, and each alms person was to receive from eight to twelve shillings a week, as well as a certain amount of coals and clothing. The claimant had been an inmate since 1875.*

*Held, that this was a receipt of alms which, by the law of Parliament, disqualified from being registered as a voter under sect. 36 of the Reform Act 1832.*

*Harrison v. Carter* (35 L. T. Rep. N. S. 511; 2 C. P. Div. 26; 46 L. J. 57, C. P.) approved.

THIS was an appeal from the decision of the Revising Barrister for the borough of Monmouth, who disallowed the claim of the appellant and six others to be placed on the register of voters for the borough of Monmouth. He stated the following cases:—

1. John Baker's name was duly published on the K. I. occupation list of claimants to vote in the election of a member of Parliament for the

(a) Reported by F. A. CHAILSEYM, Esq., Barrister-at-Law.

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borough of Monmouth in respect of his occupation of a dwelling-house, as follows:

Name of Claimant in full, Surname being first.	Place of Abode.	Nature of Qualification	Description of Qualifying Property.
Baker, John	Weirhead-street	Dwelling-house	Weirhead-street.

2. The said John Baker was duly objected to on the ground that he had within twelve months next previous to the 15th July 1885 received alms which, by the law of Parliament, disqualified him from voting in the election of a member to serve in Parliament.

3. The facts upon which this objection was founded and proved were the following:—

John Baker is an occupier of one of the almshouses belonging to the charity called "The Almshouse and Free Grammar School of William Jones at Monmouth, in the county of Monmouth." This charity is regulated under a scheme approved and established by the Board of Charity Commissioners for England and Wales as the scheme for the regulation of the said charity, and which is set forth in the schedule to an order of the said board, dated the 26th June 1868. A copy of such scheme is appended to, and forms part of this case.

4. The material portions of such scheme are as follows:

Sect. 8. The almshouse buildings belonging to the charity shall be appropriated and used for the occupation of twenty alms people, ten of whom shall be men and ten women, being respectively poor single persons of good character, widowers, or widows, or never having been married, who shall have resided in the town or borough of Monmouth without having received any parochial relief during the period of not less than five years next preceding the time of their appointment, and who from age, ill-health, accident, or infirmity, shall be unable to maintain themselves by their own exertions, with a preference for those persons who being otherwise qualified as aforesaid shall have become reduced by misfortune from better circumstances. For want of a sufficient number of duly qualified candidates resident in the town or borough of Monmouth, residents having the qualifications in the county of Monmouth shall be eligible for appointment.

Sect. 9. There shall be paid to each alms person, out of the income of the charity, such a weekly sum being not less than 8s., and not more than 12s., as shall be fixed and determined from time to time by the governors, and each alms person, in addition to such weekly stipend, shall be provided by the governors with two tons of coal annually, and with a cloth cloak and esoutecheon or badge (such as has been heretofore worn) at Christmas in every alternate year. The cloak of each alms person, with the esoutecheon or badge worn thereon, shall, however, remain the property of the governors, and shall be delivered to the successor of such alms person upon his or her appointment.

Sect. 10. Within the period of three calendar months from the occurrence of every vacancy in the almshouses the visitors shall elect a duly qualified person to fill such vacancy, at a special meeting to be held for the purpose, and shall cause every such election to be forthwith notified to the governors for approval and confirmation, without which the same shall not be complete. In default of such election being so made and notified by the visitors to the governors before the expiration of three calendar months after occurrence of a vacancy in the almshouse, the appointment shall for that occasion be made by the governors.

Sect. 17. If any alms person shall be guilty of insobriety, insubordination, breach of rules, or immoral or unbecoming conduct, or shall, in the opinion of the visitors, from any cause become disqualified from retaining his or her appointment, or if in any case it should appear that any alms person has been appointed without having the required qualifications, the visitors, upon

proof thereof to their satisfaction, may remove such alms person, and take possession of the house or tenement occupied by him or her, and may proceed to elect another alms person in his or her place, or in any such case (except that of disqualification) the visitors may, if they so think fit, direct that the payment of the stipend of such alms person shall be suspended, either wholly or in part, during such time as they shall think fit and expedient.

5. John Baker was duly elected by the visitors to fill a vacancy in one of the said almshouses on the 17th Dec. 1875, and such election was subsequently approved of and confirmed by the governors, and he thereupon entered into the occupation of one of the said almshouses and has continued to occupy the same ever since, and has been during the same period, and now is, in receipt of the sum of 10s. per week out of the funds of the said charity in pursuance of the provisions of clause 9 of the scheme.

John Baker's claim was in respect of his occupation of the almshouse aforesaid.

6. Upon objection taken that John Baker's occupation of the said almshouse and receipt of the weekly sums aforesaid constituted a receipt of alms such as incapacitated the said John Baker from being registered as a voter, the revising barrister upheld the objection and expunged the name of the said John Baker from the list of claimants accordingly.

If the court should be of opinion that the revising barrister was wrong in striking out the name of the claimant, his name is to be re-inserted in the list of voters for the borough of Monmouth.

*W. Daniell* for the appellant.—There is in this case no receipt of alms such as to disqualify the claimant under sect. 36 of the Reform Act 1832. It is a general principle with regard to charitable foundations and endowments that those only disqualify whose funds form a part of the general parish resources for the relief of the poor, and are managed by the overseer or other officer whose duty it is to provide for and pay the paupers in the same manner as if the funds had been the produce of the parish rates. The charity here is no relief to the parish, and is totally independent of the parish officials; it is not an annual charity, but a fixed bounty. This case is distinguishable from *Harrison v. Carter* (35 L. T. Rep. N. S. 511; 2 C. P. Div. 26; 46 L. J. 57, C. P.), where the funds in question were distributed to the poorest inhabitants of the parish. Here the almshouse people are not necessarily of the poorest, nor for two years previous to the time of their appointment must they have been recipients of parochial relief. *Lindley, J.*, in his judgment in that case says that there are three elements of disqualification—poverty, the receipt of alms, and the absence of that independence essential to the qualification of a voter. It is submitted that these elements of disqualification do not exist in the present case. The visitors have a discretion in selecting the alms people, who when chosen are entitled permanently to receive the charity, and they cannot then be said to be in a state of indigence or abject poverty. Again, the distribution of the bounty does not interfere with the freedom of voting, for when a man is once elected he is there presumably for life and in a state of perfect independence as regards his vote. After election the possession of the house and the receipt of from

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eight to twelve shillings a week are matters of right, and are not of an eleemosynary character:

*Smith v. Hall*, 9 L. T. Rep. N. S. 413; 33 L. J. 59, C. P.; 15 C. B. N. S. 59.

Moreover the fact that the occupation is partly of an eleemosynary character, *e. g.*, by the gift of clothes, coals, &c., and the fact that the inmates are subject to certain rules, will not deprive such inmates of the franchise, if they substantially occupy as owners and are not liable to a motion or change from the houses once granted to them:

*Fryer v. Bodenham*, 10 L. T. Rep. N. S. 645; L. Rep. 4 C. P. 529.

The charity is for a particular class of persons, and not for the general relief of any person who might be burdensome to the parish. For these reasons this is a case where the tenure is of such a certain character that the inmates of these almshouses are entitled to be put on the register, and the decision of the revising barrister ought to be reversed.

No counsel appeared on the other side.

LORD COLERIDGE, C. J.—I think that the revising barrister was right, and that the claimant does come within sect. 36 of the Reform Act 1832, which enacts that no person shall be entitled to be registered in any year as a voter in the election of a member to serve in Parliament for any county, city, or borough, who shall within twelve calendar months next previous to the last day of July in such year have received parochial relief or other alms which, by the law of Parliament, now disqualify from voting. I do not think it necessary to repeat what I said in *Harrison v. Carter* (35 L. T. Rep. N. S. 511; 2 C. P. Div. 26; 46 L. J. 57, C. P.); I adhere to the judgment I delivered in that case. It is not the mere receipt of eleemosynary relief that disqualifies a man from voting, otherwise fellows of colleges might be disqualified, for they are in one sense in receipt of alms; but what receipt of alms will disqualify is a question which depends upon the circumstances of each particular case. There are cases in which persons of extreme indigence are kept from parochial relief in the almshouses by some charity to which they are entitled. The question is whether in this case the alms disqualify the recipient from exercising the franchise. I think that they do, for the qualification is that the inmates shall be poor single persons of good character, who shall have resided in Monmouth without having received any parochial relief during the period of two years next previous to the time of their appointment, and who, from various causes, are unable to maintain themselves by their own exertions. I think, therefore, that the revising barrister was right in holding the claimant disqualified.

GROVE, J.—I concur. Sect. 36 of the Reform Act 1832 expressly specifies other relief or alms than parochial. It is not a matter of right but of pure charity. I agree with the judgments in *Harrison v. Carter*, and that it was a question of fact for the revising barrister, and one which he decided rightly.

CAVE, J.—I am of the same opinion. I can only agree with *Harrison v. Carter*. Each case must depend upon its own circumstances. Here it appears that it was necessary that the inmates should have been poor "persons unable to support themselves," and persons unable to support them-

selves are surely in extreme indigence. The claimants are clearly on the wrong side of the line.

*Decision affirmed.*

Solicitors for the appellant, *Gibbs and White*, for *Powles and Vizard*, Monmouth.

Oct. 28, 29, 30, and Nov. 5, 1885.

(Before Lord COLERIDGE, C.J., GROVE and CAVE, JJ.)

ATKINSON (app.) v. COLLARD (resp.).

SEDGWICK (app.) v. NEVILLE (resp.).

LOURY (app.) v. COLLARD (resp.). (a)

*Parliament—Occupation franchise—Soldiers living in barracks by virtue of service—Inhabiting separate rooms in a block—Soldiers of superior rank inhabiting other rooms in same block—Restrictions—Rights of entering the rooms—Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 5—Representation of the People Act 1884 (48 Vict. c. 3), s. 3, and s. 9, sub-sect. 9.*

*Sect. 3 of the Representation of the People Act 1884 enacts that "where a man himself inhabits a dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed, for the purposes of this Act and of the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as a tenant."*

*The claimants, commissioned and non-commissioned officers in the army, as such had separately occupied rooms in barracks during the qualifying period; superior officers occupied quarters in the same building, and the commanding officer lived in a detached house within the barrack inclosure. The rooms were liable to be entered by the medical and certain superior officers for purposes of inspection and enforcing order, and the occupants were subject to various disciplinary restrictions.*

*Held, that the claimants occupied their quarters by virtue of their service, within sect. 3 of the Representation of the People Act 1884.*

*Held also, that a room or rooms so occupied constituted a "dwelling-house" within the meaning of sect. 5 of the Parliamentary and Municipal Registration Act 1878.*

*Held also, that there was no dwelling-house here of which the claimants occupied a part, and their superior officer living in the same block the whole. Held also, that the whole block was not inhabited by any person under whom the claimants served.*

*Held also, that the Crown was named in the statute (48 Vict. c. 3), and that it was not contrary to public policy that soldiers should be parliamentary voters.*

CONSOLIDATED appeal from the decision of the Revising Barrister for the city of Canterbury, refusing to allow the name of the appellant, who was quartered at Canterbury, to be retained on the list of parliamentary voters. He stated a case, as follows:—

At a court held on 10th Sept. 1885, at the Guildhall, in the city of Canterbury, George Collard

(a) Reported by F. A. CRAILSEITH, Esq., Barrister-at-Law.

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duly objected to the name of John Atkinson (the appellant) being retained on division 1 of the overseers' list of occupation voters for the parish of St. Mary Northgate, in the said city, on the grounds that he had not occupied the premises in respect of which he appeared in the list a sufficient time, and that his occupation was not as owner or tenant.

The name and qualification of the appellant appeared in the list as follows:

Name.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Atkinson, John	Barracks.	Part of house.	Barracks.

It was, however, admitted that, if entitled to be retained on the list at all, the appellant was only entitled to have his name inserted in division 2 of the said list, and that his name should be transferred accordingly.

The appellant is a sergeant in the 7th Dragoon Guards, the depôt of which is attached to the cavalry depôt at Canterbury (such cavalry depôt consisting of the depôt troop of every cavalry regiment in India).

As such sergeant he inhabited, by virtue of his service in the army, two rooms on the first floor in a block of buildings in the cavalry barracks, and had inhabited the same two rooms for more than twelve calendar months immediately preceding the 15th July 1885. The said rooms were used by him as a bedroom and sitting-room respectively; of the furniture, the Government supplied bed, table, two chairs, fender and fire-irons. A board with a list of these articles (which the appellant was not allowed to remove) was hung up in the appellant's sitting-room. All other furniture the appellant supplied himself.

The appellant's rooms open into a passage used in common by himself and other non-commissioned officers, the passage communicating with a staircase, and that again with a passage on the ground floor which leads to the front door. No one had a key of the rooms but the appellant.

The appellant was obliged to be in his quarters by a stated hour every evening.

In accordance with the Queen's regulations and certain standing orders issued by the commanding officer, it was the duty of the medical officer to inspect the appellant's quarters, as well as all other portions of the barracks, every week, and to report as to the condition thereof. It was also the duty of the orderly officer, the troop officer, the quartermaster, and orderly troop-sergeant-major to visit such quarters at stated times, and to report as to the order and condition in which the same were found, and such inspection as above mentioned did in fact from time to time take place, for which purpose the appellant, on receiving notice, was bound to admit the above-mentioned persons to his quarters, and they would have power, if refused admittance, to break open the doors and enter.

There are non-commissioned officers of superior rank to the appellant, who live in the same block. It is the duty of the senior non-commissioned officer for the time being in each block, in case of need, to maintain order.

In case the appellant should be disorderly, or make himself a nuisance, it would be the duty of such senior non-commissioned officer for the time

being to enter the appellant's room to enforce order.

The colonel commanding the whole of the depôt lives in a detached house away from the block in which the appellant lived. The colonel's house is within the wall which extends round the various barracks and barrack yards, such barracks comprising artillery, cavalry, and infantry.

The commanding officer can at any moment enter any part of the barracks, including the appellant's room, for any cause which might seem to him to be reasonable, though it is usual for him to give notice before making a general inspection, and he further has the power of closing the barrack gates, and forbidding any person to enter or leave the barracks at any time.

The appellant was liable at any time to be ordered by the commanding officer to change from the quarters assigned to him and to live in others, and he would be bound to obey such orders.

The Queen's Regulations and Orders for the Army, published by the War Office on the 10th May 1883, are to be taken as part of this case.

It was contended on behalf of the appellant that he himself inhabited a dwelling-house by virtue of his service, and that the dwelling-house was not inhabited by any person under whom he served in such service within the meaning of sect. 3 of the Representation of the People Act 1884, and that he must therefore be deemed to be an inhabitant occupier of his quarters as a tenant within the meaning of that Act, and of the Representation of the People Acts.

It was contended for the respondent—(1) that, in order to constitute the appellant a person deemed to be an inhabitant occupier of a dwelling-house within the meaning of the said section, he must have had during the prescribed period the separate and exclusive occupation of his quarters, which the appellant had not had; (2) that, assuming upon the facts proved in evidence that the appellant could not be said to have inhabited a dwelling-house by virtue of his service within the meaning of the first part of the said section, yet, that the "dwelling-house," in the proviso or second part of the said section, must be taken in this case to be the barracks as a whole, or, at any rate, the block in which the appellant lived; in either of which cases the dwelling-house, in such larger sense, was inhabited by a person or persons under whom the appellant served, and that he could not therefore be deemed to occupy as tenant within the meaning of that section.

The names of twenty-eight other persons were objected to under similar circumstances.

The revising barrister held that the occupation by the appellant and by the twenty-eight other persons had not been of such a separate and exclusive nature as to constitute him, or any of them, a person deemed to be an inhabitant occupier of a dwelling-house as tenant within the true intent and meaning of sect. 3 of the Representation of the People Act 1884. He further held that, if wrong in his decision as to this point, the dwelling-house in the proviso or second part of the said section mentioned must be taken to mean either the barracks as a whole, or the block of buildings in which the appellant's quarters are situated; and that in either of such views the dwelling, in such extended sense, was inhabited by a person or per-

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sons under whom the appellant served. He therefore expunged the names of the appellant, and of each of the other persons, from the list of parliamentary voters.

*Crumph, Q.C. and Bargrave Deane* for the appellant.—The question to be decided is really one of fact. Before the Representation of the People Act 1884 the law was of a confused character as to the question of what constituted the occupation of a tenant. That difficulty has now been got rid of, and all the court has to deal with is as to what is called the service franchise. This service franchise was created by sect. 3 of the Representation of the People Act 1884, which enacts that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and such dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act, and of the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as tenant." The revising barrister in the case says that the claimant inhabited as sergeant, by virtue of his service in the army, two rooms, and had inhabited the same two rooms for more than twelve calendar months immediately preceding the 15th July 1885. Therefore he has found that the appellant inhabited, and for the qualifying period. Then certain facts are stated as to the furniture, and the regulations to which the inhabitants of barracks are subjected—facts, it is submitted, quite immaterial as affecting the present question, but from which the barrister appears to have derived the conclusion that the claimant did not inhabit separately and exclusively; he found that supervision over the occupant prevented the occupation from being separate and exclusive. It is submitted, however, that a revising barrister has no right to deny the franchise on the ground of the existence of certain terms or conditions under which, by reason of the regulations of the service, the occupation of soldiers takes place. It is sufficient that the claimant has inhabited his rooms for the qualifying period, and that is a mere question of fact. Then comes the second point, that the revising barrister has held that the "dwelling-house" mentioned in the proviso of sect. 3 of the Representation of the People Act 1884, must be taken to mean either the barracks as a whole, or the block of buildings in which the appellant's quarters are situated, and that in either of such views the dwelling in such extended sense was inhabited by a person or persons under whom the appellant served. It follows from this that, if a man occupies rooms in barracks, and a superior officer, no matter of what grade, resides in the same barracks, then the subordinate in rank is not qualified to exercise the franchise. This, again, is a question of fact, and it is for the court to say whether the superior officer is a person under whom the claimant serves. Is that a person contemplated by the Act? Can it be suggested that the section contemplates that the mere fact of a person of superior grade in the same service living in a block should disqualify all persons of inferior grades who may happen also to have rooms in that block? The instructions for filling up forms contained in the third schedule to the Registration Act 1885 state that, "in the case of what is commonly called the service franchise, the dwelling-house may be a

part of a dwelling-house separately occupied as a dwelling—for example, a room or rooms over a stable, or a caretaker's rooms in an office." And further on they state that, "in the case of a man who inhabits by reason of any office, service, or employment, if the same house is inhabited by any person under whom such man serves in his office, service, or employment, such man is not considered a separate inhabitant occupier; for example, a butler occupying rooms in his master's house is not such an occupier;" that is, in the case of part of a house, if the superior inhabited the same rooms as his servant; that is material as showing what the Act contemplates. But here the claimant has occupied two rooms exclusively, and the question now becomes whether these two rooms are a dwelling-house within the meaning of the Act. The barrister has found that the claimant inhabited two rooms for the qualifying period, but he does not say that this is not a dwelling-house, which it is now submitted that it is. It is sufficient that the claimant has complete dominion over the rooms and inhabits them. It is true that he might be disturbed by his superior officer at any time, and periodically, by the medical officer, but as a fact it is clear that he occupied, and separately occupied, these rooms, and all collateral questions as to control and disciplinary regulations are removed by the statute and its instructions. Mere military control does not interfere with occupation. The fact that there would be power to turn the claimant out of his rooms, or even to break into them, does not interfere with the tenancy, if, in fact, he has been an inhabitant occupier of the rooms for the qualifying period. A man does not cease to inhabit because he is liable to be turned out. Moreover, the Act appears to have contemplated something which is neither tenancy nor occupation, because it says "he shall be deemed to be an inhabitant occupier as tenant;" that is, he shall be deemed to be something which he is not. Similarly, in the case of a coachman, the stables may be detached from the house, and yet the master may enter the rooms, as in the case of a superior officer, but there is not the less a separate and exclusive occupation. It is therefore submitted that these two rooms do constitute a dwelling-house within the meaning of sect. 3 of the Representation of the People Act 1884. It is further submitted that the occupation of the whole barracks is not that of any superior officer, but the occupation of the Crown. The officers in command are in the same position as the claimant, they merely occupy their rooms or houses by virtue of the same service. What is contemplated by the Act is occupation separately, not conjointly with any other person. It is the separate use that constitutes a dwelling-house, and here we have that. It may also be mentioned that, by sect. 2 of 10 & 11 Vict. c. 21, it is expressly enacted that soldiers may leave their quarters on polling day to record their votes. For these reasons the revising barrister was wrong on both points.

*Asquith* in support of the revising barrister's decision.—It is reasonably clear that it was not the intention of the Legislature to confer, by the Representation of the People Act 1884, any new franchise, but simply to remove an existing disability. This may be inferred from the language of sect. 3 of the Representation of the People Act 1867, and also from the schedules to the

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Registration Act 1885 (scheds. 2 and 3, Forms of Precept, part I., par. 7, general instructions), which class service franchise under the marginal note of "Household qualification," and where it it said that "if a person inhabits a dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he is to be considered as an inhabitant occupier of that dwelling-house"—showing that the service franchise is not a new franchise, but merely supplemental to the dwelling-house qualification of the Act of 1867. Before the passing of the recent Act persons who possessed all other qualifications, but were servants, were held to be not qualified, because they were not occupants in the legal relation of tenants, but as servants only. The one point in which these persons were deficient in point of qualification was that they were servants, and not occupiers; the occupation was deemed to be in their masters. [Lord COLERIDGE, C.J.—But all these persons inhabited?] No doubt. [Lord COLERIDGE, C.J.—And now it is enacted that if they inhabit they shall be deemed to be inhabitant occupiers as tenants.] Provided they satisfy the other requisitions of the Representation of the People Act 1867, which created this franchise and enumerated its various ingredients—the period of qualification, for instance, which is not specified in the Act of 1884, and that the voter shall be of full age. In these respects the Act of 1867 must still be satisfied. Sect. 3 of the Representation of the People Act 1884 was intended simply to deal with that part of the Act of 1867 which applies to occupation as tenant and not as servant. Before this Act the servant occupying was deemed to occupy not as a tenant, now he shall be deemed to be a tenant though he is not one. The Act is intended to apply to such cases as *Dobson v. Jones* (5 M. & Gr. 112), *Clarke v. Overseers of St. Mary, Bury St. Edmunds* (26 L. J. 12, C. P.). The words of the section, "deemed for the purposes of this Act, and of the Representation of the People Acts," show that the intention was to engraft this enactment on to the Act of 1867, and merely to get rid of the requirement that the occupation must be as tenant. The effect is, that the technical difficulty that the servant does not occupy as tenant has now disappeared; but he must, nevertheless, still be an inhabitant occupier, though not necessarily as tenant. It is further submitted that these rooms in barracks do not constitute a dwelling-house. Here the rooms occupied are part of a larger structure, and, therefore, prior to the Representation of the People Act 1867, they could not have been a dwelling-house at all:

*Cook v. Humber*, 5 L. T. Rep. N. S. 838; 31 L. J. 73, C. P.; 11 C. B. N. S. 33.

By sect. 61 of the Representation of the People Act 1867 it was enacted that dwelling-house should include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor. After that the court was equally divided in opinion as to whether this definition did not mean that a structural severance was essential:

*Thompson v. Ward, Ellis v. Burch*, 24 L. T. Rep. N. S. 679; L. Rep. 6 C. P. 327; 40 L. J. 169, C. P.

Sect. 5 of the Parliamentary and Municipal Regis-

tration Act 1878 (41 & 42 Vict. c. 26) enacts that "in and for the purposes of the Representation of the People Act 1867, the term 'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling." The rooms in question, however, are not occupied as a dwelling, for the reason that the sergeant is not entitled to their sole and exclusive use within the meaning of the Act of 1878. The rooms may be entered by several persons on various grounds; the power to enter is not confined to reasonable grounds—the commanding officer could enter at any time. A coachman, on the other hand, could exclude his master, except upon reasonable grounds. In the present case, the persons entitled to enter, and in the habit of entering, are other than the master or employer—for instance, the medical or orderly officer; so there is here really a wider power of interference than in the ordinary case of master and servant. The user is subject to many kinds of inspection and control, and others than the employer can enter, and enter as they please, and therefore the claimant is not an occupier:

*Bradley v. Baylis*, 46 L. T. Rep. N. S. 253; 8 Q. B. Div. 195.

Lastly, it is submitted that, even if the claimant has inhabited a dwelling-house, yet the same building is inhabited by a person under whom the claimant serves, and the claimant is thereby disqualified by reason of the proviso in sect. 3 of the Representation of the People Act 1884. A non-commissioned officer of superior rank to the claimant lives in a house not structurally severed from the claimant's house, and the colonel lives within the barrack wall; and these are superior officers, to whose orders the claimant is bound to conform and under whom he serves. For these reasons the claimant is not an inhabitant occupier within the meaning of sect. 3 of the Representation of the People Act 1867, as amended by sect. 5 of the Parliamentary and Municipal Registration Act 1878, and if he is, he is an inhabitant of the same building as an officer under whom he serves, and therefore disqualified by the Act of 1884. It is submitted that the revising barrister was right on both grounds. To be entitled the claimant must have occupied a separate house, or part of a house, structurally severed from that of a person under whom he serves; or, at all events, he must have occupied as sole occupier, not under the control of other persons.

SEDGWICK (app.) v. NEVILLE (resp.).

Consolidated appeal from the decision of the Revising Barrister for the borough of Lichfield, who had allowed the claim of a non-commissioned officer living in married men's quarters, under circumstances substantially similar to those in the previous case.

The Hon. *Mark Napier* for the appellant.—It is submitted that sect. 3 of the Representation of the People Act 1884 does not apply to the case of soldiers at all. Soldiers, if they are servants, are the servants of the Crown, and if they are in the service of the Crown, then the Crown, which is not mentioned in the Act, may object to its servants being deemed to be tenants of its property against its will, and to their having the franchise suddenly conferred upon them. The consent of the



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Crown would be necessary to put its servants in the position of tenants, and for this the Crown ought to have been specially mentioned in the Act, if its interests were to be affected thereby. The Crown would certainly be put in a very different position towards its military officers by their being endowed with votes derived from its own property, especially as by the Queen's Regulations (rule 9, sect. 6) soldiers are prohibited from taking part in political meetings or demonstrations. If they did so there might be a danger of their being less useful to the Crown. Therefore, if the franchise were conferred upon soldiers, the interests of the Crown would be materially affected, and if such was the intention of the Legislature, the Crown ought to have been specially mentioned in the Act. Moreover, it is contrary to public policy that soldiers should have votes.

G. B. Rosher appeared for the respondent, and argued in support of the vote.—The law is, that the Crown is not bound by a statute by which its right, interest, or prerogative is prejudicially affected, unless specially mentioned. The exercise of the franchise by its servants cannot prejudicially or detrimentally affect the Crown, and there is therefore no reason why it should have been mentioned in this statute. Sect. 2 of 10 & 11 Vict. c. 21, shows that the fact of soldiers voting is not a detriment to the Crown, so as to require it to be specially mentioned in the statute, but as a matter of fact the Crown is mentioned in sub-sect. 9 of sect. 9 of the Act of 1884, which shows that it was in the contemplation of the Legislature to confer the franchise on its servants; therefore, even if the fact of soldiers having a right to vote is a detriment to the Crown, it is clear that it was the intention of the Legislature to allow them to exercise the privilege of voting. He also referred to "Bacon's Abridgment," title "Prerogative," in support of his argument that it is only where any prerogative, right, title, or interest is taken from the Crown that the Crown need be mentioned in an Act of Parliament. The revising barrister was therefore right in holding the respondent qualified to vote.

LOURY (app.) v. COLLARD (resp.).

Consolidated appeal from the decision of the Revising Barrister for the city of Canterbury, refusing to allow the name of the appellant to be retained on the list of parliamentary voters for the said city. The appellant was a captain in the King's Dragoon Guards, and as such captain occupied for the qualifying period a room in a block of buildings called the "Officers' Quarters" in the Cavalry Barracks. During the whole of the qualifying period Major Hickman occupied similar quarters in the same block of buildings, and was the senior officer occupying quarters in such block. In all other material respects the case was similar to that of *Atkinson v. Collard* above set out.

Crump, Q.C. and Bargrave Deane appeared for the appellant.

Asquith for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by

CAVE, J.—The appellant in the case of *Atkinson v. Collard* is a sergeant in the army,

and he claims the vote as having inhabited a dwelling-house by virtue of his service within the meaning of the 3rd section of the Representation of the People Act 1884. It was objected that the section does not apply to service in the army, because the Crown is not bound by a statute unless named in it. How the rights, prerogatives, or property of the Crown are affected by soldiers having votes we cannot see; but it is enough to say that the Crown is named in the statute, as we shall show presently. Next it was said that it was contrary to public policy that soldiers should have votes. No authority was cited for this proposition; on the contrary, soldiers have always in respect to the franchise been treated on the same footing as civilians. By 8 Geo. 2, c. 30, which provides for the removal of soldiers from the vicinity of an election, it is enacted that "nothing in the Act contained shall extend to any officer or soldier who shall have a right to vote at any such election; but that every such officer and soldier may freely and without interruption attend and give his vote at such election." A similar provision is to be found in 10 & 11 Vict. c. 21. It is true that by 22 Geo. 2, c. 41, and 8 Geo. 4, c. 53, s. 9, officers of Excise and Customs and persons engaged in the Post-office were disqualified from voting, but these disqualifications were finally removed by 31 & 32 Vict. c. 73, which recites that "it is inexpedient that any person otherwise entitled to be registered as a voter should be incapacitated to vote at the election of a member or members to serve in Parliament by reason of being employed in the collection or management of Her Majesty's revenues." The question, moreover, is put beyond all doubt by the 9th section of the Representation of the People Act 1884, sub-sect. 9, which provides that, "where a man inhabits a dwelling-house belonging to or being occupied on behalf of the Crown, or by reason of any other ground of exemption, such person shall not be disentitled to be registered as a voter," &c. Now, a dwelling-house can only be occupied on behalf of the Crown by a servant of the Crown, or at any rate by someone who is regarded as being *in consimili casu* with a servant of the Crown, so that the provision is a clear indication that servants of the Crown are intended to be included within the Act. The other objections made against the vote were of a more special character. The word "inhabit" simply means "to dwell in," and there can be no doubt that the appellant inhabits the two rooms in question. It admits of as little doubt that they form a dwelling-house. By sect. 5 of the Registration Act of 1878 the term "dwelling-house" is to include any part of a house where that part is separately occupied as a dwelling, and it is also provided that where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part. Now, the two rooms in question are either themselves a dwelling-house or they are part of a dwelling-house, and in the latter case, as they are separately occupied as a dwelling, they form a dwelling-house within that section. A servant does not the less inhabit a dwelling-house, nor is it less a dwelling-house, because the master makes and enforces regulations for the good government of the servant and of



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his house; nor does the fact that the master retains himself, or delegates to others, the power of entering a servant's house for the purpose of maintaining order, prevent the servant from having the sole and exclusive use of the house. The next objection is, that the dwelling-house was inhabited by a person under whom the appellant served. Now, it is obvious that this part of the section cannot apply where the master and servant occupy separate and distinct houses, and, as where the servant inhabits part of a house he must have the sole and exclusive use of that part, this clause can only apply where the servant inhabits part of a house and the master inhabits the house of a part of which the servant has the sole and exclusive use. Thus, where a butler has the sole and exclusive use of a bedroom in his master's house, it is clear that the dwelling-house is inhabited by the person under whom the butler serves, and where a gatekeeper has the sole and exclusive use of a cottage at the gate of his master's park, it is equally clear that the dwelling-house is not inhabited by the person under whom he serves. In the present case, the appellant inhabits two rooms in a block of buildings, and there are other rooms in the same block inhabited by other non-commissioned officers, some of them of superior rank to himself. Now it appears impossible to contend that the appellant inhabits the whole block as a dwelling-house; and if he inhabits his own two rooms only, it must follow that the other non-commissioned officers do the same, and consequently the officer of higher rank also only inhabits his two rooms. If this is not so, either every person in the block must inhabit the whole block, which is absurd; or else, when the officer of highest rank goes away, the next officer immediately, and by virtue of his superior rank, at once begins to inhabit the whole block, having previously inhabited only his two rooms. In truth, the senior non-commissioned officer occupies his own two rooms, and those only, and cannot inhabit rooms which he, in fact, does not occupy either by himself or his servants, although undoubtedly the converse does not hold, and a man may occupy what he does not inhabit. In our judgment there is no dwelling-house here of which the appellant occupies a part and the senior non-commissioned officer the whole. Moreover, we think the appellant in this case does not serve under the senior non-commissioned officer. It is not necessary to decide whether a private soldier serves under the captain of his troop or company, or a captain under the colonel of his regiment. A soldier does not serve under every one of superior rank to himself in the same regiment, and there are no facts stated in the case which warrant the conclusion that the appellant served under anybody who inhabited any rooms in the same block of buildings. These considerations dispose of most of the cases relating to non-commissioned officers and married men. In the case of *Loury v. Collard* it was contended that the appellant, in that case a captain, would not have the right to vote, because an officer of superior rank, a major, had quarters in the same block of buildings. This case, however, is not substantially different from *Atkinson v. Collard*, and we think the same considerations apply. The major did not, in fact or constructively, inhabit the whole block, but only his own quarters, and, moreover, is not a person under whom

Captain Loury served in his office, service, or employment.

*Atkinson v. Collard and Loury v. Collard:*

*Decision reversed.*

*Sedgwick v. Neville:*

*Decision affirmed.*

Solicitors for appellants Atkinson and Loury, *Speechly, Mumford, and Landon*, for Plummer and Fielding, Canterbury.

Solicitors for respondent Collard, *Wyatt, Hoskins, and Hooker*.

Solicitors for appellant Sedgwick, *Terrell and Atkinson*.

Solicitor for respondent Neville, *H. Russell, Lichfield*.

Oct. 28, 29, and Nov. 5, 1885.

(Before Lord COLERIDGE, C.J., GROVE and CAVE, JJ.)

FORD (app.) v. BARNES (resp.).

FORD (app.) v. ELMSLEY (resp.). (a)

*Parliament—Occupation franchise—Soldier living in barracks by virtue of service—Occupying separate room—Break of residence—Actual or constructive inhabitancy—Representation of the People Act 1884 (48 Vict. c. 3), s. 3.*

*The claimants, soldiers in the army, had separately occupied quarters in barracks during the whole of the qualifying period. They had been absent on duty at Okehampton for twenty-one days during that period, and could not have returned without leave during such absence. Their wives remained in their quarters, and they left their furniture and effects there, and no other person used or occupied the rooms.*

*Held, that, by reason of such absence, there had been neither actual nor constructive inhabitancy on the part of the claimants during the whole qualifying period, and that the claimants were therefore disqualified from being registered as voters.*

*Ford v. Hart* (29 L. T. Rep. N. S. 685; L. Rep. 9 C. P. 273) approved.

APPEAL from the decision of the Revising Barrister for the city of Exeter, allowing the name of the respondent to be retained on the list of parliamentary voters for the said city. The case stated that the following facts were proved:—

The respondent is a battery sergeant-major in B Battery B Brigade Horse Artillery stationed at Topsham Barracks. He is an unmarried man, but, being a staff sergeant, he has the right to the exclusive use and occupation of one large room in the block of buildings known as staff sergeants' quarters in the Topsham Barracks, and during the whole of the qualifying period he himself separately occupied the said room as a dwelling by virtue of his office as a sergeant-major in Her Majesty's army.

The said room was subdivided by respondent for his own convenience into, and formed, a sitting room and bedroom, and is approached by a passage and staircase which are common to another staff sergeant as the occupier of similar quarters. These are the quarters set apart for the sergeant-major, and were allotted to him by the quartermaster sergeant. The respondent would, as a matter of military discipline, have to

(a) Reported by F. A. CHALSHAM, Esq., Barrister-at-Law.

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obey an order given to him by the commanding officer to change his quarters to other quarters of a like character, but no such order was ever known to have been given. If there were no quarters available for the respondent within the barracks he would be entitled to select and reside in a private dwelling-house outside the barracks, and would receive a weekly allowance from Government in addition to his pay, to pay the rent of same. All the furniture in the quarters belongs to the respondent, with the exception of the fireirons, bedstead, and table. Respondent has the right to ask any civilian friend into his quarters. As a rule, all civilians leave the barracks at ten o'clock, but the respondent or any other staff sergeant may accommodate their friends or relatives by lodging them in their quarters for a night or longer period. The quarters are lighted by gas supplied by the Government, but the gas is turned off at eleven o'clock at night, but respondent may have candles afterwards at his own expense. It is the duty of the commanding officer to occasionally inspect the staff sergeant's quarters for the purpose of seeing they are kept clean. The commanding officer does not reside within the said barracks, but other officers superior in rank to the respondent, who also have a like right of inspection, reside in the officers' quarters in another block of buildings in the same barracks. Respondent is not allowed out of barracks after ten o'clock in the evening without leave. He takes his meals, as a rule, at the staff sergeant's mess on the opposite end of the barrack square, but has a right to have them in his own quarters if he pleases, and to invite any friends to dine with him.

The stove in respondent's quarters is not fitted with apparatus sufficient for cooking purposes as are the stoves in the married men's quarters. Fuel is supplied by Government. Respondent was absent on duty at Okehampton for twenty-one days during the qualifying period, and could not return without leave, but during his absence he retained his room and kept his furniture in it, and no other person used or occupied the said room.

The respondent did not appear in person, but Lieutenant Gartside Tipping appeared for him, and proved the above facts; he refused to say, however, whether or not he had been requested by the respondent to appear, and the revising barrister considered it unnecessary that he should do so, and he declined to order him to do so.

The appellant contended: (1) that quarters in barracks did not form a dwelling-house, except by virtue of the occupation of them by soldiers, and that it is a condition precedent that the occupation must be of that which is at the time otherwise dwelt in. (2) That quarters in barracks do not constitute a dwelling-house. (3) That respondent did not in fact occupy a dwelling-house, and that the remainder of the dwelling-house was occupied by the persons under whom respondent served. (4) That respondent did not himself occupy a dwelling-house during the whole of the qualifying period. (5) That the respondent not having appeared in person, and Lieutenant Tipping, who appeared for him, having refused to answer a question put to him by the appellant whether or not he had been requested by the respondent to appear on his behalf, that the voter (the respondent) did not appear by

himself, nor by someone on his behalf, under sub-sect. 11 of sect. 28 of 41 & 42 Vict. c. 26.

It was contended on behalf of the respondent that he had as a fact himself inhabited, and had the separate and exclusive use and occupation of the room in question by virtue of his office of a sergeant-major in Her Majesty's army for the whole of the qualifying period, that he having occupied such room as a dwelling, it was his dwelling-house within the meaning of the Representation of the People Acts, and his employer (the Queen) not having inhabited the said room, he was by sect. 3 of the Representation of the People Act 1884 declared to be an inhabitant occupier of such dwelling-house as tenant. That the inspection by the commanding officer of such room was no more an interference with his separate occupation than the exercise of a right reserved by a landlord to enter to view the state of repair of an ordinary dwelling-house. That his not being allowed to leave the barracks after a certain hour was in accordance with the rules of the service, and no more an exercise of control than would arise in the case of a lodge-keeper, coachman, caretaker, or other servant in the employment of a civilian who, by the nature of the services required of him, would be compelled to be in their dwelling-houses at certain hours for the proper performance of their duties. That sect. 3 of the Representation of the People Act 1884 expressly conferred the franchise on persons who otherwise could not be said to occupy as owners or tenants, and that as a solicitor appeared for the respondent it was not competent for the court to inquire as to his retainer, or for the appellant to question his right to put any witnesses in the box to support the claim of the respondent.

The revising barrister decided that the respondent was entitled to have his name retained on the list of voters as an inhabitant occupier of a dwelling-house by virtue of sect. 3 of the Representation of the People Act 1884, and he retained the name of the respondent on the list of parliamentary voters for the said city and county of the city of Exeter.

*Bompas Q.C.* and the Hon. *Bernard Coleridge* for the appellant Ford.—The "dwelling-house" in sect. 3 of the Representation of the People Act 1884 is meant to apply only to the case of a house structurally separate. This is clearly so in sub-sect. 2 of sect. 3 of the Representation of the People Act 1867. Then by sect. 5 of the Parliamentary and Municipal Registration Act 1878, incorporated with sect. 3 of the Representation of the People Act 1884, "dwelling-house" includes any part of a house separately occupied as a dwelling. But the meaning of sect. 3 of the Act of 1884 must be to confer the franchise only upon a person who occupies a separate house structurally severed and distinct, for otherwise the greatest difficulty would arise as to the subsequent words "and the dwelling-house is not inhabited, etc." If "dwelling-house" might mean one or two rooms in a house, there would then follow the absurdity that a master, to exclude the vote of his servant, must live in the same room. It is therefore submitted that no person is entitled to vote within the meaning of the recent Act unless he occupies either a whole house or part of a house within the definition of the earlier Act. At all events the occupation

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must be sole and separate, and not under the control of anyone else:

*Bradley v. Baylis*, 46 L. T. Rep. N. S. 253; 8 Q. B. Div. 195.

The case also states that the claimant was absent on duty at Okehampton for twenty-one days during the qualifying period, and that he could not have returned without leave; but that during his absence he retained his room and kept his furniture in it, and no other person used or occupied the said room. It is submitted that this compulsory absence constitutes a break of residence such as will disqualify him; he has not occupied as an "inhabitant" during the qualifying year, as required by sect. 3 of the Representation of the People Act 1867, and therefore he is not qualified to vote:

*Durant v. Carter*, 29 L. T. Rep. N. S. 681; L. Rep. 9 C. P. 261;

*Ford v. Pye*, 29 L. T. Rep. N. S. 684; L. Rep. 9 C. P. 269;

*Ford v. Hart*, 29 L. T. Rep. N. S. 685; L. Rep. 9 C. P. 273.

Moreover, Okehampton is more than seven miles distant from Exeter, and therefore the claimant is also disqualified under sect. 27 of the Reform Act 1832, which enacts that "no person shall be registered as a voter in any year unless he shall have resided for six calendar months next previous to the last day of July in such year within the city or borough in respect of which he shall be entitled to vote, or within seven statute miles thereof, or any part thereof." The decision of the revising barrister ought therefore to be reversed.

*Foots* (Sir John Gorst, S.G. with him) for the respondent Barnes.—The last point taken by the other side relates to residence, and does not arise in the present case. The question here is one of inhabitancy and occupation, and there is a distinction between this and residence. It is not stated in the grounds of objection that the claimant had not resided within seven miles of the borough during the last six months before July, and, by sect. 26 of the Parliamentary and Municipal Registration Act 1878, the notice to be given to persons objected to must state specifically the grounds of objection. The revising barrister, on the other hand, has found that the claimant occupied during the qualifying period. Keating, J. seems to found his judgment in *Ford v. Hart* (29 L. T. Rep. N. S. 685; L. Rep. 9 C. P. 273) upon the difference between residence and inhabitancy. All the cases cited by the other side were upon the question of residence. The case of *Re v. Mitchell* (10 East, 511) was decided upon a question of inhabitancy. In order to constitute residence, Erle, C.J. says that a party must possess at the least a sleeping apartment, but an uninterrupted abiding at such dwelling is not requisite:

*Powell v. Guest*, 11 L. T. Rep. N. S. 599; 34 L. J. 69, C. P.

This is different from a case where a person has no power of returning from a criminal disability, but is similar to the case of *Re v. Mitchell* (10 East, 511). In these cases it is a question of degree. A mere temporary absence does not disqualify; but where a person resides elsewhere during a large proportion of the year, he will then not be entitled to vote:

*Ford v. Drew*, 41 L. T. Rep. N. S. 478; 5 C. P. Div. 59.

The question is, where does a man habitually reside? It is submitted that a man may inhabit a house for a certain time, and during some part of that time not live there. Mere temporary absence does not deprive a man of the franchise. The claimant left his furniture in the room, and it was locked up and retained for him. He might obtain leave to return, and the cases show that under similar circumstances a man does not cease to be an inhabitant of his house. The revising barrister has found that he did inhabit for a year, and that is a question of fact on which there is no appeal. [The Court intimated that they did not desire to hear the other points further argued.]

*Bompas*, Q.C. in reply.—The question in the case of *Re v. Mitchell* (10 East, 511) was whether the persons claiming to vote could be said to be inhabitants under the charter of the borough. There the question arose upon different words from those which govern the present case, and the distinction was fully discussed in *Ford v. Hart* (29 L. T. Rep. N. S. 685; L. Rep. 9 C. P. 273). In his judgment in *Durant v. Carter* (29 L. T. Rep. N. S. 681; L. Rep. 9 C. P. 261) Keating, J. said: "It appears to me that the question of residence under one statute is very much the same as the question of inhabitancy under the other." There is, in fact, no difference between residence and inhabitancy:

*Re v. Inhabitants of North Curry*, 4 B. & C. 953.

There can be no inhabitancy where there is no power to return. The words of the statute creating the service franchise are, "where a man 'himself' inhabits a dwelling-house," showing that he must be actually present during the whole qualifying period.

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Appeal from the decision of the Revising Barrister for the city of Exeter, allowing the name of the respondent to be retained on the register under circumstances similar to those in the above case, except in that here the respondent's wife and family remained in his quarters in barracks while he was absent on duty at Okehampton.

*Bompas*, Q.C. and the Hon. Bernard Coleridge for the appellant Ford.—The words of the statute are peremptory; it is essential that the claimant should have himself resided during the whole of the qualifying period, it is not sufficient that the wife and child have lived there.

Sir John Gorst, S.G. (*Foots* with him) for the respondent Elmsley.—This is not a case of residence nor of occupation, but one of inhabitancy. It is a pure question of fact whether a man inhabits. In the case of *Reg. v. Mayor of Exeter* (19 L. T. Rep. N. S. 432; L. Rep. 4 Q. B. 114) Blackburn J. in his judgment says: "In all these cases it is a question of degree, more or less. There is no precise line to be drawn. A person may inhabit a place without sleeping there, or sleep there without inhabiting it." An absence of twenty-one days is not such a fact as to prevent the claimant from being an inhabitant of Exeter; but, even if it is, he is at any rate a constructive inhabitant. The real test is whether a man has put it out of his power by his own act to return; this is not a case where it was absolutely out of the claimant's power to return. In the case of *Powell v. Guest* (11 L. T.

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Rep. N. S. 599; 34 L. J. 69, C. P.) in his judgment, Byles J. says: "It is not necessary nor convenient to lay down any universal rule as to what is the result of the cases as to a legal disability to reside; that is, how far inability created by the claimant's own criminal and voluntary act, and not by his misfortune, will break the residence. This case is distinguishable from the cases of persons being innocent and remanded for acts not caused by their own criminal and voluntary acts. It is distinguishable from a case of legal process under a *capias ad satisfaciendum*, and from the case of imprisonment for nonpayment of a fine; because in both cases the payment of the debt or the fine would relieve the party from imprisonment." In this case the claimant was not under any physical impossibility of returning, nor was such inability as existed created by his own criminal act; he could return at any time with leave, and his wife had a right to remain there. Many persons must be absent on duty at times; for instance, a judge on circuit or a sheriff in attendance upon him. A sheriff might return to his home if he risked a fine, and similarly the soldier might return if he risked punishment. The absence on duty is in the course of the service which is the qualification. It is a question in each case as to what can reasonably be considered a continuance of residence, and it is submitted that in this case the claimant was an inhabitant of his quarters for the qualifying period within the meaning of the Act.

*Cur. adv. vult.*

CAVE, J. delivered the judgment of the court as follows:—In this case the respondent, who claims to vote in respect of his inhabitancy of a dwelling-house in the barracks at Exeter, was absent for three weeks during the qualifying period at Okehampton. During this period he could not return to Exeter without leave. The respondent did not therefore in fact inhabit at Exeter during the whole of the three hundred and sixty-five days making the qualifying period. We think, however, that the actual inhabitancy during every one of the days is not necessary, and that it is sufficient if the claimant can make out a constructive habitancy. But in order to make out a constructive habitancy there must be

an intention of returning after a temporary absence and a power of returning at any time without breach of any legal obligation. The case of a sheriff was put in the course of the argument. A sheriff always intends to return when his duties are at an end, and has always power to return without breach of any legal obligation. If his home is sufficiently near to the assize town he does in fact return to it every evening. If it is too far he does not return to it, not because he breaks any legal obligation, but because he cannot get back to his official duties. His difficulty is a physical and not a legal one, and he cannot go home every evening for the same reason that a man who is travelling on the continent cannot do so. In this case unfortunately the facts are very briefly stated, and we do not know whether, when the claimant was sent to Okehampton, it was the intention of those who sent him that he should return to Exeter, or whether leave to return could have been procured; if not, why it would have been refused. If it could have been shown that it was always the intention of the authorities that he should stay at Okehampton three weeks only and then return to Exeter, and that leave would have been granted as a matter of course, or if refused, only refused on account of difficulty of communication, and not because his presence was required at Okehampton in the night time, we should have thought that these were strong grounds for contending that there was a constructive inhabitancy. As, however, there was no inhabitancy in fact during the three weeks in question it lay on the claimant to prove facts establishing a constructive inhabitancy, and this, in our judgment, he has failed to do. We were pressed on the one side with the case of *Ford v. Hart* (29 L. T. Rep. N. S. 685; L. Rep. 9 C. P. 273), and on the other side with the case of *Rees v. Mitchell* (10 East, 511). In our judgment this case falls within the principle laid down in *Ford v. Hart*. If the two cases are inconsistent, we think that the later decision should be followed.

*Appeals allowed.*

Solicitors for the appellants, *J. E. Fox and Co.*, for *H. and B. J. Ford*, Exeter.

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